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EVIDENCE

by David A. Schlueter*

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I. INTRODUCTION

During the survey period, the Fifth Circuit decided a number of cases involving a variety of evidentiary issues. This article addresses some of the more significant cases. Before addressing those decisions, however, it is important to recognize the deference that the court

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usually gives to evidentiary rulings made by a trial court. Even assuming that the trial court has erred in making an evidentiary ruling, the court is not likely to reverse the decision. These points were clearly articulated by Judge Rubin in *Hardy v. Chemetron Corp.*:¹

In reviewing these [evidentiary] rulings we recognize that a trial court must make hundreds of evidentiary rulings in the course of a trial and often must decide whether to admit or exclude evidence almost instantaneously. No trial judge can be, or is expected to be, infallible in making these decisions. The trial judge moreover has the feel of the trial, sensing its tempo, the effect of evidence, and the likely probative value of proffered testimony. Acknowledging both our respect for the local judge's superior knowledge of the trial scene and the importance of enabling the trial judge to keep the trial on course, we accord considerable deference²

Judge Rubin continued by noting that in assessing a litigant's claim of error, the court applies two principles of law: First, error may not be predicated on a ruling excluding or admitting evidence unless it affects a substantial right of a party,³ and second, the court will not overturn an evidentiary ruling and reverse the case or grant a new trial unless the "ruling was so erroneous as to constitute an abuse of discretion."⁴

II. PRESERVATION OF ERROR

It is axiomatic that in order to effectively assert on appeal that the trial court made an erroneous evidentiary ruling, counsel must have perfected the record at trial.⁵ To perfect the record in the case of the admission of evidence, counsel must have made a timely and specific objection or motion to strike.⁶ Where counsel hopes to argue on appeal that the trial court erred in excluding evidence, counsel must insure that the record indicates what the rejected evidence would have shown. That is usually accomplished through an offer

1. 870 F.2d 1007 (5th Cir. Apr. 1989).

2. *Id.* at 1009.

3. *Id.*; see FED. R. EVID. 103(a).

4. 870 F.2d at 1007.

5. See FED. R. EVID. 103(a).

6. *Id.*

of proof.⁷ One Fifth Circuit case, however, demonstrates that an offer of proof may not be the only way to protect the record where offered evidence is rejected.

In *Garner v. Santoro*,⁸ a spray painter sued the manufacturer of an epoxy paint for injuries he sustained while painting a Navy ship under construction in a shipyard.⁹ At trial, the defendant unsuccessfully attempted to assert the "Government Contractor Defense."¹⁰ On appeal, the plaintiff argued that the court could not consider whether the trial court erred in refusing to hear evidence on that defense because the defendant had not made an offer of proof on the defense¹¹ as required by Federal Rule of Evidence 103(a)(2).¹² Noting that an offer of proof normally is required to preserve a claim of error,¹³ the court stated that "[a] specific offer of evidence is not needed where an entire class of evidence has been in advance formally declared inadmissible by the trial court during preliminary argument or colloquy, for the court's ruling relates forward to all possible offers of such evidence and renders them needless."¹⁴ Here, the defendant had been precluded, by order of the district court, from presenting the contractor defense.¹⁵ That order was later reaffirmed by a magistrate.¹⁶ Accordingly, the court ruled that the absence of an offer of proof under rule 103(a)(2) did not preclude it from considering whether the trial court erred in barring use of the defense.¹⁷ After considering the substantive law

7. See FED. R. EVID. 103(a)(2).

8. 865 F.2d 629 (5th Cir. Jan. 1989).

9. *Id.* at 631.

10. *Id.* at 633. The elements of the defense are that [l]iability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. *Id.* at 635 (citing *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988)).

11. *Id.* at 636.

12. FED. R. EVID. 103(a)(2) provides: "Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked."

13. See *Mills v. Levy*, 537 F.2d 1331, 1333 (5th Cir. 1976).

14. 865 F.2d at 636 (quoting 1 J. WIGMORE, WIGMORE ON EVIDENCE § 17 (Tillers rev. 1983)(footnote omitted)).

15. *Id.*

16. *Id.*

17. *Id.*

and the facts in this case,¹⁸ the court concluded that the defendant should have been permitted to present the defense, and remanded the case to the trial court for further development of the contractor defense.¹⁹ Interestingly, the court at several points noted the absence of "facts" which would have enabled it to more fully analyze the components of the contractor defense.²⁰ An offer of proof spelling out some of those facts might ultimately have assisted the court in its analysis.

This case should not be read as a *carte blanche* justification for not making an offer of proof. The court's decision is limited to those situations where an entire class of evidence has been excluded after some discussion by the parties. An offer of proof not only provides the appellate courts with some information that they might consider in evaluating whether the trial court erred in excluding evidence, but it also provides the trial court with an opportunity to reconsider its decision after counsel has set out on the record what the evidence would have provided.²¹ The fact that some form of discussion or colloquy takes place during pretrial proceedings is some assurance that both the trial and appellate courts have enough information upon which they can decide whether a particular class of evidence is admissible. Although an offer of proof might not be required in this sort of case, it would seem wise to place information on the record to show what the offered evidence would have been.

III. JUDICIAL NOTICE

Normally, counsel is required to prove formally the proposition on which he or she is relying.²² One of the classic exceptions to this requirement of formal proof is judicial notice.²³ If counsel can demonstrate that an offered fact is not reasonably in dispute, judicial notice is usually appropriate. The notice is judicial in nature because the court decides whether the fact is subject to reasonable dispute.²⁴

18. *Id.* at 642-44.

19. *Id.* at 644.

20. *Id.* at 636.

21. See E. CLEARY, MCCORMICK ON EVIDENCE § 51, at 123-24 (3d ed. 1984).

22. See S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 58 (4th ed. 1986).

23. *Id.*

24. See E. CLEARY, MCCORMICK ON EVIDENCE § 328, at 919-20 (3d ed. 1984).

If the fact is not subject to reasonable dispute, judicial notice relieves the jury from deciding whether the fact exists.²⁵ In a civil case, the jury is bound by any fact which is judicially noticed; in a criminal case, it is not.²⁶

The key inquiry in deciding whether to take judicial notice is whether the fact to be noticed is "subject to reasonable dispute."²⁷ In making that determination the trial court is apparently given discretion in both how it reaches that decision and what evidence it considers in the process.²⁸

In *Wooden v. Missouri Pacific Railroad Co.*,²⁹ however, the court indicated that whether another court has taken judicial notice of the same facts is not necessarily dispositive.³⁰ The plaintiff filed a suit against the defendant railroad under the Federal Employers' Liability Act,³¹ alleging that he had contracted silicosis³² by coming into contact with substantial quantities of silica dust while working with gravel placed under the railroad's tracks.³³ In order to establish that the railroad had previous notice of the dangers of exposure to silica dust and that the railroad was thus negligent in not providing him with a mask,³⁴ the plaintiff asked the trial court to take judicial notice that it was common knowledge in the 1950's that such dust created a risk of silicosis.³⁵ He further argued that, under the rea-

25. *Id.*

26. See FED. R. EVID. 201(g) which states: "Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed."

27. See FED. R. EVID. 201(b) which states:

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

28. Rule 201 is silent as to the particulars of how the parties are to present the necessary information to the court to justify judicial notice of adjudicative facts. Given the fact that the rules of evidence generally do not apply to preliminary matters, a judge should be able to consider virtually any type of evidence that is not privileged information. See FED. R. EVID. 104(a); see also FED. R. EVID. 501 (general rule for determining what is privileged information).

29. 862 F.2d 560 (5th Cir. Jan. 1989).

30. *Id.* at 563.

31. 45 U.S.C. § 51-60 (1982).

32. 862 F.2d at 561. Silicosis is a lung disease associated with silica dusts. *Id.*

33. *Id.* He had operated a tamping machine, which was powered by compressed air to pack the gravel under the railroad tracks between the years 1954 to 1961. *Id.*

34. *Id.*

35. *Id.* at 563.

soning of the 1944 New York Court of Appeals case of *Sadowski v. Long Island Railroad Co.*,³⁶ this fact was not subject to reasonable dispute.³⁷ The trial court declined to take judicial notice.

On appeal, the Fifth Circuit concluded that the proffered fact was not suitable for judicial notice.³⁸ In holding that the trial court had not erred in its ruling,³⁹ the court cited its earlier decision in *Hardy v. Johns-Mansville Sales Corp.*,⁴⁰ where it stated:

[J]udicial notice applies to self-evident truths that no reasonable person could question, truisms that approach platitudes or banalities. The proposition that asbestos causes cancer, because it is inextricably linked to a host of disputed issues, . . . is not at present so self-evident a proposition as to be subject to judicial notice.⁴¹

According to the court, the plaintiff in this case had attempted to link his proffered fact — that it was common knowledge that inhaling silica dust could lead to lung disease — with the controverted issue of whether the defendant in this case knew that the “particular concentration of dust to which [the plaintiff] was exposed entailed a significant risk of silicosis.”⁴² The court noted that to take judicial notice that some amounts of silica dust were known to cause injury would only have confused the jury in deciding whether the defendant knew, or should have known, that a particular amount was harmful.⁴³ The court added that the plaintiff had misused precedent by attempting to argue that dicta, even in Supreme Court decisions, could dispose of factual issues in later cases.⁴⁴ However, the fact that silicosis lawsuits existed in the 1950’s, said the court, could be offered

36. 292 N.Y. 448, 456, 55 N.E.2d 497, 500 (1944) where the court stated that “[i]t is a matter of common knowledge that it is injurious to the lungs and dangerous to health to work in silica dust, a fact which defendant was bound to know.” *Id.* A similar observation has been made by the United States Supreme Court. See *Urie v. Thompson*, 337 U.S. 163, 180 (1949).

37. 862 F.2d at 563; see FED. R. EVID. 201.

38. 862 F.2d at 563.

39. *Id.*

40. 681 F.2d 334 (5th Cir. 1982).

41. *Id.* at 347-48.

42. 862 F.2d at 563.

43. *Id.*

44. *Id.* at 563-64. The court noted that “the Supreme Court is an authoritative source of federal law, but it is not authoritative on factual questions about industrial knowledge of occupational diseases in the 1950’s.” *Id.*

into evidence to support the inference that railroads knew about the dangers of silicosis.⁴⁵

IV. RELEVANCY ISSUES

At a minimum, evidence offered by counsel must meet the relevancy threshold. That is, the proponent of evidence must demonstrate that the evidence tends to make the existence of a fact more probable, or less probable.⁴⁶ This hurdle is sometimes referred to as the requirement of "logical relevance."⁴⁷ But that is only the first hurdle. Counsel and the court must also be prepared to address the issue of whether there are intrinsic or extrinsic policy reasons for declaring the evidence inadmissible even though it is relevant. Perhaps the clearest example of this doctrine, which is sometimes referred to as "legal relevance,"⁴⁸ is reflected in Federal Rule of Evidence 403 which requires the trial judge to balance the probative value of the offered, relevant evidence against probative dangers such as confusion of issues or cumulativeness.⁴⁹ Other examples of this exclusionary rule include rule 404 which normally excludes character evidence,⁵⁰ rule 407 which blocks admission of subsequent remedial measures,⁵¹ and rule 411 which generally excludes admission of the existence of liability insurance.⁵²

A. "Other Acts" Evidence: Similar Incidents in Products Liability Cases

The federal courts have typically permitted a plaintiff in a negligence case to introduce similar acts of the defendant on the theory that such acts put the defendant on notice that a dangerous condition existed.⁵³ Two issues usually arise in conjunction with such evidence: the degree of similarity between the prior incident(s) and

45. *Id.* at 564.

46. See FED. R. EVID. 401 (setting out the definition of relevant evidence).

47. See generally E. CLEARY, MCCORMICK ON EVIDENCE § 185, at 542 (3d ed. 1984)(using the term).

48. See generally *id.* at 548 (citing cases but concluding that the term may be misleading).

49. See FED. R. EVID. 403.

50. See FED. R. EVID. 404(a).

51. See FED. R. EVID. 407.

52. See FED. R. EVID. 411.

53. See, e.g., E. CLEARY, MCCORMICK ON EVIDENCE § 200, at 587 (3d ed. 1984).

the incident at issue, and the number of incidents involved.⁵⁴ The greater the similarity and number of incidents, the greater the inference that the defendant knew of the dangerous condition.⁵⁵

In *McGonigal v. Gerhart Industries, Inc.*,⁵⁶ the plaintiffs were military service members who were injured when a hand grenade, manufactured and tested by the defendants, prematurely exploded.⁵⁷ The plaintiffs proceeded on a negligence theory,⁵⁸ arguing that the defendants had improperly conducted the so-called "100% x-ray" procedure which was supposed to detect faulty delay fuses to be installed in hand grenades.⁵⁹ The plaintiffs introduced evidence of two other defective time delay fuses which had been tested by the "100% x-ray" procedure.⁶⁰ One had been tested by the defendant; the other had not.⁶¹ The plaintiffs also introduced evidence of two other premature detonations which had passed the same testing procedure used by other manufacturers.⁶² In short, of the four earlier incidents involving defective fuses, only one directly implicated the defendant.⁶³

Noting that it had relaxed the requirement of similarity in permitting introduction of other accidents in *Jackson v. Firestone Tire and Rubber Co.*,⁶⁴ the court stated that any differences in the

54. *Id.*

55. *Id.*

56. 851 F.2d 774, 776 (5th Cir. Aug. 1988). An earlier directed verdict in favor of one of the defendants had been remanded by the court for a new trial. *McGonigal v. Gerhart Indus.*, 788 F.2d 321, 328 (5th Cir. 1986).

57. 851 F.2d at 776. The defective fuses in the grenades which caused the accident had been manufactured by Gerhart Industries which later settled the case. The remaining defendant, Day and Zimmerman, had assembled the grenades. The accident occurred as the service members were involved in hand grenade requalification training at Fort Bragg, North Carolina. *Id.*

58. *Id.* Although the plaintiffs had initially filed a cause of action based upon both strict liability and negligence theories, they later proceeded solely on a theory of negligence. *Id.*

59. *Id.* at 777. The term "100% x-ray" procedure was used by the parties to describe the procedure for testing each grenade fuse and eliminating every one which was defective. *Id.*

60. *Id.*

61. *Id.* The usual time delay fuse lasts approximately five seconds. The fuse tested by the defendants had a delay of only 2.47 seconds. *Id.*

62. *Id.* at 777-78. These premature detonations had occurred at Fort Jackson and Quantico Marine Base. *Id.*

63. *Id.*

64. 788 F.2d 1070 (5th Cir. 1986).

occurrences affect only the weight to be given to the evidence.⁶⁵ In this case, the court concluded, evidence that another grenade tested and assembled by the defendant had prematurely exploded was "reasonably probative" of the plaintiff's argument that the defendant was negligent in approving defective fuses.⁶⁶ Conversely, evidence of the other three defective grenade fuses was not admissible because the plaintiff had not challenged the testing procedure itself, but instead the manner in which the defendant used it.⁶⁷ The negligence of other contractors "had no tendency to prove negligence on the part of [the defendant]."⁶⁸ The introduction of the three unrelated incidents was harmless error, however, because the jury was aware that only one of the incidents involved a fuse tested by the defendant.⁶⁹

It is difficult to quarrel with the result in this case. The relaxed standard for admissibility of similar incidents in negligence cases is generally in harmony with the low threshold of relevancy articulated in Federal Rule of Evidence 401 which requires only that the proffered evidence have "any tendency" to prove or disprove a fact in issue.⁷⁰ Where a defendant is using a procedure designed to remove all defective fuses, evidence of even a solitary incident has some tendency, however slight, to show that the defendant was aware of a dangerous condition.

B. "Other Acts" Evidence: Uncharged Misconduct in Criminal Cases

As a general rule the prosecution may not introduce evidence of other crimes or acts committed by the defendant in an attempt to show that he has a bad character.⁷¹ It may, however, introduce such evidence if it can establish that the evidence is relevant for other purposes. Federal Rule of Evidence 404(b) provides that:

65. 851 F.2d at 778 (citing *Jackson v. Firestone Tire & Rubber Co.*, 788 F.2d 1070, 1083 (5th Cir. 1986)).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. See FED. R. EVID. 401.

71. See *id.* at 404(b). Cf. *id.* at 405(b)(specific instances of conduct admissible where character is an essential element of a claim or a defense).

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.⁷²

It should come as no surprise that rule 404(b) is one of the most litigated of the Federal Rules of Evidence, given the fact that in most criminal cases, the prosecution can almost always locate some act or incident in the defendant's past which would be admissible under rule 404(b).⁷³

For example, in *United States v. Tullos*,⁷⁴ the defendants were charged with various improprieties in loan transactions with a federally insured bank.⁷⁵ One of the defendants, an attorney for the bank, testified that he had never knowingly filed false reports with the bank.⁷⁶ In rebuttal, the prosecution offered evidence that on several prior, unrelated occasions the defendant had filed bills for his services with the bank which did not comport with the version of the bills he prepared for his law firm's records.⁷⁷ The defendant unsuccessfully argued that the evidence was introduced only to show that he was cheating his law partners, that he was a bad person, and that he was probably involved with the other defendant's criminal activity.⁷⁸

On appeal, the court stated that the evidence of the other misconduct could be properly used to rebut the defendant's good faith defense.⁷⁹ That defense, according to the court, placed the defendant's intent in issue and the offered incidents of misconduct were admissible to dispel his contention of mistake.⁸⁰

72. See *id.* at 404(b).

73. See S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 125 (3d ed. 1982).

74. 868 F.2d 689 (5th Cir. Mar. 1989).

75. *Id.* at 690-93. The defendants were indicted for, inter alia, numerous counts of making false entries in reports filed with the bank in violation of 18 U.S.C. §§ 2 and 1006, willful misapplication of the bank's funds in violation of 18 U.S.C. § 657, and conspiracy to make false entries and misapply funds in violation of 18 U.S.C. § 371. *Id.*

76. *Id.* at 697.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

The court noted that an "appropriate" limiting instruction had been given to the jury⁸¹ and that although this evidence was "obviously prejudicial," the trial court did not abuse its discretion in concluding that the probative value outweighed that prejudice.⁸²

C. Evidence of Subsequent Remedial Measures

In order to encourage employers and manufacturers to improve safety, Federal Rule of Evidence 407 generally prohibits the introduction of evidence of "subsequent remedial measures."⁸³ The rule recognizes that if the jury hears that a defendant has fixed the defect that caused an accident, it is likely to assume that the defendant, by making the repairs, has admitted fault. But rule 407 is not an absolute exclusionary rule. Although the proponent cannot introduce evidence of subsequent remedial measures to prove negligence or culpable conduct, such evidence may be used for such purposes as proving "ownership, control, or feasibility of precautionary measures, if controverted, or impeachment."⁸⁴

In *Hardy v. Chemetron Corp.*⁸⁵ the court squarely addressed the applicability of rule 407. In that case, the plaintiff lost the tips of two fingers while operating a bacon-slicing machine manufactured by the defendant.⁸⁶ The focus of the litigation centered on whether the machine had been properly wired.⁸⁷ The plaintiff attempted to offer evidence that shortly after the accident, the defendant had rewired its slicers.⁸⁸ The trial court ruled that the evidence of the defendant's subsequent remedial measure was inadmissible and the jury ultimately returned with a verdict favorable to the defendant manufacturer.⁸⁹

81. *Id.* See FED. R. EVID. 105. The value of limiting instructions on the limited admissibility of rule 404(b) evidence was discussed in Schlueter, *Evidence, Fifth Circuit Symposium*, 20 TEX. TECH L. REV. 427, 435-37 (1989) (discussing *United States v. Chase*, 838 F.2d 743 (5th Cir.), *cert. denied*, ___U.S. ___, 108 S. Ct. 2022, 100 L. Ed.2d 609 (1988)).

82. 868 F.2d at 697. The court summarily rejected the argument that the other defendants had been prejudiced by this evidence. *Id.* See also FED. R. EVID. 403 (requiring court to balance probative value against prejudice).

83. See FED. R. EVID. 407 advisory committee's note.

84. FED. R. EVID. 407.

85. 870 F.2d 1007 (5th Cir. Apr. 1989).

86. *Id.* at 1008.

87. *Id.* at 1010.

88. *Id.*

89. *Id.* at 1008.

On appeal the plaintiff argued that the evidence was admissible to (1) impeach the defendant's position at trial that the wiring was not the cause of the injury;⁹⁰ (2) to impeach the defendant's assertion that the machine worked properly after the accident;⁹¹ (3) to rebut testimony that rewiring the machine was impractical;⁹² and (4) to rebut testimony that the design change would not have prevented the accident.⁹³ The court rejected all four arguments.⁹⁴

As to the first argument, the court indicated that to permit the plaintiff to rebut the defendant's "trial position" that the wiring was not at fault would in effect permit her to argue that the subsequent change proved the defendant's negligence.⁹⁵ That, said the court, is exactly what rule 407 was designed to preclude and labeling the evidence as impeachment is "semantic manipulation."⁹⁶ The court cited the Seventh Circuit's opinion in *Public Service Co. of Indiana v. Bath Iron Works Corp.*:⁹⁷

[The impeachment] exception must be applied with care, since "any evidence of subsequent remedial measures might be thought to contradict and so in a sense impeach [a party's] testimony that he was using due care at the time of the accident . . . [I]f this counted as 'impeachment' the exception would swallow the rule."⁹⁸

The court emphasized that its earlier decision in *Muzyka v. Remington Arms Co.*⁹⁹ did not support the plaintiff's position.¹⁰⁰ In *Muzyka*, subsequent remedial measures were admitted for impeachment but the court noted that in that case the defendants had testified in "superlatives" that the product was safe and of superior quality.¹⁰¹ In this case, said the court, the defendant's testimony contained no such superlatives and could not have misled the jury.¹⁰²

90. *Id.* at 1010-11.

91. *Id.*

92. *Id.* at 1011-12. The court noted that this argument had not been raised in the plaintiff's appellate brief but had been raised at oral argument. *Id.*

93. *Id.* This argument was also raised at oral argument. *Id.*

94. *Id.* at 1010-12.

95. *Id.* at 1010-11.

96. *Id.* at 1011.

97. 773 F.2d 783 (7th Cir. 1985).

98. 870 F.2d at 1010-11 (quoting *Public Serv. Co. of Ind. v. Bath Iron Works Corp.*, 773 F.2d 783 (7th Cir. 1985)).

99. 774 F.2d 1309 (5th Cir. 1985).

100. 870 F.2d at 1011.

101. *Id.*

102. *Id.* The court noted that the defendant had conceded that rewiring was feasible. *Id.*

With regard to the second argument, that the evidence was admissible to impeach testimony that the machine had functioned properly after the accident, the court concluded that the facts did not support the argument since the testimony offered by the defense only indicated that the machine had operated without incident after the accident, but only the same day as the accident.¹⁰³ The defendant made no claim regarding the subsequent functioning of the machine.¹⁰⁴ Thus, there were no misleading claims by the defense which would have permitted evidence of the subsequent repairs.¹⁰⁵

The court also rejected the plaintiff's third argument that the evidence was admissible to rebut the defense testimony that a design advocated by the plaintiff was impractical.¹⁰⁶ The court noted that the defense witnesses had not so testified.¹⁰⁷ Instead, they had indicated that the original wiring was "more practical."¹⁰⁸

Finally, the court rejected the argument that the evidence should have been admitted to rebut testimony that the "design change would not have prevented the accident."¹⁰⁹ On this point, the court simply concluded that the fact that remedial steps were taken "in no way demonstrates whether the change would or would not have prevented the accident."¹¹⁰

Judge Garza registered a lengthy and thoughtful dissent.¹¹¹ He noted that the defense had repeatedly opened the door for impeachment evidence and then relied upon rule 407 to prevent the plaintiff from responding.¹¹² If the defendant wished to block evidence concerning its subsequent remedial measure, then it should have refrained from presenting evidence that no such remedial measure had been taken.¹¹³ In concluding that the plaintiff had not received a fair trial,¹¹⁴ Judge Garza stated:

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 1011-12.

107. *Id.*

108. *Id.*

109. *Id.* at 1012.

110. *Id.*

111. *Id.* at 1012-16 (Garza, J., dissenting).

112. *Id.* at 1015 (Garza, J., dissenting).

113. *Id.* at 1014 (Garza, J., dissenting).

114. *Id.* at 1015 (Garza, J., dissenting).

The impeachment exception to Rule 407 is not surplusage; it was drafted for a reason. If, as the majority holds today, the case at bar does not fall within the exception, it is difficult to imagine one that would. I do not believe that Rule 407 permits a defendant who has effected subsequent design changes to make statements which repeatedly imply that no subsequent remedial measures were taken, or that no practical manufacturer would consider taking such measures, or that such changes would, in any event, simply not work. In three different ways, and on at least three different occasions during trial, Chemetron's expert laid these inferences before the jury and then hid within the shelter of Rule 407¹¹⁵

Judge Garza's dissent is persuasive. Although it is always difficult, as the majority recognizes, to second guess the trial court, the majority's view that its decision in *Muzyka* was distinguishable is questionable. That position seems to send the signal that rule 407's impeachment exception is only available when the defendant exaggerates about the fine features of its product. Certainly, exaggerations and superlatives make it easier for both trial and appellate courts to conclude that remedial measures should be admitted for impeachment. But the lack of superlatives should not preclude that evidence if the defense has been subtle enough to send the same signal to the jury in more humble tones.

D. Evidence of Liability Insurance

Like rule 407, rule 411 reflects particular policy reasons for excluding evidence of liability insurance.¹¹⁶ Rule 411 provides a general rule of exclusion followed by several exceptions. One of the stated exceptions is to permit evidence of insurance for impeachment purposes.

In *Granberry v. O'Barr*,¹¹⁷ the plaintiff's father was killed when a semi-trailer truck owned by the defendant collided with his pickup truck.¹¹⁸ The only non-participant eyewitness testified on behalf of the defendant.¹¹⁹ On cross-examination the plaintiff attempted to question the eyewitness on the fact that he was employed by a life insurance company which was under the "umbrella" of the same

115. *Id.* (Garza, J., dissenting).

116. See FED. R. EVID. 411 advisory committee's note.

117. 866 F.2d 112 (5th Cir. Dec. 1988).

118. *Id.* at 113.

119. *Id.* at 113-14.

insurance company that carried liability insurance on the defendant's truck.¹²⁰ The trial court carefully explored the issue of the corporate structure of the insurance company and the witness' exact relationship to the company¹²¹ and blocked the plaintiff's attempt to cross-examine the witness about that relationship.¹²²

The Fifth Circuit concluded that the trial court had not abused its discretion in excluding the evidence.¹²³ Particularly relevant, said the court, was the fact that the testimony of the witness was entirely consistent with several statements made at the time of the accident to the driver of the semi-truck and to a policeman.¹²⁴ Further, there was no evidence to indicate that he was aware that the owner of the truck was insured, let alone that he was insured by the witness' employer.¹²⁵

This case is a difficult one. Rule 411 recognizes that evidence that a party is insured generally may mislead the jury into a particular result under a "deep pocket" theory.¹²⁶ But the rule also recognizes that there are other independent reasons for admitting such evidence.¹²⁷ This case seems to fall clearly within those exceptions. The witness in question was apparently a key witness for the defense and as a "non-participant" to the accident itself, must certainly have been perceived by the jury as an uninterested party. But at the time of trial, the witness was employed as an executive for the insurance company which carried the liability insurance on the defendant's truck.¹²⁸ This seems to be the classic case of using the witness' relationship to a party to show "bias,"¹²⁹ which the Supreme Court

120. *Id.* at 114.

121. *Id.* Apparently, the witness had earlier been an agent for the parent company and at the time of the trial was an executive with the company which was the defendant's liability insurer. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *See* FED. R. EVID. 411 advisory committee's note.

127. *See* FED. R. EVID. 411.

128. 866 F.2d at 114.

129. The topic of bias is not specifically mentioned in the Federal Rules of Evidence but is nonetheless recognized as a valid means of impeaching a witness. State codifications of the Federal Rules of Evidence have included specific provision for impeachment by showing bias. *See, e.g.,* TEX. R. CIV. EVID. 613(b); TEX. R. CRIM. EVID. 612(b). *See generally* H. WENDORF & D. SCHLUETER, TEXAS RULES OF EVIDENCE MANUAL, 247-49 (2d ed. 1988)(discussing impeachment by bias).

has indicated is important enough to carry constitutional implications, at least in criminal cases.¹³⁰ The court places much emphasis on the fact that the witness' testimony was consistent with statements made at the time of the accident and from that, apparently concludes that his relationship with the insurance company was not an important factor.¹³¹ But that determination should have been made by the jury in assessing the credibility of the witness.¹³²

V. COMPETENCY OF WITNESSES: THE MENTAL PROCESSES RULE

Federal Rule of Evidence 601 assumes that all witnesses are competent to testify about relevant matters.¹³³ The rule also recognizes that certain categories of individuals may be considered incompetent to testify under applicable state law.¹³⁴ Other rules in Article VI of the Federal Rules of Evidence specify that certain individuals may not testify about certain matters.¹³⁵ For example, rule 606 generally disqualifies jurors from testifying about what was said or done during deliberations;¹³⁶ rule 605 declares that a judge may not testify at a trial over which he is presiding.¹³⁷

Although it is not specifically mentioned in the Federal Rules of Evidence, the courts have recognized a "mental processes" rule which, like rule 607, exempts quasi-judicial officials from providing compulsory testimony. The Fifth Circuit addressed the applicability of this rule in *Gary W. v. Louisiana Department of Health and Human Resources*.¹³⁸

In that case, a district court in 1978 appointed a special master¹³⁹ to ensure compliance with a protective order by the court addressing

130. See *Davis v. Alaska*, 415 U.S. 308, 316-18 (1974).

131. See 866 F.2d at 114.

132. See FED. R. EVID. 104(e)(jury to decide weight and credibility of evidence).

133. FED. R. EVID. 601 states:

Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

134. *Id.*

135. See FED. R. EVID. 601-614.

136. See FED. R. EVID. 606.

137. See FED. R. EVID. 605.

138. 861 F.2d 1366 (5th Cir. Dec. 1988).

139. *Id.* at 1367; see also FED. R. CIV. P. 53(e) (governing the appointment of masters).

the rights of mentally retarded and emotionally disturbed children.¹⁴⁰ In 1979, the Fifth Circuit affirmed the appointment¹⁴¹ and noted that the master would serve the roles of fact-finder, hearing officer, and monitor.¹⁴² In 1987, the master issued a formal recommendation and in accordance with Federal Rule of Civil Procedure 53,¹⁴³ a hearing was scheduled before a magistrate to determine whether the report should be adopted.¹⁴⁴ In preparation for the hearing, the special master prepared a report to substantiate her recommendations.¹⁴⁵ The State, in an attempt to review that report, noticed the master's deposition and issued her a subpoena and a subpoena duces tecum.¹⁴⁶ The magistrate quashed the subpoenas and the district court affirmed.¹⁴⁷

In affirming the district court's ruling that the special master could not be deposed, the court cited the "mental processes rule."¹⁴⁸ The court noted that the rule was recognized by the Supreme Court in *United States v. Morgan*¹⁴⁹ where it concluded that the Secretary of Agriculture should not have been subjected to a deposition and trial testimony on the issue of how certain rates had been established.¹⁵⁰ In reaching its conclusion the Supreme Court stated in part:

[T]he Secretary should never have been subjected to this examination. The proceeding before the Secretary "has a quality resembling that of a judicial proceeding." Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held in this very litigation that "it was not the function of the court to probe the mental processes of the Secretary." Just as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected.¹⁵¹

The court also cited its own opinion in *Bank of Commerce of Laredo v. City National Bank of Laredo*,¹⁵² where it had blocked the testi-

140. 861 F.2d at 1367.

141. Gary W. v. Louisiana, 601 F.2d 240 (5th Cir. 1979).

142. *Id.*

143. FED. R. Civ. P. 53(e).

144. 861 F.2d at 1367.

145. *Id.* at 1368.

146. *Id.*

147. *Id.*

148. *Id.*

149. 313 U.S. 409 (1941).

150. *Id.* at 421-22.

151. *Id.* at 422.

152. 484 F.2d 284 (5th Cir. 1973), *cert. denied*, 416 U.S. 905 (1974).

mony of the Comptroller of the Currency.¹⁵³ The court noted that although in both of these cases, the mental processes rule had been applied to agency officials, the rule had also been applied to judicial and quasi-judicial officials.¹⁵⁴ In this case, said the court, the special master had performed a quasi-judicial role in fulfilling her duties as a master and it would have been inappropriate to examine her mental processes.¹⁵⁵

This decision is sound and tracks the more formalized rule that judges should normally not testify.¹⁵⁶ Although it is not clear from the decision itself, presumably the "mental processes rule" is not an absolute bar and under appropriate circumstances, a judicial or quasi-judicial official could be required to testify. The court implied as much when it cited language from *United States v. Dowdy*,¹⁵⁷ to the effect that the rule would apply absent "extreme and extraordinary circumstances."¹⁵⁸

VI. OPINION TESTIMONY

As a general rule, courts prefer to hear "facts" based upon a witness' personal knowledge. Article VII of the Federal Rules of Evidence, however, recognizes that both lay and opinion testimony may be helpful to the fact-finder and specifically address the admissibility of both brands of opinion testimony.¹⁵⁹ During the survey period the court addressed a variety of issues generally falling under the topic of "opinion" testimony.

A. Lay Opinion Testimony

Federal Rule of Evidence 701 permits introduction of lay opinion testimony if (1) it is "rationally based on the perception of the

153. *Id.* at 287.

154. 861 F.2d at 1369 (citing *United States v. Dowdy*, 440 F. Supp. 894 (W.D. Va. 1977)).

155. *Id.* The court recognized that at the time she prepared her report to be submitted to the magistrate, she was no longer the special master. Nonetheless, the report was prepared to support her recommendations and the State sought to depose her on the findings she had entered as a master. *Id.* at n.5.

156. FED. R. EVID. 607.

157. *United States v. Dowdy*, 440 F. Supp. 894, 896 (W.D. Va. 1977).

158. 861 F.2d at 1369; *see also* *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) (indicating that the rule would not apply where there was strong showing of bad faith or improper behavior).

159. *See* FED. R. EVID. 701-706.

witness” and (2) it is “helpful to the determination of a fact in issue.”¹⁶⁰ This two-pronged requirement is usually easily met and on appellate review of the issue, the federal courts will reverse only for an abuse of discretion.¹⁶¹

The court addressed the issue of lay opinion testimony in *Hansard v. Pepsi-Cola Metropolitan Bottling Co.*,¹⁶² and *Peteet v. Dow Chemical Co.*¹⁶³ In *Hansard*, the 59-year-old plaintiff brought action against his former employer arguing that he had been discharged in violation of the Age Discrimination in Employment Act.¹⁶⁴ At trial, the plaintiff relied on the opinion testimony of a supervisor employed by the defendant¹⁶⁵ to the effect that the plaintiff had been relieved, and not rehired, as part of the defendant’s “youth movement.”¹⁶⁶ Noting that courts often permit lay witnesses to express an opinion on the intent or motivation of a particular person,¹⁶⁷ the court concluded that the witness in this case had some basis for expressing an opinion on the defendant’s motivation for discharging the plaintiff.¹⁶⁸ The court admitted that the witness’ testimony was not “strongly supported” but that it was based upon his own experience in the defendant corporation, and not the hearsay statements of another person.¹⁶⁹

In *Peteet v. Dow Chemical Co.*,¹⁷⁰ the plaintiff had worked for the United States Forest Service for two years as a seasonal employee.¹⁷¹ His primary duties were those of a firefighter but he

160. FED. R. EVID. 701.

161. See, e.g., Scheib v. Williams-McWilliams Co., 628 F.2d 509, 511 (5th Cir. 1980).

162. 865 F.2d 1461 (5th Cir. Feb.), cert. denied, ___U.S. ___, 110 S. Ct. 129, ___L. Ed. 2d ___(1989).

163. 868 F.2d 1428 (5th Cir. Apr.), cert. denied, ___U.S. ___, 110 S. Ct. 328, ___L. Ed. 2d ___(1989).

164. 865 F.2d at 1464-66; see also 29 U.S.C. §§ 621-634 (1982 & Supp. V 1987) (the Age Discrimination in Employment Act).

165. 865 F.2d at 1464. The witness, Mr. Charles Miller, was a warehouse manager for the defendant. *Id.*

166. *Id.*

167. See, e.g., John Hancock Mut. Life Ins. Co. v. Dutton, 585 F.2d 1289 (5th Cir. 1978) (permitting the plaintiff’s daughter to testify that her father did not believe that his wife would shoot him).

168. 865 F.2d at 1466-67.

169. *Id.* at 1467. Cf. Mitroff v. Xomox Corp., 797 F.2d 271, 275-76 (6th Cir. 1986) (finding no basis for lay opinion testimony).

170. 868 F.2d 1428 (5th Cir. Apr.), cert. denied, ___U.S. ___, 110 S. Ct. 328, ___L. Ed. 2d ___(1989).

171. *Id.* at 1430.

sometimes participated in a weed control project called "hack and squirt."¹⁷² The program required him to use a herbicide containing a chemical manufactured by the defendant chemical company.¹⁷³ Two years later he was diagnosed as having Hodgkin's disease; he eventually died from that disease but not before he had filed an action against the defendant.¹⁷⁴

At trial the plaintiffs relied on both expert testimony of a toxicologist and lay opinion testimony from two former employees of the United States Forest Service to show that the cause of death was directly related to exposure to the defendant's herbicide.¹⁷⁵ One of the the two former employees testified that although he had never actually participated in the "hack and squirt" operations, he had seen other workers frequently get the herbicide on their clothes and skin.¹⁷⁶ The other employee testified that he had taken part in the weed control program where workers were exposed to the fumes and that he and other workers had been splashed with the herbicide.¹⁷⁷

The defense argued that this testimony was irrelevant and that neither employee had actually seen the plaintiff conducting the "hack and squirt" operations.¹⁷⁸ Concluding that the trial court had not abused its discretion in admitting this lay opinion testimony, the court simply, and correctly, stated that the testimony of both employees was founded upon their own knowledge and observations.¹⁷⁹

B. *Expert Opinion: Qualifications of Experts*

Typically the federal courts are generous in interpreting the application of Federal Rule of Evidence 702 which states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill,

172. *Id.*

173. *Id.*

174. *Id.* After the plaintiff-worker died, his wife, children and parents were substituted as parties. *Id.* at n.1.

175. *Id.* at 1430, 1434-35. See *infra* notes 182-211 and accompanying text (discussing the portion of the court's opinion addressing the admissibility of the expert opinion testimony).

176. 868 F.2d at 1434.

177. *Id.* at 1434-35.

178. *Id.* at 1435.

179. *Id.*

experience, training, or education, may testify thereto in the form of an opinion or otherwise.¹⁸⁰

In applying this rule, the courts will generally provide great leeway to trial courts in deciding whether a particular witness qualified as an "expert" and will reverse only if a trial court's ruling was manifestly erroneous.¹⁸¹

In *Peteet v. Dow Chemical Co.*,¹⁸² a toxicologist testified that in his expert opinion the defendant's herbicide had caused the death of one of the plaintiffs.¹⁸³ There seemed to be no doubt that the witness had substantial qualifications: he was a medical doctor and a certified toxicologist; he had various academic appointments and had consulted with several companies on handling toxic products; he had published thirty-eight or thirty-nine articles on the subject; and he had extensive experience in determining whether an environmental or occupational development had caused cancer.¹⁸⁴ The defendant complained, however, that the witness was not qualified to render an opinion because he was not a "specialist in any particular field."¹⁸⁵ The court rejected that argument and cited extensive authority for the proposition that the fact that a witness is not a specialist goes only to the weight, and not to the admissibility, of the opinion testimony.¹⁸⁶

C. Expert Opinion: The Requirement of a Basis

Assuming that a particular witness is an "expert" within the broad terms of Federal Rule of Evidence 702, the proponent of the expert testimony must demonstrate that there is some basis for the opinion.¹⁸⁷ Federal Rule of Evidence 703 states:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming

180. See FED. R. EVID. 702; see also S. SALTZBURG AND K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 638-39 (4th ed. 1986) and Supp. 159-60 (1989)(collection of cases).

181. See *Koonce v. Quaker Safety Prods. & Mfg. Co.*, 798 F.2d 700, 721 (5th Cir. 1986); *Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110, 1115 (5th Cir. 1984).

182. 868 F.2d at 1428.

183. *Id.* at 1430-31.

184. *Id.* at 1431.

185. *Id.*

186. *Id.* See also *Hermes v. Pfizer, Inc.*, 848 F.2d 66, 69 (5th Cir. Jun. 1988) ("There is nothing that generally disqualifies a non-physician as an expert on causation").

187. See FED. R. EVID. 702.

opinions or inferences upon the subject, the facts or data need not be admissible in evidence.¹⁸⁸

The application of this rule was discussed in detail in *Peteet*.¹⁸⁹

The plaintiffs in *Peteet* relied heavily upon the expert testimony of a toxicologist that the defendant's herbicide had caused the death of one of the plaintiffs.¹⁹⁰ The defense challenged the "basis" of the expert's opinion on several grounds.¹⁹¹ First, the defendant argued that the expert never "personally examined" the deceased.¹⁹² Citing opinions from other circuits¹⁹³ and noting that rule 703 reduces the need for firsthand knowledge,¹⁹⁴ the court stated that a personal examination is not required.¹⁹⁵

The defendant also argued that the toxicologist's expert opinion should have been disallowed because he had relied upon information provided by plaintiff's counsel.¹⁹⁶ The court summarily rejected this argument noting that "[a] different result would infuse many personal injury suits with quite difficult issues of source tracing."¹⁹⁷

The plaintiff's expert also relied upon information he had obtained from scientific literature which had been published after the plaintiff had been exposed to the defendant's herbicide.¹⁹⁸ The court rejected the defense's argument that the opinion should thus have been excluded.¹⁹⁹ First, the defendant had waived that particular argument,²⁰⁰ and second, the articles were admissible on the issue of causation.²⁰¹

The defendant also argued that some of the scientific literature upon which the expert relied was "wholly irrelevant" to injuries not

188. See FED. R. EVID. 703.

189. See *supra* notes 170-79, 182-86 and accompanying text.

190. 862 F.2d at 1431.

191. *Id.* at 1432.

192. *Id.*

193. *Id.* (citing *Sweet v. United States*, 687 F.2d 246, 249 (8th Cir. 1982)); *Data Line Corp. v. Micro Tech., Inc.*, 813 F.2d 1196, 1200-01 (Fed. Cir. 1987)).

194. *Id.* (citing 3 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 389, at 657 (1979)).

195. 868 F.2d at 1432.

196. *Id.*

197. *Id.*; see also *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1135 (5th Cir. 1985).

198. 868 F.2d at 1432-33.

199. *Id.* at 1433.

200. *Id.* See FED. R. EVID. 103(a).

201. 868 F.2d at 1433. Cf. *Challoner v. Day & Zimmerman, Inc.*, 512 F.2d 77, 79 (5th Cir.), *vacated on other grounds*, 423 U.S. 3 (1975) (subsequent study following accident was admissible on issue of defectiveness).

involved in the case.²⁰² The court agreed on this issue but determined that any error was harmless because it did not substantially prejudice the defendant.²⁰³

Finally, the defendant argued that the plaintiff's expert improperly relied upon a study conducted by the defendant to express his opinion that the defendant's herbicide contained impurities and that the defendant was in violation of various Environmental Protection Act provisions.²⁰⁴ The court noted that the expert could properly rely upon a study in formulating his opinion.²⁰⁵ With regard to his testimony that the defendant had violated the law, however, the court concluded that the admission of that portion of his opinion was harmless error.²⁰⁶

The *Peteet* decision is a good case study on the variety of information which may serve as a legitimate source for an expert's opinion. Further, the court's disposition of the case seems to be entirely consistent with the breadth of rule 703 which recognizes that an expert may rely on virtually any information which is reliable and reasonably related to a fact in issue.²⁰⁷

D. Expert Opinion: The Maverick Opinion

One final point on expert testimony in *Peteet* deserves attention. The plaintiff's toxicologist testified that in his opinion "one molecule of carcinogen, in the right place and at the right time, can cause cancer."²⁰⁸ The defendant argued on appeal that this "one-hit" theory was "specious."²⁰⁹ Noting that the defendant had waived the issue, the court nonetheless suggested that the absence of a consensus on a scientific theory did not render it inadmissible:

An expert's opinion need not be generally accepted in the scientific community before it can be sufficiently reliable and probative to

202. 868 F.2d at 1433.

203. *Id.*

204. *Id.* at 1434.

205. *Id.*

206. *Id.* The court noted that the testimony was beyond the witness' expertise. *Id.*

207. See also *Hermes v. Pfizer, Inc.*, 848 F.2d 66 (5th Cir. Jun. 1988) (noting that expert's opinion was supported by another doctor's testimony that his mother had exhibited the same symptoms as those experienced by the plaintiff). Cf. *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987) ("[the] lack of reliable support may render [the opinion] more prejudicial than probative, [thus] making it inadmissible under Fed. R. Evid. 403").

208. 868 F.2d at 1433.

209. *Id.*

support a jury finding. . . . What is necessary is that the expert arrived at his causation opinion by relying upon *methods* that other experts in his field would reasonably rely on in forming their own, possibly different opinions, about what caused the patient's disease.²¹⁰

The court stated that in this case the expert, in expressing his "one-hit" theory, had relied upon the "same kind of information relied upon by other medical experts."²¹¹

VII. HEARSAY

The common-law rules regarding the treatment of "hearsay" are codified in Article VIII of the Federal Rules of Evidence.²¹² Although the codified version arguably permits more hearsay evidence into a trial,²¹³ the rules often remain the bane of counsel and judges alike. Under rule 801, hearsay is defined as a statement, other than one made by the declarant in court, which is offered to prove the truth of the matter asserted.²¹⁴ Under the common law, evidence which satisfied this test could not be offered for the truth of the matter asserted unless it fell into one of many exceptions to the hearsay rule. The Federal Rules of Evidence, however, converted a number of those exceptions into exemptions from the rule; that is, they were considered nonhearsay, not because they did not otherwise fall within the common-law definition of hearsay, but because the drafters determined that such evidence was reliable enough to be treated with greater deference.²¹⁵ During the survey period, the Fifth Circuit addressed several of these nonhearsay statements²¹⁶ and also addressed the availability of the business records and residual hearsay exceptions.²¹⁷

210. *Id.* (quoting *Osburn Anchor Laboratories, Inc.*, 825 F.2d 908, 915 (5th Cir. 1987) (emphasis in original, citations omitted)).

211. *Id.* at 1433-34.

212. See FED. R. EVID. 801-806.

213. See generally S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL, 717 (4th ed. 1986) (noting that rule 801 did not include within the definition of hearsay the common-law rule adopted in some jurisdictions that nonverbal conduct not intended to be statement was hearsay).

214. FED. R. EVID. 801(c).

215. See FED. R. EVID. 801 advisory committee's note.

216. *Davis v. Mobil Oil Exploration & Producing S.E., Inc.*, 864 F.2d 1171 (5th Cir. Feb. 1989); *Hardy v. Johns-Manville Sales Corp.*, 851 F.2d 742 (5th Cir. Aug. 1988); *Staheli v. University of Miss.*, 854 F.2d 121 (5th Cir. Sept. 1988).

217. *Broadcast Music, Inc. v. Xanthas, Inc.*, 855 F.2d 233 (5th Cir. Sept. 1988).

A. *Hearsay: Party Admissions as Nonhearsay*

Federal Rule of Evidence 801(d)(2) defines admissions by a party-opponent as nonhearsay²¹⁸ and includes within that definition personal admissions by a party,²¹⁹ admissions by an agent of a party about matters arising within the scope of the agency relationship,²²⁰ an admission adopted by a party,²²¹ admissions made by a person authorized to do so by a party,²²² and finally, statements made by co-conspirators.²²³ If the offered statement falls within one of these categories and is offered against the party²²⁴ then it is, by definition, nonhearsay and is admissible without regard to whether it also falls within one of the many "exceptions" to the hearsay rule.²²⁵

The issue of admissions by an agent was addressed in *Staheli v. University of Mississippi*,²²⁶ where a university professor brought action against the university for denial of tenure. At trial, the professor attempted to introduce the testimony of an accounting professor who stated that tenure had been denied because the university's chancellor was vindictive.²²⁷ The Fifth Circuit agreed with the trial court that this statement was not a nonhearsay admission by an agent of a party-opponent under rule 801(d)(2)(D).²²⁸ Noting that there are few cases in the circuit on the issue, the court concluded that the offered statement did not concern a matter within the scope of the agency relationship.²²⁹ The accounting professor had nothing to do with the university's tenure decision or with any personnel matter affecting the plaintiff.²³⁰ The court added that the accounting

218. See FED. R. EVID. 801(d)(2).

219. FED. R. EVID. 801(d)(2)(A).

220. FED. R. EVID. 801(d)(2)(D).

221. FED. R. EVID. 801(d)(2)(B).

222. FED. R. EVID. 801(d)(2)(C).

223. FED. R. EVID. 801(d)(2)(E).

224. FED. R. EVID. 801(d)(2).

225. For example, a statement by a party at the scene of an accident could be admissible as an admission, if offered against the party, and also as an excited utterance under FED. R. EVID. 803(2).

226. 854 F.2d 121 (5th Cir. Sept. 1988).

227. *Id.* at 127.

228. *Id.*

229. *Id.* See FED. R. EVID. 801(d)(2)(D). The rule requires more than simply an agency relationship. The offered statement of the agent must have been made "concerning a matter within the scope of the agency or employment, made during the existence of the relationship . . ." *Id.*

230. 854 F.2d at 127.

professor made the statement only in his "capacity as wiseacre" ²³¹

The admissibility of an agent's statement as nonhearsay was also at issue in *Davis v. Mobil Oil Exploration & Producing Southeast, Inc.*²³² In that case an oil rig worker brought a negligence action against Mobil after he slipped and fell on mud which had been allowed to remain on the rig.²³³ At trial the plaintiff, through three witnesses, introduced evidence that at a safety meeting shortly before the accident, an unidentified employee of Mobil ordered that the accumulation of mud should not be washed from the floor of the rig.²³⁴ The defendant unsuccessfully argued that the admission should not have been admitted because the plaintiff had not been able to identify by name the individual who gave the order.²³⁵ In rejecting that argument the Fifth Circuit noted that the plaintiff's witnesses testified that there were three Mobil employees at the meeting and that the older employee gave the order.²³⁶ There was also testimony that the person giving the order wore a Mobil hard hat.²³⁷ The court concluded by stating:

Persuaded that the . . . evidence is sufficient to allow the district court to permit the testimony as an admission against Mobil, we affirm the decision of the district court on this point. It should not be understated, however, that while a name is not in all cases required, a district court should be presented with sufficient evidence to conclude that the person who is alleged to have made the damaging statement is in fact a party or an agent of that party for purposes of making an admission within the context of Rule 801(d)(2)(D).²³⁸

231. *Id.* The court noted that this result was similar to that reached by other circuits. *See, e.g., Hill v. Speigel, Inc.*, 708 F.2d 233, 237 (6th Cir. 1983).

232. 864 F.2d 1171 (5th Cir. Feb. 1989).

233. *Id.* at 1173.

234. *Id.* The order was given in an attempt to conserve water. *Id.*

235. *Id.* at 1173-74.

236. *Id.* at 1174.

237. *Id.*

238. *Id.* The court cited *O'Neal v. Esty*, 637 F.2d 846 (2d Cir. 1980), *cert. denied*, 451 U.S. 972 (1981) where the court addressed the problem of determining which of the defendants in a multi-defendant case made the admission. The Court of Appeals for the Second Circuit stated that "justice might be better served and the Rules of Evidence more reasonably construed by permitting a plaintiff to inform the jury that one of the defendants made an admission, leaving to each defendant the burden of persuading the jury that the admission was not made by him." 637 F.2d at 851.

The issue of whether statements in an appellate brief could constitute an admission by a party-opponent under rule 801(d)(2)(A) was addressed in *Hardy v. Johns-Manville Sales Corp.*²³⁹ In a consolidated case, multiple plaintiffs argued that they had been injured by asbestos products manufactured by the eight defendants.²⁴⁰ At trial, one of the plaintiffs introduced excerpts from appellate briefs filed by two of the defendants in unrelated litigation.²⁴¹ The statements, which regarded the effect of exposure to asbestos, were offered as party admissions.²⁴²

The Fifth Circuit rejected the argument that the statements in the two appellate briefs were party admissions under rule 801(d)(2).²⁴³ There is a difference, the court said, between statements made by a party in trial court pleadings, which are normally admissible,²⁴⁴ and those made in an appellate brief.²⁴⁵ Statements in trial documents normally constitute statements concerning the historical "real world" facts of a case.²⁴⁶ But appellate briefs are confined to statements about the trial record.²⁴⁷ That distinction, the court stated, is crucial.²⁴⁸ Because of the difference in the nature of the documents, there is a danger that statements in an appellate brief are "bound to be uncertain in the best of circumstances and dangerously misleading in most others."²⁴⁹ Thus, the trial court abused its discretion

239. 851 F.2d 742 (5th Cir. Aug. 1988).

240. *Id.* at 744.

241. *Id.* One of the statements was located in an appellate brief filed in a declaratory judgment action in Illinois. The other had been filed in a federal declaratory judgment action in the District of Columbia. In both instances, the briefs had been filed to establish insurance coverage. *Id.*

At trial the defendants did not argue that the offered statements should only have been admitted against the two defendants who had made them. The court noted that clearly the statements could have been so limited but in the absence of an objection it considered the statements to have been offered against all of the defendants. *Id.* at 745.

242. *Id.* at 745-46.

243. *Id.* at 746.

244. *Id.* at 745. The court noted that such trial pleadings might not be admissible in a "complicated joinder situation, involving . . . the contingent liability of third parties. . . ." *Id.* at n.5 (citing *Continental Ins. Co. of N.Y. v. Sherman*, 439 F.2d 1294, 1298 (5th Cir. 1971)).

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

in admitting the excerpts as admissions of a party opponent under rule 801(d)(2).²⁵⁰

Having determined that it was error to admit the statements, the court analyzed the adverse impact of the statements on the defendants and concluded that considering the prejudicial nature of the excerpts and the "substantial potential to engender" jury confusion, the judgment should be reversed and remanded for a new trial.²⁵¹

Of the foregoing "admissions" cases decided by the court, *Hardy* is certainly the most remarkable. First, as the court recognized, there are few, if any, cases in which counsel has attempted to introduce appellate briefs from other cases as party admissions.²⁵² Second, aside from the novelty of the evidentiary issue, the case is a rare example of the court granting relief for an erroneous evidentiary ruling.²⁵³

B. Hearsay: The Business and Residual Hearsay Exceptions

Assuming that counsel offers a statement which satisfies the definition of hearsay in rule 801(c) but does not fall within one of the nonhearsay exemptions in rule 801(d), counsel may still find help in a long list of hearsay exceptions. Two of those exceptions were addressed by the court in *Broadcast Music, Inc. v. Xanthas, Inc.*²⁵⁴

In *Xanthas*, a music society dedicated to protecting performance rights brought a copyright infringement action against a juke box operator.²⁵⁵ In an attempt to prove that the juke box operator actually owned the juke boxes in question, the plaintiff introduced the testimony of one of its counsel who read the responses of proprietors who had answered a questionnaire prepared by the plaintiff.²⁵⁶ The trial court erred, said the Fifth Circuit, when it admitted this hearsay testimony on the rationale that the hearsay rule does not apply to bench trials.²⁵⁷ According to the court, the letters from the proprietors

250. *Id.* at 746.

251. *Id.* at 747.

252. *Id.* at 745. The court indicated that it had found no cases involving the admissibility of appellate briefs filed in different cases between different parties. *Id.*

253. See *supra* note 4 and accompanying text; see also *Broadcast Music, Inc. v. Xanthas, Inc.*, 855 F.2d 233 (5th Cir. Sept. 1988) (another Fifth Circuit evidentiary case where appellate relief was granted).

254. 855 F.2d 233 (5th Cir. Sept. 1988).

255. *Id.* at 235.

256. *Id.* at 237.

257. *Id.* at 238.

were not admissible under the business records exception²⁵⁸ or the residual hearsay exception.²⁵⁹

With regard to the business records exception, the plaintiff argued that it “mailed out the questionnaires as a part of its ‘regularly conducted business activity.’ ”²⁶⁰ But there was nothing in the record, said the court, which indicated that the responses from the proprietors were made as a part of their business activity.²⁶¹ The court continued:

Even assuming the proprietors had filled out such forms regularly, this would not show that they were kept “in the regular course of business” under Rule 803(6), as the Supreme Court held in *Palmer v. Hoffman*, construing the statutory predecessor of Rule 803(6). Like the accident reports the railroad in *Palmer* customarily produced, the forms were not completed by the proprietors as part of the “systematic course” of their business; their primary utility, rather, is for litigation.²⁶²

The court also rejected the plaintiff’s argument that the proprietors’ responses were admissible under the residual hearsay exception.²⁶³ The plaintiff had argued that the responses were reliable and therefore admissible because they had been completed by the proprietors in compliance with section 116(a)(1)(B) of the Copyright Act.²⁶⁴ Noting that it had in the past accepted similar arguments of this form,²⁶⁵ the court indicated that the provisions of the Copyright Act do not impose penalties for providing inaccurate information.²⁶⁶ Thus, although the proprietors had an incentive to complete the forms, they did not have “any incentive to fill out the questionnaires from [the plaintiff] with precision or completeness.”²⁶⁷

258. *Id.* See FED. R. EVID. 803(6).

259. 855 F.2d at 238-39. See FED. R. EVID. 803(24).

260. 855 F.2d at 238.

261. *Id.*

262. *Id.* (citing *Palmer v. Hoffman*, 318 U.S. 109 (1943)).

263. *Id.* See FED. R. EVID. 803(24) which provides in part:

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

264. 855 F.2d at 238.

265. *Id.* at 239; see also *id.* n.16 (citing cases which have accepted this argument).

266. *Id.* at 239.

267. *Id.*

Noting that the trial court had erroneously relied on this inadmissible hearsay,²⁶⁸ the court ultimately reversed and remanded the case.²⁶⁹ Thus, this case, like *Hardy*, shares the distinction of being one of the few evidence cases decided by the Fifth Circuit where an evidentiary issue resulted in appellate relief.²⁷⁰

VIII. AUTHENTICATION

Before a proponent may introduce documents or physical evidence, he or she must be prepared to "authenticate" or "identify" it.²⁷¹ That is, a proponent must show that the offered evidence is what it purports to be.²⁷² The methods of authentication are varied and normally counsel will be able to find some way to meet the requirement. Federal Rule of Evidence 901 sets out ten nonexhaustive methods commonly relied upon to authenticate evidence.²⁷³ Federal Rule of Evidence 902 recognizes that some forms of evidence are self-authenticating because they inherently possess indicia of reliability.²⁷⁴

Both rule 901 and rule 902 were at issue in *United States v. Jimenez Lopez*.²⁷⁵ In that case the defendant was tried in the Western District of Texas for illegally entering the United States after being convicted of an earlier similar entry.²⁷⁶ To show the first offense, the prosecution introduced a photostatic copy of a "Record of Proceedings and Judgment" from the records of a United States Magistrate in California.²⁷⁷ The document showed that a person having the same name as the defendant had been convicted under 8 U.S.C. section 1325.²⁷⁸ The clerk of the court had stamped the document as "certified a true copy" and dated and signed it although

268. *Id.* at 238.

269. *Id.* at 240.

270. *See supra* notes 239-53 and accompanying text.

271. *See* FED. R. EVID. 901(a) which states: "General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

272. *Id.*

273. *See id.*

274. *See* FED. R. EVID. 902 advisory committee's note.

275. 873 F.2d 769 (5th Cir. May 1989).

276. *Id.* at 770; *see also* 8 U.S.C. § 1325 (1988) (the first commission of illegal entry is a misdemeanor and any subsequent offense is a felony).

277. 873 F.2d at 771.

278. *Id.*; *see supra* note 276.

the signature was illegible.²⁷⁹ A border patrol agent testified that he had personally requested the exhibit and had received it from an agent in California who had in turn obtained it from the magistrate's court.²⁸⁰ The defendant objected on the ground that the document was not an Immigration and Naturalization Service document, and therefore, it would not qualify under rule 901 or rule 902.²⁸¹ The defendant further objected on the ground that there was no seal on the document so that it was not self-authenticating.²⁸² "Certification," said the defendant, "is not enough."²⁸³ The sole issue on appeal was the admissibility of this prosecution exhibit.²⁸⁴ According to the court, government documents normally are self-authenticating.²⁸⁵ But it measured the admissibility of the exhibit under rule 901 after the prosecution conceded that rule 902 was inapplicable.²⁸⁶

The court noted that it "does not require conclusive proof of authenticity before allowing the admission of disputed evidence."²⁸⁷ Instead, all that is required by rule 901 is that there be some evidence which is sufficient to support the conclusion that the item is what the proponent claims it is.²⁸⁸ Noting that the illustrations in rule 901 are not exhaustive, the court concluded that the document was admissible.²⁸⁹ First, the document on its face appeared to be the record of a conviction.²⁹⁰ Second, even though it was not under seal, it was certified by the clerk of a court.²⁹¹ And third, the agent's testimony concerning the chain of custody of the document in conjunction with "the internal indicia of reliability within the document" justified its admission.²⁹²

279. 873 F.2d at 771.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* The concession was apparently based upon the fact that the exhibit was not under seal and no public officer had certified under seal that the document was genuine. *Id.* See FED. R. EVID. 902(1), (2).

287. 873 F.2d at 772.

288. *Id.*

289. *Id.* at 772, 774.

290. *Id.* at 772.

291. *Id.*

292. *Id.* The court recognized that without the testimony of the agent, "the admissibility of the document would have been doubtful." *Id.*

The defendant argued that the court should follow the Ninth Circuit's opinion in *United States v. Perlmutter*.²⁹³ In *Perlmutter*, the prosecution had presented a document purportedly reflecting the defendant's criminal record in Israel.²⁹⁴ The trial court ruled that the authentication certificate attached to the document was invalid but that the document itself had an "aura of authenticity."²⁹⁵ The Ninth Circuit recognized that normally the Federal Rules of Evidence offer "generous opportunity" to authenticate evidence by extrinsic evidence or by means of self-authentication under rule 902.²⁹⁶ But it rejected the argument that an appearance of authenticity would be sufficient.²⁹⁷

Noting that the Ninth Circuit "appears to require exceedingly strict compliance with the authenticity rules," the Fifth Circuit distinguished *Perlmutter* on three grounds.²⁹⁸ First, the document in *Perlmutter* was a record of convictions provided by Interpol which is not a United States agency.²⁹⁹ Second, the records in *Perlmutter* involved foreign judicial proceedings.³⁰⁰ And third, defense counsel in *Perlmutter* also raised hearsay objections to the offered documents.³⁰¹ The Fifth Circuit noted that there were hearsay elements in the authenticating testimony of the agent in this case, but that no hearsay objections had been made and that the issue had therefore not been preserved for appeal.³⁰²

The court's disposition of the authentication issue in *Jimenez Lopez* makes eminent sense. As the court noted, conclusive proof of authenticity should not be required.³⁰³ The stated threshold in rule 901 is relatively low and can be met by offering circumstantial evidence, as was done in this case.³⁰⁴

293. 693 F.2d 1290 (9th Cir. 1982).

294. *Id.* at 1292.

295. *Id.* at 1292-93.

296. *Id.* at 1293.

297. *Id.*

298. 873 F.2d at 773.

299. *Id.* In *Perlmutter*, the Ninth Circuit had indicated that "the record of convictions for the purposes of a court must come from a court itself in order to be considered reliable." 693 F.2d at 1295.

300. 873 F.2d at 773.

301. *Id.*

302. *Id.* See FED. R. EVID. 103(a)(1).

303. 873 F.2d at 772.

304. See also FED. R. EVID. 901(b)(4) which provides: "(4) Distinctive characteristics and

IX. CONCLUSION

Although most of the foregoing cases are not remarkable, several points are worth emphasizing. First, the court has continued its trend of careful and prudent analysis of evidentiary issues. Second, the court has addressed several evidentiary issues that do not arise often. For example, in *Hardy v. Johns-Manville Sales Corp.*,³⁰⁵ it considered the issue of whether a party's statements in an appellate brief could constitute party admissions under the hearsay rules.³⁰⁶ It also considered the "mental processes" rule, an issue one rarely sees, in *Gary W. v. Louisiana Department of Health and Human Resources*.³⁰⁷

But just as noteworthy is the fact that the court in *United States v. Jimenez Lopez*³⁰⁸ addressed only one issue on appeal — the question of whether a government document was adequately authenticated.³⁰⁹ That fact alone distinguishes the case because one usually sees the evidentiary issues buried amidst other, more esoteric procedural matters.

Throughout all of the cases, one message should be clear: Regardless of whether the issue is novel or esoteric, if counsel has any hopes of obtaining appellate relief on an evidentiary issue, it is essential that the issue be presented concisely and completely to the trial court.

the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with the circumstances."

Although the court did not cite this provision, it seems that it would have provided ample support for the court's conclusion. See, e.g., *United States v. Wilson*, 532 F.2d 641, 644 (8th Cir. 1976) (notebooks authenticated by using distinctive characteristics).

305. 851 F.2d 742 (5th Cir. Aug. 1988).

306. *Id.* at 744.

307. 861 F.2d 1366, 1368 (5th Cir. Dec. 1988).

308. 873 F.2d 769 (5th Cir. May 1989).

309. *Id.* at 770.

