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EVIDENCE

*by David A. Schlueter**

I. INTRODUCTION

Throughout the survey period[1] the Fifth Circuit decided a number of cases addressing various evidentiary problems. All of

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1. June 1, 1987 through May 31, 1988.

the cases discussed here relate in one way or another to a specific federal rule of evidence. Although several cases provided the court with the first occasion to address particular issues—for example the admissibility of a civil deposition in a subsequent criminal case[2]—the bulk of cases simply carry forward precedent.

II. PRESERVATION OF ERROR

If there is one elementary rule that pervades all of the Federal Rules of Evidence, it is the requirement that counsel properly object and preserve evidentiary errors.[3] It is no mistake that the rules governing this important topic are prominently located in article I of the Federal Rules of Evidence.[4] Two cases from the Fifth Circuit during the survey period serve as reminders of this need to preserve error.

In *Fischer v. Dallas Federal Savings & Loan Association*[5] the appellants were unsuccessful loan applicants who filed individual and class action suits against the appellee bank alleging that the latter had violated, *inter alia*, the Fair Housing Act and the Equal Credit Opportunity Act by refusing to grant loans for property located in minority areas.[6] During discovery the appellants requested the appellees to produce copies of three documents relating to Federal Home Loan Bank Board memoranda and investigations.[7] The trial court ruled that these documents were protected from disclosure by the Bank Board's regulations.[8] At trial the appellants offered copies of the requested documents that they had obtained from other sources.[9] The trial court, however, relying on the earlier discovery ruling, ruled them inadmissible.[10] The Fifth Circuit noted that the appellant's argument for admissibility had some merit because the Bank Board regulations only proscribe certain disclosures, not necessarily any use once the documents have been made

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2. United States v. McDonald, 837 F.2d 1287 (5th Cir. Feb. 1988).
3. *See generally* E. CLEARY, MCCORMICK ON EVIDENCE § 52, at 126 (3d ed. 1984) (discussing the need to object to evidence).
4. *See* FED. R. EVID. 103.
5. 835 F.2d 567 (5th Cir. Jan. 1988).
6. *Id.* at 568.
7. *Id.*
8. *Id.* (citing 12 C.F.R. § 505.5(a)).
9. *Id.*
10. *Id.*

public.[11] The appellants, however, failed to preserve error because they did not make any offer of proof on the documents as required by rule 103(a)(2).[12] The court noted that while the trial court had heard arguments on the admissibilty of the documents, the record was devoid of any indication that two of the documents were actually presented to the trial judge for his consideration.[13] Thus, the appellants had not made an offer of proof "sufficient to allow intelligent review."[14] With regard to the third document, the court found no possible harm requiring reversal.[15]

Although this case is problematic, it is consistent with earlier decisions by the court which emphasize the need for an adequate offer of proof.[16] The case indicates that where the evidence in question is in documentary form, counsel should, at a minimum, present the document to the trial judge for consideration and ask that the document be included in the record. This will permit the judge, under rule 103(b), to add any comments for the record to show the character of the offered evidence.

In a subsequent case, the Fifth Circuit addressed the issue of using motions *in limine*[17] to preserve error. In *Wilson v. Waggener*[18] the appellant brought an action against his former employer for breach of an agreement to purchase stock.[19] Before trial, the appellant made a motion *in limine* asking that the court block any evidence relating to his duty to remain within the employment of

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11. *Id.* at 568-69.

12. *Id.* at 569; *see* FED. R. EVID. 103(a)(2).

13. 835 F.2d at 569.

14. *Id.* An argument could be made that under rule 103(a)(2), the arguments made to the court, which would presumably have indicated some of the nature of the documents, might have been sufficient. The rule only requires that "the substance of the evidence was made known to the court by offer or was *apparent from the context* within which questions were asked." FED. R. EVID. 103(a)(2) (emphasis added).

15. 835 F.2d at 569.

16. *See, e.g.*, Petty v. Ideco, 761 F.2d 1146 (5th Cir. 1985); Mercado v. Austin Police Dep't, 754 F.2d 1266 (5th Cir. 1985).

17. The topic of motions *in limine* are not specifically noted in the Federal Rules of Evidence but are a recognized vehicle for obtaining rulings on evidentiary issues before the issues arise at trial. *See generally* S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 19-21 (4th ed. 1986) (noting United States Supreme Court case law allowing motions *in limine*).

18. 837 F.2d 220 (5th Cir. Feb. 1988).

19. *Id.* at 220-21.

the appellee.[20] The trial court denied the motion and the appellant failed to object at trial when that evidence was introduced, thus waiving the issue.[21] The Fifth Circuit noted that while rule 103(a)(1) requires that, "to preserve the admission of evidence as error for appellate review, an objection must be made at trial,"[22] nonetheless, a motion *in limine* is insufficent in itself to preserve the issue.[23] Thus, if the motion is denied, the objection must be renewed at trial.[24] Examining the record, the court concluded that admission of this evidence was not plain error.[25]

III. RELEVANCE

As a threshold to the introduction of evidence, counsel must show that the proferred evidence is "relevant."[26] In the words of rule 401, evidence is relevant if it tends "to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence."[27] Assuming that this hurdle, which is sometimes referred to as "logical relevance," is cleared,[28] counsel must still clear the "legal relevance" hurdle, that is, the judge's authority to exlude otherwise relevant evidence because of intrinsic or extrinsic policy considerations.[29] For example, the fact that the defendant has committed similar crimes might be logically relevant to the issue of whether he committed the crime charged.[30] But rule 404(b) might require exclusion because of policy considerations which recognize the potential dangers of

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20. *Id.* at 222. The appellant unsuccessfully argued that to admit such evidence would violate Louisiana's parol evidence rule. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* This is consistent with earlier Fifth Circuit cases. *See, e.g.*, Petty v. Ideco, 761 F.2d 1146, 1150 (5th Cir. 1985); Collins v. Wayne Corp., 621 F.2d 777, 784 (5th Cir. 1980).

25. 837 F.2d at 222.

26. *See* FED. R. EVID. 402.

27. *Id.* 401. This is a very low threshold and trial judges are granted broad discretion in deciding whether, under rule 401, the evidence is admissible.

28. *See generally* E. CLEARY, MCCORMICK ON EVIDENCE § 185, at 542 (3d ed. 1984) (stating that "evidence that is probative is often said to have 'logical relevance' ").

29. Rule 403 is generally considered to reflect intrinsic policy grounds for excluding otherwise logically relevant evidence: *e.g.*, waste of time, confusion of the issues, and cumulativeness. *See* FED. R. EVID. 403.

30. *See* S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 183 (4th ed. 1986).

linking the defendant with other criminal acts.[31] In deciding whether to admit the evidence, the trial court traditionally balances the probative value against the probative dangers of the evidence.[32] Several Fifth Circuit cases during the survey period address these points.

A. Relevant But Repetitious Evidence

In *United States v. Thompson*[33] the defendant was charged with conspiring to receive, conceal, transport, and store stolen dynamite.[34] After stealing 900 pounds of dynamite, the defendant stored it in a mini-storage facility in San Antonio.[35] At trial an explosives expert for the prosecution testified that the destructive power of the stolen dynamite would reach approximately 1000 feet from where it was stored.[36] Other witnesses previously testified that dynamite was indeed an "explosive" and the jury had seen a film demonstrating a sample of dynamite being detonated.[37] The court noted the broad discretion granted trial judges and concluded that while the expert's testimony was relevant to prove that dynamite is an explosive, it was repetitious of earlier evidence.[38] The court concluded, however, that even assuming the trial judge abused his discretion in balancing the probative value against the probative dangers, the error was harmless.[39]

B. Admissibility of Mug Shots: A New Test

In *United States v. Torres-Flores*[40] the Fifth Circuit concluded that the trial judge committed reversible error in striking the rule 403 balance in favor of admissibility.[41] The defendant was charged

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31. *Id.* at 183-84.
32. *Id.* at 184.
33. 837 F.2d. 673 (5th Cir. Feb. 1988), *cert. denied*, ___ U.S. ___, 109 S. Ct. 89, 102 L. Ed. 2d 65 (1988).
34. *Id.* at 674.
35. *Id.*
36. *Id.* at 676.
37. *Id.*
38. *Id.* at 677.
39. *Id.* The court based that conclusion on the fact that no reference to the expert's "brief testimony" was made during closing arguments and the evidence of guilt was overwhelming. *Id.*
40. 827 F.2d 1031 (5th Cir. Sept. 1987).
41. *Id.* at 1039-40.

with firing several shots at a border patrolman.[42] Identification of the defendant as the assailant was the only real issue at trial and the patrolman was the only witness to identify the defendant.[43] The patrolman indicated that several months after the incident he was looking through a stack of photographs in the border patrol locker room and noticed the picture of a man resembling the man who had shot at him.[44] The photograph was of the defendant and had been taken several months earlier for an unrelated arrest.[45] At trial the photographs, which defense counsel characterized as a "rogues' gallery," were admitted over the defendant's objections.[46] The trial judge, however, gave a limiting instruction to the jury.[47]

The Fifth Circuit concluded that the prejudicial dangers of these photographs, specifically "the possibility that the photographs impressed upon the jury impermissible evidence of bad character," substantially outweighed their probative value.[48] The court noted that some courts have admitted photographs of a defendant if all police or prison markings have been completely deleted[49] but that failure to remove markings renders the photographs inadmissible because it paints the defendant as having a bad character.[50] Two other circuits, moreover, have concluded that even masking the

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42. *See id.* at 1032.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 1033. The nine photographs had been taken by the border patrol and were identified as those of "smugglers, transvestites." *Id.* Eight of the nine photographs bore some notations such as "river bandit," "thief," and "robbery suspect." *Id.* Although the notations on the defendant's picture had been masked, the other photographs had not been altered thereby allowing the jury to see the various notations. *Id.*

47. *Id.* at 1035. The trial judge instructed the jury in part:

> Please understand that the only reason you are to consider these pictures is for the information as to whether they were pictures that [the border patrolman] used when he went through the pictures. But you are to disregard any statement with regards to any allegation of any other crime that may be written on there and you cannot consider that for purposes of returning a verdict in this case.

Id. at 1035 n.6.

48. *Id.* at 1040.

49. *Id.* at 1036; *see, e.g.*, Reiger v. Christensen, 789 F.2d 1425, 1430 (9th Cir. 1986); Huerta v. State, 390 S.W.2d 770, 772 (Tex. Crim. App. 1965).

50. 827 F.2d at 1036; *see, e.g.*, United States v. Scott, 494 F.2d 298, 301 (7th Cir. 1974). *See generally* Annotation, *Admissibility, and Prejudicial Effect of Admission, of "Mug Shot," "Rogues' Gallery" Photograph, or Photograph Taken in Prison, of Defendant in Criminal Trial*, 30 A.L.R.3d 908 (1970) (comprehensive review of federal and state cases dealing with the admissibility of "mug shots").

notations does not remove the improper connotation.[51] Although the issue had been raised in previous Fifth Circuit cases, the court noted that whatever error may have occurred in those cases was considered harmless because either the defendant admitted a prior criminal record or evidence of guilt was overwhelming.[52] In *Torres-Flores*, however, the defendant's identification was paramount to the case and there was no other strong evidence of guilt.[53] Furthermore, the court pointed out that it has cautioned in the past that prosecutors should take care in introducing mug shots and that such cases might be reversed in the future.[54]

The court adopted the "tripartite test" set out in *United States v. Fosher*[55] and *United States v. Harrington*:[56]

> 1. The Government must have a demonstrable need to introduce the photographs;
> 2. The photographs themselves, if shown to the jury, must not imply that the defendant has a prior criminal record; and
> 3. The manner of introduction at trial must be such that it does not draw particular attention to the source or implications in the photographs.[57]

Applying that template to these facts, the court concluded first, that the Government needed to introduce the photographs into evidence.[58] Second, the inartful manner of masking the defendant's photograph while the other photographs were not masked at all created a substantial probability that the exhibits impressed upon the jury the defendant's prior criminal record.[59] Third, the character of the photographs, despite the trial judge's attempt to "cautiously

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51. 827 F.2d at 1036; *see* United States v. Fosher, 568 F.2d 207, 215 (1st Cir. 1978); Barnes v. United States, 365 F.2d 509, 510 (D.C. Cir. 1966).

52. *See* 827 F.2d at 1038; *see, e.g.*, United States v. Davis, 487 F.2d 112, 121 (5th Cir. 1973) (defendant testified as to prior felony conviction), *cert. denied*, 415 U.S. 981 (1974); United States v. Rixner, 548 F.2d 1224, 1226 (5th Cir.) (there was other "strong evidence" against the defendant), *cert. denied*, 431 U.S. 932 (1977).

53. *See* 827 F.2d at 1038.

54. *Id.* (noting United States v. Rixner, 548 F.2d 1224, 1226 (5th Cir.), *cert. denied*, 431 U.S. 932 (1977)).

55. 568 F.2d 207, 214 (1st Cir. 1978).

56. 490 F.2d 487, 494 (2d Cir. 1973).

57. 827 F.2d at 1037 (quoting United States v. Harrington, 490 F.2d 487, 494 (2d Cir. 1973)).

58. *See id.* at 1039. The court stated that "[t]he matter of identification was the crux of the Government's case." *Id.*

59. *See id.*

guide" the prosecutor, was clearly evident at trial.[60] Thus, the Fifth Circuit determined that the trial court committed prejudicial error in admitting the photographs and that the defendant was entitled to a new trial.[61]

C. *Uncharged Misconduct: Establishing Independent Relevance*

The admissibility of uncharged misconduct was also raised in *Torres-Flores*[62] where, as noted in the preceding discussion, the defendant was charged with firing shots at a border patrolman before fleeing back across the border into Mexico.[63] A key issue in the trial was the identity of the assailant and at trial the court allowed testimony to the effect that the defendant had been apprehended at the same border point on two occasions, once before and once after the alleged assault on the patrolman.[64] Citing its earlier decision in *United States v. Beechum*,[65] the court stated that in deciding the admissibility of other crimes or bad acts, a two-step analysis under rule 404 is required.[66] First, evidence of the extrinsic act must be "relevant to an issue other than the defendant's character."[67] Second, in accordance with rule 403, the probative value of this evidence must not be substantially outweighed by its undue prejudice.[68] The court added that when uncharged misconduct is offered to prove identity, there must be a greater degree of similarity between the charged and uncharged acts.[69] Applying this analysis to the facts, the court concluded that evidence that the defendant visited the same area before and after the alleged assault bore on the probability of his presence there at the time of the

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60. *See id.* The patrolman testified that the photographs were kept in the border patrol station and that they represented "thiefs, transvestites." *Id.*

61. *See id.* at 1040. The court indicated that a trial court "must be active in protecting the jury from hearing about the source and implications of the photographs." *Id.* at 1039. The court added that "it should have been stipulated that the source of the photographs would not be brought out on direct examination." *Id.*

62. *Id.* at 1033-35.

63. *See id.* at 1032.

64. *Id.* at 1033.

65. 582 F.2d 898, 911 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920 (1979).

66. *See* 827 F.2d at 1034.

67. *Id.*

68. *Id.*

69. *Id.* (citing United States v. Myers, 550 F.2d 1036, 1045 (5th Cir. 1977), *cert. denied*, 439 U.S. 847 (1978)).

assault and was highly probative.[70] The court also concluded that the danger of prejudice did not outweigh the probative value since the prosecution had not indicated for what crimes the defendant had been apprehended on the other two occasions and since the judge adequately protected the defendant's rights by instructing the jury not to consider the offered evidence on the issue of propensity.[71]

Concluding that the trial court did not abuse its discretion in admitting this extrinsic offense evidence,[72] the court nonetheless directed that on retrial it is a "fairer and wiser practice" to limit this sort of testimony.[73] Thus, it instructed the trial court to limit evidence to the fact that the defendant had been "observed" at the particular border point on two occasions.[74] While the prosecution witnesses could testify as to what they observed the defendant doing on the other occasions, the prosecution must be careful not to bring out evidence of other crimes.[75]

This advice is sound. Although rule 404(b) permits evidence of uncharged misconduct, this case demonstrates that in many cases the prosecution may avoid potential problems of reversible error by recharacterizing the extrinsic offense evidence.[76] The more detail presented about those offenses, the greater the danger that the jury will place undue emphasis on those offenses and, despite the judge's instructions, consider that evidence as "propensity" character evidence.[77]

D. Uncharged Misconduct: The Value of Instructions

Assuming that the court admits evidence of extrinsic offenses or uncharged misconduct, it is important that limiting or cautionary instructions be given to the jury to the effect that the evidence is not an indication that the defendant committed the charged offense.[78] Failure to give such instructions may result in reversible error.[79]

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70. *Id.*
71. *Id.* at 1034 & n.4.
72. *Id.*
73. *See id.* at 1040.
74. *Id.*
75. *Id.*
76. *See id.* at 1033-35.
77. *See id.* at 1040.
78. *See* FED. R. EVID. 105.
79. *See, e.g.*, United States v. Yopp, 577 F.2d 362, 365-66 (6th Cir. 1978).

The adequacy of such limiting instructions was raised in *United States v. Chase*[80] where the defendant, along with three other defendants, was charged with various drug offenses, including possession with intent to distribute cocaine.[81] At trial the defense portrayed the defendant as a person who used cocaine but who had never sold the substance.[82] Thus, during both the prosecution's and defense's argument, there was extrinsic evidence of other drug offenses.[83] The judge cautioned the jury that:

> The government has offered testimony and exhibits regarding matters not charged in the indictment as crimes or offenses. This evidence, even if you find it to be believable, in whole or in part, is not evidence that defendants committed the crimes charged in this case but is only background information to assist you in determining matters such as the defendants' motive, opportunity, intent, preparation, plan, knowledge, or identity. The defendants are on trial only for the charges in the indictment. Do not convict them if the government has failed to prove these charges beyond a reasonable doubt.[84]

There was apparently no attempt to distinguish between the defendants and the instructions made no specific mention regarding the various incidents of uncharged misconduct.[85] On appeal Chase argued that the instruction was inadequate because it should have been connected with each witness who testifed that he had previously used cocaine.[86] The court summarily rejected this argument noting that some of the extrinsic offense evidence was actually not "extrinsic" because it related to the conspiracy count.[87] In any event, the instruction was considered adequate.[88]

Although the instruction was considered adequate under the circumstances of the case,[89] a better practice would be to tailor the

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80. 838 F.2d 743 (5th Cir. Feb. 1988), *cert. denied sub nom.* Mesa v. United States, ___ U.S. ___, 108 S. Ct. 2022, 100 L. Ed. 2d 609 (1988).

81. *Id.* at 745. The defendants were charged with drug-related offenses arising out of what the court characterized as "a large organization that imported and distributed cocaine in the Dallas area." *Id.*

82. *Id.* at 746.

83. *See id.* at 746-47.

84. *Id.* at 747.

85. *See id.*

86. *Id.*

87. *Id.* at 748 n.2.

88. *Id.* at 748.

89. *Id.*

instruction to the purpose for which the prosecution offered the extrinsic evidence. In this instance, the court typified the extrinsic offense evidence as "background" information which could be used to determine any one of the factors listed in rule 404(b) as independent reasons for admitting uncharged misconduct.[90] It would not be inappropriate for the court to ask the prosecution to specify the reasons the evidence is being offered and then, assuming the evidence is admitted, to limit the jury's consideration of the evidence for that reason.

IV. WITNESSES AND CREDIBILITY

A. Impeachment Through Bias: The Paid Informant

One of the most time-honored methods of impeaching a witness is through a showing that the witness is biased.[91] Although the Federal Rules of Evidence do not specifically provide for this method,[92] the courts have nonetheless recognized its important role in trial advocacy.[93]

The Fifth Circuit addressed the issue of impeachment through bias in *United States v. Rizk*[94] where a government informant was paid $15,000 for his activities in ferreting out drug activity by posing as an interested drug buyer.[95] Although the agreement of payment was in the form of a contingent fee arrangement, full payment was made before trial began.[96] The defendants argued that the prosecution's disclosure of the arrangements with the informant did not comply with the requirements of *United States v. Cervantes-Pacheco*.[97] The Fifth Circuit, in *Cervantes-Pacheco*, had held that

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90. *Id.* at 747; *see* FED. R. EVID. 404(b).

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

92. *See* H. WENDORF & D. SCHLUETER, TEXAS RULES OF EVIDENCE MANUAL 249 (2d ed. 1988); *cf.* TEX. R. CIV. EVID. 613(b); TEX. R. CRIM. EVID. 612(b) (Identical rules that provide, in part, that before evidence may be allowed showing bias of a witness, the witness must first have an opportunity to view the impeaching evidence and either explain or deny such. If the witness unequivocally admits such bias, extrinsic evidence will not be allowed.).

93. *See* 415 U.S. at 316-18.

94. 833 F.2d 523 (5th Cir. Nov. 1987), *cert. denied*, ___ U.S. ___, 109 S. Ct. 90, 102 L. Ed. 2d 66 (1988).

95. *Id.* at 524-25.

96. *Id.* at 525.

97. *Id.* (citing United States v. Cervantes-Pacheco, 826 F.2d 310 (5th Cir. Aug. 1987) (en banc), *cert. denied sub nom.* Nelson v. United States, ___ U.S. ___, 108 S. Ct. 749, 98 L. Ed. 2d 762 (1988)).

the testimony of a paid government informant is admissible if four requirements are met: First, the government cannot deliberately use or encourage the use of perjured testimony.[98] Second, the government must have made a complete and timely disclosure of the arrangement.[99] Third, the defendant must have had an adequate opportunity to cross-examine both the informant and the agents regarding the fee arrangements.[100] Finally, the trial court must instruct the jury that the credibility of a witness who has been paid for his testimony is suspect.[101] If these requirements are met, the jury may then, as in any other case, decide the issues of credibility and weight.[102]

In *Rizk* the court concluded that although the government may not have made complete disclosure during pretrial discovery, by the time of trial the defense had all of the pertinent information.[103] The court further noted that the defense conducted an extensive cross-examination of the informant at trial but waived cross-examination of the agent for the Drug Enforcement Agency.[104] In fact, the court observed, when the prosecutor began to inquire of the agent about the fee arrangements, defense counsel objected on relevancy grounds.[105] Thus, the requirements of *Cervantes-Pacheco* was found to be met and the informant's testimony was properly admitted.[106] Apparently, in convicting the defendants, the jury believed that the fee arrangement with the informant did not render him a hopelessly biased and incredible witness.[107]

B. Impeachment and Access to Grand Jury Testimony

During pretrial discovery counsel will often obtain materials or information which might be used for impeachment purposes at trial.[108] But gathering otherwise useful information may be limited

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98. 826 F.2d at 315.
99. *Id.* at 315-16.
100. *Id.* at 316.
101. *Id.* The *Rizk* court noted that, generally, high fees for informants are considered "suspect." 833 F.2d at 525 (citations omitted).
102. 826 F.2d at 315-16; *see* FED. R. EVID. 104(e).
103. 833 F.2d at 525.
104. *Id.*
105. *Id.*
106. *Id.* at 525-26.
107. *See id.*
108. *See* FED. R. EVID. 613(b) (addressing the use of prior inconsistent statements).

by countervailing rules or laws limiting discovery—such as rule 6(e) of the Federal Rules of Criminal Procedure which blocks disclosure of grand jury testimony.[109]

In the case of *In re Grand Jury Testimony*[110] the plaintiff in a civil racketeering suit requested the release of the grand jury testimony of the two defendants and another witness who had earlier been acquitted of similiar federal criminal charges.[111] The plaintiff wanted the information for impeachment and refreshment of recollection.[112] The trial court ordered the release of the information after the presiding judge in the criminal trials conluded that the the need for secrecy in the grand jury proceedings was "for the most part dissolved."[113] The trial court, however, limited use of the grand jury transcripts to the immediate trial and ordered that the plaintiff's counsel would be personally liable for any unauthorized use of the information.[114] On appeal, the Fifth Circuit reversed.[115]

Citing *Douglas Oil Co. v. Petrol Stops Northwest*[116] and *In re Corrugated Container Antitrust Litigation*,[117] the court noted that federal courts have long recognized the need to maintain the integrity of the grand jury system by protecting the proceedings with some assurance of secrecy.[118] To that end, a party requesting grand jury materials must demonstrate with particularity that there is a compelling necessity for the materials.[119] The test for obtaining grand jury transcripts under rule 6(e) is the three-pronged template set out by the Supreme Court in *Douglas Oil*: The parties seeking the transcripts must show "(1) that the material they seek is needed to avoid possible injustice in another judicial proceeding, (2) that

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109. *See, e.g.*, FED. R. CRIM. P. 6(e).

110. 832 F.2d 60 (5th Cir. Oct. 1987).

111. *Id.* at 61. The defendants in the criminal case were charged in a 52-count federal indictment which charged them, *inter alia*, with public bribery, mail fraud, and wire fraud. *Id.* The first trial ended in a mistrial and they were acquitted at the second trial. *Id.* The civil trial, brought under the Racketeer Influenced and Corrupt Organizations Act, § 96 18 U.S.C. §§ 1961-68 (1982 & Supp. IV 1986), had been stayed until the completion of the criminal proceedings. 832 F.2d at 61.

112. 832 F.2d at 63.

113. *Id.* at 62.

114. *Id.*

115. *Id.* at 64.

116. 441 U.S. 211 (1979).

117. 687 F.2d 52 (5th Cir. 1982).

118. 832 F.2d at 62.

119. *Id.* (citing United States v. Procter & Gamble Co., 356 U.S. 677 (1958)).

the need for disclosure is greater than the need for continued secrecy, and (3) that their request is structured to cover material so needed.''[120]

The court noted that impeachment and refreshment of recollection are reasons often cited for release[121] and concluded that while both are considered a valid "particular need," the need for the grand jury testimony must be real.[122] Unless counsel can show an actual inconsistency or inability to recall, it is "difficult to confine disclosure 'strictly to those portions of a particular witness' testimony at trial.' ''[123] This difficulty, moreover, sometimes requires that the requesting party first proceed through depositions or questioning the parties at trial.[124]

As a model, the court cited its opinion in *In re Corrugated Container Antitrust Litigation*[125] where it approved disclosure only after the requesting party had failed to depose the witness, the request had been narrowed, and the trial court had reviewed the requested materials *in camera*.[126] The court noted that at least one circuit and numerous district courts have concluded that disclosure of grand jury transcripts would be premature until an actual inconsistency or inability to recall had been demonstrated.[127]

In *In re Grand Jury Testimony* the court stated that the plaintiff had only presented the "hypothesis" of need.[128] Although one of the defendants had already been impeached during the criminal trial with his prior grand jury testimony, which was thereafter a matter of public record,[129] the plaintiff nonetheless failed to show any further inconsistencies which would warrant release of more portions

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120. *Id.* (citing Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 222 (1979)).

121. *Id.* at 63 (citing *In re* Corrogated Container Antitrust Litigation, 687 F.2d 52, 55 (5th Cir. 1982)).

122. *Id.*

123. *Id.* (citing 441 U.S. at 222 n.12).

124. *Id.*

125. 687 F.2d 52 (5th Cir. 1982).

126. *See id.* at 56.

127. 832 F.2d at 63 (citing Lucas v. Tanner, 725 F.2d 1095 (7th Cir. 1984); Grumman Aerospace v. Titanium Metals Corp., 554 F. Supp. 771, 776 (E.D.N.Y. 1982); Index Fund, Inc. v. Hagopian, 512 F. Supp. 1122, 1130 (S.D.N.Y. 1981); *In re* Grand Jury, 469 F. Supp. 666, 670 (M.D. Pa. 1978); Illinois v. Harper & Row Publishers, Inc., 50 F.R.D. 37, 40 (N.D. Ill. 1969)).

128. 832 F.2d at 64.

129. *See id.*

of his grand jury testimony.[130] As for the other witnesses, the court concluded that the request for release contained only "naked assertions" that the grand jury testimony was necessary for impeachment or refreshment of recollection.[131]

The court noted that although the trial court had been properly influenced by the fact that the criminal proceedings had ended, the need for secrecy of grand jury proceedings continued because witnesses generally expect that only under unusual circumstances will their testimony be made public.[132] Indirectly recognizing that requiring the trial courts to conduct *in camera* examinations of requested grand jury materials would add to their workloads, the court believed that such examination was necessary to protect grand jury secrecy.[133]

This decision presents a balanced approach to the problem of providing legitimate materials for impeachment and protecting the sanctity of the grand jury proceedings. It seems a bit curious that amidst calls for elimination of unnecessary discovery that the court is now requiring depositions before ruling on whether to release grand jury testimony.[134] Although deposition testimony will usually demonstrate inconsistencies, it may be that other means may be used just as effectively. The key inquiry should be whether an actual need for access to the grand jury testimony has been shown, not whether a pro forma deposition has been taken.

V. EXPERT OPINION TESTIMONY

A. Qualifications of Expert Witnesses

The federal appellate courts generally allow trial courts considerable leeway in deciding whether a particular witness is qualified to testify as an expert.[135] Indeed, rule 702 of the Federal Rules of Evidence sets out a broad category of reasons for considering a

130. *Id.*
131. *Id.*
132. *Id.*
133. *See id.*
134. *See id.* at 63.
135. *See generally* S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 638-39 (4th ed. 1986 & Supp. 1988) (collection of cases).

witness to be an expert in a particular field.[136] Only if the trial court's ruling to treat a witness as an expert has been "manifestly erroneous" will the appellate court reverse the decision.[137]

The Fifth Circuit addressed the qualifications of experts in both *West Wind Africa Line, Ltd. v. Corpus Christi Marine Services Co.*[138] and *Snyder v. Whittaker Corp.*[139] In *West Wind* the plaintiff sought recovery of damages caused when the defendant provided contaminated oil fuel for the plaintiff's ship.[140] At trial the plaintiff offered testimony of two "experts" who, according to the defendant, were not qualified to testify as experts.[141] Taking note of rule 702 and the requirement to show a manifestly erroneous ruling by the trial court, the Fifth Circuit concluded that there was an "ample basis" for permitting these witnesses to testify as experts.[142] The first witness was a marine engineer and a consultant and an officer in a marine engineering company[143] who worked with fuels and lubricants and was familiar with their relationship to power plants.[144] He was also active in the American Society of Testing Materials.[145] Presumably he testified on the quality of the fuel supplied by the defendants and the damage that it caused to the ship's engines.[146] The second witness was an operations manager for a shipping company and was familiar with the problems and the expenses incurred by the plaintiff in diverting its ship for repairs.[147]

Although the court concluded that both of these witnesses were qualified to testify as experts, it made no detailed analysis to support its conclusion.[148] Apparently, the court instead relied on the trial court to determine whether, under the circumstances, these wit-

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136. Rule 702 provides: "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, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702.

137. *See, e.g.*, Holmes v. J. Ray McDermott & Co., 734 F.2d 1110, 1115 (5th Cir. 1984); Perkins v. Volkswagen of Am., Inc., 596 F.2d 681, 682 (5th Cir. 1979).

138. 834 F.2d 1232 (5th Cir. Jan. 1988).

139. 839 F.2d 1085 (5th Cir. Mar. 1988).

140. 834 F.2d at 1233-34.

141. *See id.* at 1235-36.

142. *Id.* at 1236.

143. *Id.*

144. *Id.*

145. *Id.*

146. *See id.*

147. *Id.*

148. *See id.*

nesses' testimony would assist the trier of fact given their specialized training and knowledge. This reliance is consistent with the federal courts' deference to a trial court's ruling regarding a witness' qualifications as an expert.[149]

In *Snyder v. Whittaker Corp.*[150] the plaintiffs offered the expert testimony of a witness who, according to the defendant, was a "professional expert" who earned substantial income from testifying at trials.[151] Although the defendant had waived the issue at trial by failing to object, the court nonetheless noted that a witness is not disqualified simply because he "spends substantially all of his time consulting with attorneys and testifying . . . ."[152] Thus, it was not plain error to permit the witness to testify as an expert. The court added that the defendant had brought the witness' professional status to the attention of the jury,[153] implying that the jury could consider the witness' posture in deciding what weight, if any, to give to his opinion.[154] This case recognizes the realities of modern litigation which often involves a "battle of the experts,"[155] some of whom make substantial sums of income serving as expert witnesses.

B. Expert Opinions: Measuring the Foundations

Assuming that an expert witness is qualified under rule 702 to state an opinion, the opinion must have some basis or foundation. Rule 703 of the Federal Rules of Evidence provides that:

> 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 opinions or inferences upon the subject, the facts or data need not be admissible in evidence.[156]

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149. *See* S. SALTZBURG & K. REDDEN, *supra* note 135, at 638-39.

150. 839 F.2d 1085 (5th Cir. Mar. 1988).

151. *Id.* at 1089.

152. *Id.* (citing FED. R. EVID. 103; *In re* Crash Disaster at New Orleans, 795 F.2d 1230, 1234 (5th Cir. 1986)).

153. *Id.*

154. *See id.*

155. *See, e.g.*, Osburn v. Anchor Laboratories, Inc., 825 F.2d 908, 916 (5th Cir. 1987) (case presenting a bona fide "battle of the experts").

156. FED. R. EVID. 703.

According to the notes of the advisory committee, the rule was intended to broaden, at least in part, the common law bases upon which experts could rest their opinions.[157] Notwithstanding this liberalization of the rules governing expert testimony, the Fifth Circuit, during the survey period, indicated that no matter how well qualified the expert may be, there must be some reliable basis for the resulting opinion offered at trial.

In *Viterbo v. Dow Chemical Co.*[158] the plaintiffs brought suit against the defendant chemical company alleging toxic effects of the herbicide Tordon 10K.[159] The district court granted summary judgment in favor of the defendant on the grounds that the plaintiffs could not prove causation and, in the alternative, that the plaintiffs' expert testimony was not admissible under rules 703 and 403.[160] The Fifth Circuit affirmed.[161]

In an attempt to discover the cause of an apparent chemical reaction, a medical doctor ran a battery of tests upon the plaintiff.[162] Based solely upon the results of those tests and the patient's oral medical history, the doctor was prepared to testify that, in his opinion, Tordon 10K had caused the alleged toxic reaction.[163] Concluding that this testimony would be inadmissible, the district court noted that the doctor had no experience with Tordon 10K and that none of the plaintiff's four physicians stated that Tordon 10K was the cause.[164] The court noted the liberalization of the common law rules of admitting expert testimony and the role of the jury as an "arbiter" in resolving conflicting opinions and stated:

> As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration. In some cases, however, the source upon which an expert's opinion relies is of such little weight that the jury should not be permitted to receive that opinion. Expert opinion testimony falls into this category when that testimony would not

157. *Id.* advisory committee's note.
158. 826 F.2d 420 (5th Cir. Sept. 1987).
159. *Id.* at 421. Tordon 10K is a pesticide used by the plaintiffs to eliminate tallow trees on their property. *Id.*
160. *Id.*
161. *Id.* at 424.
162. *Id.* at 421.
163. *See id.* at 422.
164. *Id.*

> actually assist the jury in arriving at an intelligent and sound verdict. If an opinion is fundamentally unsupported, then it offers no expert assistance to the jury. Furthermore, its lack of reliable support may render it more prejudicial than probative, making it inadmissible under Federal Rule of Evidence 403.[165]

Neither the plaintiff's oral medical history,[166] the tests conducted by the expert,[167] nor the study of the effect of a chemical called picloram on rats[168] provided a sufficient foundation or basis for the doctor's testimony.[169] The court indicated that while an expert is not required to discredit every other possible cause of a condition,[170] here, however, the doctor had admitted that a number of elements may have caused plaintiff's condition and yet he simply picked the cause offered by plaintiff himself—the one cause most advantageous to the plaintiff's claim.[171] The court concluded that the doctor's testimony was "nothing more than [the plaintiff's] testimony dressed up and sanctified as the opinion of the expert. Without more credentials and a subjective opinion, an expert's testimony that 'it is so' is not admissible."[172]

The court reached a similar result in *Washington v. Armstrong World Industries, Inc.*[173] There, the plaintiff, the wife of a colon cancer victim, alleged that her husband's cancer had been caused by thirty-two years of exposure to asbestos in a product manufactured by the defendant.[174] The defendant obtained a summary

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165. *Id.* (citations omitted).

166. *Id.* at 421. The plaintiff indicated that on December 24, 1981, three months after beginning periodic use of Tordon 10K, he first experienced symptoms attributable to the chemical: he cried, felt nervous, and experienced itching on his arms and legs. *Id.*

167. *Id.* Beginning in 1982, the plaintiff saw a number of doctors, including psychiatrists, who diagnosed his problems as "endogenous depression, depressive neurosis, essential hypertension, and allergies." *Id.* The plaintiff's expert, a medical doctor, ran a blood test on the plaintiff in April 1984 which indicated a presence of dieldrin, a herbicide, in his blood. *Id.* When he was exposed to a small sample of Tordon 10K, however, he showed no reaction. *Id.* Additional tests showed that the plaintiff had renal failure and hypertension and that he was allergic to a variety of molds. *Id.*

168. *Id.* at 424. It is not entirely clear why the expert offered the results of this study. That point was not lost on the court, which stated that it was "left to conclude that the study, at most, is only evidence that picloram may produce some unidentified effect on humans." *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. 839 F.2d 1121 (5th Cir. Mar. 1988).

174. *Id.* at 1122.

judgment after offering the affidavits of three physicians.[175]

The first physician, who had performed the cancer operation on the plaintiff's husband, indicated that he had seen no evidence of asbestos exposure.[176] The second physician, who reviewed pathology specimens of the deceased which indicated no evidence of asbestos bodies or fibers in any tissue examined, concluded that "there is no pathologic basis to even speculate that asbestos was a factor in the development of [the plaintiff's] tumor."[177] A third physician, who had been the personal doctor for the plaintiff's husband for many years, indicated that asbestosis had never been diagnosed or referred to in his medical records.[178] The plaintiff offered no rebuttal evidence and the district court granted summary judgment.[179] On a motion to reconsider, however, she offered the affidavit of another physician who had never treated her husband but, after reviewing his medical records, indicated that there was a reasonable medical probability that asbestos exposure had caused the cancer.[180] His explanation for the other physicians' conclusions that no asbestos was present was that "customary examination procedures used in pathology may not have been sensitive enough to detect asbestos fibers."[181] The district court found this last affidavit to be pure speculation and re-entered its summary judgment.[182]

The Fifth Circuit affirmed the district court.[183] Citing its opinion in *Viterbo v. Dow Chemical Co.*,[184] the court concluded that the expert's opinion lacked foundation and reliability.[185] According to the court, the opinion was based upon examinations performed by three other physicians who reached the conclusion that asbestos was not found in the decedent's body.[186] The court assumed, for the purposes of argument, that there was a link between asbestos and

175. *Id.*; *see* FED. R. CIV. P. 56.
176. 839 F.2d at 1122.
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.* at 1124.
184. 826 F.2d 420 (5th Cir. Sept. 1987).
185. 839 F.2d at 1124.
186. *Id.*

colon cancer, but here the expert had failed to connect that data to the decedent's cancer.[187] In short, the expert's opinion "lacked probative value because it was pure speculation based on negative inferences drawn from the testimony of three treating physicians."[188]

It would be incorrect to conclude that this expert's opinion was rejected simply because he had not previously examined the plaintiff's husband. Rule 703 is not that narrow.[189] However, the rule does indicate that where such first-hand knowledge is not available, it may be extremely difficult to prove that a particular condition existed where those who had such first-hand exposure reached an opposite conclusion.[190] In this case, the plaintiff's expert was left with explaining away the opposing opinions by suggesting that they missed crucial evidence.[191] Such an argument might carry greater weight in a case where the evidence of the condition is exceedingly difficult to discover. The court here implicitly concluded, however, that it was simply incredible to believe that three apparently unbiased physicians would somehow completely miss discovering any form of asbestosis.[192] The lesson of *Washington* and *Viterbo* is that the Fifth Circuit recognizes that litigation sometimes involves a "battle of the experts," but that in the process the battle must be bona fide and consist of reliable, nonspeculative opinions.

C. *Expert Testimony: The Controversial Opinion*

Obviously the opinions offered by experts at a trial are often in direct conflict.[193] Should the trial court, however, admit an opinion which is not generally accepted in the particular scientific community? In *Osburn v. Anchor Laboratories, Inc.*[194] the plaintiffs alleged that a veterinary chloramphenicol oral solution produced by

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187. *Id.*

188. *Id.*

189. *See* FED. R. EVID. 703. The advisory committee stated that an expert may permissibly base his opinion on "presentation of data to the expert outside of court and other than by his own perception" including "reports and opinions from . . . other doctors . . . ." *Id.* advisory committee's note.

190. *See id.*

191. *See* 839 F.2d at 1123.

192. *Id.* at 1124.

193. *See generally* 2 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 563 (Chadbourne rev. 1979) (discussing the problems inherent in expert testimony).

194. 825 F.2d 908 (5th Cir. Aug. 1987), *cert. denied sub nom.* Rachelle Laboratories, Inc. v. Osburn, ____ U.S. ____, 108 S. Ct. 1476, 99 L. Ed. 2d 705 (1988).

the defendants had caused leukemia in one of the plaintiffs.[195] After using the product in his work for eighteen months, the plaintiff was tentatively diagnosed by his family physician as having leukemia.[196] Further tests, including a bone marrow biopsy, confirmed the preliminary diagnosis.[197] At trial, the plaintiffs presented the expert testimony of two "well-qualified" expert witnesses who opined that the plaintiff's exposure to the chemical caused the leukemia, even though it had not first caused "aplastic anemia."[198] The defendants responded by arguing that "because the notion that chloramphenicol can cause leukemia without first causing aplastic anemia has not been widely accepted in the medical field," there was no evidence of causation.[199] The court responded:

> This argument misses the point. An expert's opinion need not be generally accepted in the scientific community before it can be sufficiently reliable and probative to support a jury finding. What is necessary is that the expert arrived at his causation opinion by relying on *methods* that other experts in his field would reasonably rely upon in forming their own, possibly different opinions, about what caused the patient's disease. Thus, medical expert opinion testimony that is controversial in its conclusions can support a jury finding of causation as long as the doctor's conclusory opinion is based upon well-founded methodologies.[200]

The court held that the plaintiffs' experts relied upon their particular areas of expertise, the patient's medical history, and scientific studies reported in generally accepted medical literature—methodologies "relied upon generally by physicians in diagnosing etiology of a particular patient's disease."[201] The fact that the defendants' experts, who relied on the same methodologies, reached a different conclusion simply represents a "bona fide 'battle of the

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195. *Id.* at 910. The plaintiffs were husband and wife. *Id.* The husband had been exposed to the chemical while working with sick cattle in his job as a "cowboy" in the Texas panhandle. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 914-15. One of the plaintiff's experts testified that because Mr. Osburn had not consulted a doctor in the 18 months he had handled the chemical, it was entirely feasible that he had suffered from aplastic anemia without realizing his condition. *Id.* at 915 n.9.

199. *Id.* at 915.

200. *Id.* (emphasis in original) (citations omitted).

201. *Id.* at 915-16.

experts.' "[202] In cases such as these, the jury is charged with making credibility determinations and weighing the conflicting evidence.[203]

It is important to note the distinction between this case, which addresses a controversial medical opinion, and those cases in which there is controversy regarding the underlying scientific methods of analysis used to support an opinion. In the case of the former, as recognized in *Osburn*, the controversial opinion should be admissible as long as it is otherwise reliable and nonspeculative.[204] The controversial aspects of the expert's opinion are properly matters which the jury may consider in reaching its decision.[205] In the case of a controversy regarding the underlying methods of analysis, however, the judge must first determine whether the threshold test of *Frye v. United States*,[206] or some similar test, has been satisfied. In *Frye*, the court held that scientific evidence must have "gained general acceptance in the particular field in which it belongs" before it could be admitted as expert testimony.[207] Some jurisdictions have recently opted for a relaxation of *Frye* and applied a multi-factored template which focuses on the "relevance" of the novel scientific evidence.[208]

VI. HEARSAY

A. In General

Perhaps some of the most difficult rules of evidence to understand and apply are the "hearsay" rules which are codified in the

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202. *Id.*

203. *Id.*; *see also* FED. R. EVID. 104(e) (allowing party to introduce evidence relevant to weight or credibility).

204. *See* 825 F.2d at 915-16 & n.13.

205. *Id.* at 916.

206. 293 F.2d 1013 (D.C. Cir. 1923).

207. *Id.* at 1014. *See generally* Giannelli, *The Admissibility of Novel Scientific Evidence:* Frye v. United States, *A Half-Century Later*, 80 COLUM. L. REV. 1197 (1980) (discussing history and trends in the admissibility of novel scientific evidence).

208. *See, e.g.*, Jones v. State, 716 S.W.2d 142 (Tex. App.—Austin 1986, pet. ref'd); H. WENDORF & D. SCHLUETER, TEXAS RULES OF EVIDENCE MANUAL 274-76 (2d ed. 1988); *see also* S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 633 (4th Ed. 1986) (determining that the ultimate question for the trial judge under either the *Frye* test or the "relevance" analysis should be whether both sides have had the opportunity to test the validity of the scientific results).

Federal Rules of Evidence.[209] As defined in rule 801, " '[h]earsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[210] If the statement is offered for some reason other than to prove the truth of the matter asserted, it is not hearsay.[211] Rule 801 also contains a listing of statements which do not constitute hearsay and are admissible for the truth of the matter asserted although technically they would otherwise be considered as hearsay.[212]

If the offered statement is not admissible as nonhearsay, it may nonetheless be admissible under one of the myriad exceptions to the hearsay rule in rules 803[213] and 804.[214] During the survey period, the Fifth Circuit addressed several aspects of the hearsay rule including co-conspirators' statements,[215] the business records exception,[216] and the admissibility in a criminal trial of a deposition taken in a previous civil trial.[217]

B. Hearsay: Admissibility of Co-Conspirators' Statements

In *United States v. Ascarrunz*[218] a government undercover agent named Lugo and and a government informant discussed the purchase of cocaine with an individual named Silva who was targeted as the "source."[219] When the drugs were delivered, the defendant was introduced to the government agents as Silva's pilot.[220] After the defendant had unloaded the drugs from the airplane and placed them in Lugo's car, the defendant made incriminating statements.[221]

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209. *See* FED. R. EVID. 801-05.
210. *Id.* 801(c).
211. *See, e.g.*, Snyder v. Whittaker Corp., 839 F.2d 1085 (5th Cir. Mar. 1988) (holding that memorandum concerning the strength of a product was not hearsay because it was offered only to show that statements within the memorandum had been made, not that they were true).
212. FED. R. EVID. 801(d).
213. *Id.* 803.
214. *See id.* 804.
215. United States v. Ascarrunz, 838 F.2d 759 (5th Cir. Feb. 1988).
216. Snyder v. Whittaker Corp., 839 F.2d 1085 (5th Cir. Mar. 1988).
217. United States v. McDonald, 837 F.2d 1287 (5th Cir. Feb. 1988).
218. 838 F.2d 759 (5th Cir. Feb. 1988).
219. *Id.* at 761.
220. *Id.*
221. *Id.*

When Lugo drove away with Silva, the defendant was arrested.[222] Meanwhile, on the trip to Laredo, Silva assured Lugo that the defendant could be trusted and that the defendant's share of the bounty would be discounted against money owed by the defendant to Silva.[223] Silva was later arrested.[224]

At trial the prosecution introduced the statements of both the defendant and Silva under rule 801(d)(2)(E) as statements by co-conspirators.[225] On appeal of his conviction, the defendant argued that because there was little evidence to support a finding that any conspiracy existed, the jury should not have heard Silva's statements in the absence of a cautionary instruction.[226]

The court rejected this argument noting that the trial court had held a hearing as required by *United States v. James*[227] in determining as a preliminary matter whether a conspiracy existed.[228] The court noted that the intervening decision by the Supreme Court in *Bourjaily v. United States*[229] indicated that a trial court may consider the offered co-conspirator statements themselves in determining whether there was a conspiracy.[230] In this case, even though the trial court had not considered the two offered statements, the relaxed standards of *Bourjaily*, said the court, would nonetheless support the admission of the statements.[231]

The court also rejected the argument that the statements by Silva, which implicated the defendant, should not have been admitted because at the time they were made the defendant had already been arrested and, thus, they were not made in the course and furtherance of the conspiracy.[232] While the statements of an arrested conspirator cannot be used against his co-conspirators,[233] other

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222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.* at 762; *see* FED. R. EVID. 801(d)(2)(E).
226. 838 F.2d at 761.
227. 590 F.2d 575, 581 (5th Cir.) (en banc), *cert. denied*, 442 U.S. 917 (1979).
228. 838 F.2d at 762.
229. 483 U.S. 171 (1987).
230. *See* 838 F.2d at 762.
231. *Id.*
232. *Id.*
233. *See e.g.*, United States v. Barnes, 586 F.2d 1052, 1059 (5th Cir. 1978); United States v. Muller, 550 F.2d 1375, 1379 (5th Cir.), *cert. denied*, 434 U.S. 971 (1977).

circuit courts have held,[234] and the Fifth Circuit has recognized,[235] that the statements of an unarrested co-conspirator who is still acting in furtherance of the conspiracy may be used against the arrested co-conspirator.[236] The court further noted that the drafters of rule 801 adopted an agency approach to co-conspirator statements.[237] Thus, while an arrested defendant's statements would generally not be in furtherance of the conspiracy, an unarrested co-conspirator may still be acting as an agent of the arrested party.[238]

Applying this rationale to the facts, the court concluded that because Silva's statements to Lugo were "meant to allay any suspicions Lugo might harbor [against the defendant,] they thus were made in furtherance of the conspiracy."[239] Accordingly, Silva's statements were admissible against the defendant under rule 801(d)(2)(E).[240]

A different result might have occurred in this case had the defendant "withdrawn" from the conspiracy. In that case it would be difficult for the prosecution to show that Silva's statements, following the defendant's "withdrawal," were in furtherance of the conspiracy. The court recognized, however, that case law permits admission of statements made by an unarrested party against an arrested party.[241] This is a recognition that an arrest does not, as a matter of law, operate as a withdrawal.

C. *Hearsay: The Business Records Exception*

In *Snyder v. Whittaker Corp.*,[242] a boating accident case, the plaintiffs offered a memorandum found during pretrial discovery

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234. *See* United States v. Taylor, 802 F.2d 1108, 1117 (9th Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987); United States v. Disbrow, 768 F.2d 976, 982 (8th Cir.), *cert. denied*, 474 U.S. 1023 (1985).

235. United States v. Register, 496 F.2d 1072, 1079 (5th Cir. 1974), *cert. denied sub nom.* Cochran v. United States, 419 U.S. 1120 (1975); Hornsby v. United States, 419 U.S. 1120 (1975).

236. 838 F.2d at 762-63.

237. *Id.*

238. *Id.* at 762 (citation omitted).

239. *Id.* at 763. In reaching this result, the court noted that it had "shunned an overly literal interpretation" of the phrase "in furtherance of the conspiracy." *Id.* (citing United States v. Rodgriquez, 689 F.2d 516, 519 (5th Cir. 1982)).

240. *Id.*

241. *Id.* at 762-63.

242. 839 F.2d 1085 (5th Cir. Mar. 1988).

in the files of the defendant corporation who had manufactured the boat.[243] The memo, labelled the "Baltek memo," was between two officers in the sales division of the Baltek company and indicated the results of a computer analysis on certain boat building materials.[244] The writer of the memo indicated that a copy of the memo should have been given to Desco Marine.[245] At trial the defendant objected that the memo was inadmissible hearsay.[246] The plaintiff responded that the memo was admissible under the business record exception to the hearsay rule.[247]

On appeal, the Fifth Circuit agreed with the defendant that the memo did not qualify as a business record.[248] The court noted that:

> The proponent of a document offered under the business record exception must show that the document was prepared in the regular course of its *author's* business. [The plaintiff] at most offered evidence that the Baltek memorandum was written by Baltek employees and received and kept by Desco. This showing does not suffice under Rule 803(6).[249]

The court held, however, that the memorandum was used primarily to cross-examine the defendant's expert, and for that purpose was not hearsay.[250] Although the jury was not instructed to limit its use of the memo, the Fifth Circuit held that any error was harmless.[251]

Without using the term, the court apparently applied the requirement of "business duty" to rule 803(6).[252] An argument can

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243. *Id.* at 1088.

244. *Id.* at 1090. At trial the parties offered contradictory expert testimony on the durability of the shrimp boat which sank claiming the lives of two seaman. *Id.* at 1089. The issue of the qualifications of the plaintiff's expert, as a "professional witness," is discussed *supra* at notes 150-55 and accompanying text.

245. 839 F.2d at 1090.

246. *Id.*

247. *Id.*; *see* FED. R. EVID. 803(6).

248. 839 F.2d at 1090.

249. *Id.* (emphasis in original) (citing United States v. Tafoya, 757 F.2d 1522, 1528-29 (5th Cir. 1985), *cert. denied*, 474 U.S. 921 (1985); United States v. Rosenstein, 474 F.2d 705, 709-10 (2d Cir. 1973); Hussein v. Isthmian Lines, Inc., 405 F.2d 946, 948-49 (5th Cir. 1968)).

250. *Id.* The plaintiff's counsel was apparently attempting to show a misrepresentation and that Desco had notice that the product it was using would require extra support. *Id.* The court stated that the memo could not be used under rule 703 as data underlying an expert's opinion because there was no showing that the memorandum "was of a type reasonably relied upon by experts in the particular field." *Id.*

251. *Id.*

252. *See generally* S. SALTZBURG & K. REDDEN, *supra* note 135, 831-32 (4th ed. 1986) (taking the position that rule 803(6) should be read to require that the preparer was under a business duty to keep such documents).

be made that the reliability concerns in rule 803(6) are satisfied where the business routinely relies on information supplied by persons outside the business.[253] However, the advisory committee note to rule 803(6) clearly indicates an intent to limit the exception to cases where the source of the recorded information has a business duty to maintain such information.[254] In reaching its decision in this case, the court did not cite the earlier opinion of *Mississippi River Grain Elevator, Inc. v. Bartlett & Co., Grain*[255] where it indicated that the business records exception did not require that the disputed records be prepared by the company which has possession of the record.[256]

D. Hearsay: Admissibility of Civil Depositions in a Criminal Case

In an apparent case of first impression for the Fifth Circuit, the court in *United States v. McDonald*[257] considered the issue of whether a defendant in a criminal case could offer a civil deposition of a co-defendant against the prosecution.[258] In *McDonald* the two co-defendants, McDonald and Minteer, conducted a series of fraudulent insurance transactions involving the American National Insurance Company ("ANICO").[259] ANICO filed a civil suit against both McDonald and Minteer.[260] While that suit was pending a federal indictment alleging mail fraud was returned against both defendants.[261] At the criminal trial, McDonald attempted to offer the deposition testimony of his co-defendant Minteer under rule 804(b)(1)[262] for the purpose of showing why certain payments had

253. *See, e.g.*, United States v. Lieberman, 637 F.2d 95, 99-101 (2d Cir. 1980) (hotel registration cards admissible even though filled out by third persons); United States v. Reese, 568 F.2d 1246, 1252 (6th Cir. 1977) (newspaper articles regularly maintained in hospital files). *See generally* Griffin, *The Big Civil Case and the Federal Rules of Evidence*, 49 TEMP. L.Q. 898, 904-07 (1976) (concluding that rule 803(6) "does not require transmission of information from someone within the business activity").

254. *See* S. SALTZBURG & K. REDDEN, *supra* note 135, at 831-32 (4th ed. 1986).

255. 659 F.2d 1314 (5th Cir. Unit A 1981).

256. *Id.* at 1318-19.

257. 837 F.2d 1287 (5th Cir. Feb. 1988).

258. *Id.* at 1290.

259. *Id.* at 1289.

260. *Id.*

261. *Id.*

262. *See id.* at 1290-91. On appeal the defendant argued that the former testimony should have been admissible under rule 804(b)(5), a form of the residual hearsay exception, but counsel had failed to raise that point at the trial and thus the court considered it waived. *Id.*

been made by McDonald to Minteer.[263] The trial court excluded the evidence.[264]

As to the use of former testimony where the declarant has been adjudged unavailable, rule 804(b)(1) provides that:

> Testimony given as a witness at another hearing of the same or different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, *in a civil action* or proceeding, *a predecessor in interest*, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.[265]

The issue in this case, as identified by the court, was whether the language "predecessor in interest" applied to these facts.[266] The prosecution argued that rule 804(b)(1) applies only where the deposition taken in a civil case is offered in another civil action.[267] The defendant argued that the language "in a civil case" only indicated the type of proceeding in which the deposition was taken and not the type of proceeding at which the deposition was later offered.[268]

While the court rejected the prosecution's argument for a per se exclusion making rule 804(b)(1) inapplicable in criminal cases, it noted that the meaning of the language "predecessor in interest" and "in a civil trial" was debatable.[269] The court noted that there

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263. *Id.* at 1290.

264. *Id.*

265. FED. R. EVID. 804(b)(1) (emphasis added).

266. 837 F.2d at 1291.

267. *Id.*

268. *Id.*

269. *Id.* In the original version of the rule as submitted by the Supreme Court, the former testimony could be offered if the party against whom it was now offered, or a party "with similar motive and interest," had had an opportunity to examine the witness. 46 F.R.D. 161, 377 (1969); *see* FED. R. EVID. 804(b)(1) advisory committee note. The House Committee, however, changed the rule to the current language because "it is generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party." House Committee on the Judiciary, Federal Rules of Evidence, H.R. REP. No. 650, 93rd Cong., 2d Sess. 4, 15, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7088. The Senate concurred because the change was slight. Senate Committee on the Judiciary, S. REP. No. 1277, 93rd Cong., 2d Sess. 4, 28, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7074. The commentators are split on whether the congressional change signaled a requirement of privity between the party in the case at bar and the predecessor in interest. *Cf.* TEX. R. CRIM. EVID. 804(b)(1) (limiting the exception to those situations where the "party against whom the testimony is now offered, had an opportunity and similar motive"). *Compare* E. CLEARY, MCCORMICK ON

seems to be agreement that the requirement of a predecessor in interest clause is inapplicable where the former testimony is being offered against a criminal defendant but did not indicate an opinion on whether it agreed with that position.[270] The court noted that there is a split of authority on the issue of whether former testimony may ever be offered against the prosecution.[271]

The Tenth Circuit, in several cases, has concluded that the former testimony is not admissible against the prosecution unless the prosecution had the opportunity to participate in the preceding civil action and examine the witnesses whose former testimony was being offered.[272] On the other hand, the Seventh Circuit has adopted a more flexible position and has applied a "similarity of motive" test. In *United States v. Feldman*[273] that court developed a list of factors for determining whether the motive to develop the testimony in the civil proceeding was sufficiently similar to the motive that the party would have in the present criminal proceeding: "(1) The type of proceeding in which the testimony is given, (2) trial strategy, (3) the potential penalties or financial stakes, and (4) the number of issues and parties."[274]

The Fifth Circuit indicated that it preferred the Seventh Circuit's test because it served as "a better servant of Rule 804(b)(1), and a defendant's right to obtain evidence in his defense . . . ."[275] The court noted that the language "predecessor in interest" contemplates that the litigant will not have had a personal opportunity to examine the witness.[276] Moreover, if a civil litigant and the government in a later criminal case have "sufficiently similiar incentives to develop the testimony" the court could see no reason

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EVIDENCE § 256, at 764 (3d ed. 1984) (privity between parties as a requirement is "indefensibly strict") *with* S. SALTZBURG & K. REDDEN, *supra* note 135, at 954 (4th ed. 1986) ("predecessor in interest" means something more than similar motives and interests). *See generally* H. WENDORF & D. SCHLUETER, TEXAS RULES OF EVIDENCE MANUAL 359-61 (2d ed. 1988) (brief summary and discussion of the ambiguities in rule 804(b)(1)).

270. 837 F.2d at 1291; *see also* 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 804(b)(1)[05] (1987) (review of authorities and scholars adopting both positions).

271. *See* 837 F.2d at 1291-92.

272. *Id.* at 1292; *see* United States v. Kapnison, 743 F.2d 1450, 1458-59 (10th Cir. 1984), *cert. denied*, 471 U.S. 1015 (1985); United States v. Harenberg, 732 F.2d 1507, 1516 (10th Cir. 1984).

273. 761 F.2d 380 (7th Cir. 1985).

274. *Id.* at 385.

275. 837 F.2d at 1292.

276. *Id.*

to conclude that the defendant would necessarily and always be blocked from offering that testimony.[277]

Applying that test to the facts, the court concluded that although the government and ANICO had similar status in their claims against the witness, their trial stategies were sufficiently dissimilar to block Minteer's deposition testimony.[278] Because his deposition was taken before the indictment was returned, and knowing that it could cross-examine Minteer at the civil trial, ANICO did not have the same incentives to develop inaccuracies in his deposition testimony.[279] In the criminal trial, Minteer did not testify and, knowing that, the prosecution would have had a "strong incentive to develop fully the testimony at the time of the deposition."[280]

This case presents a balance. While the approach taken by the Tenth Circuit apparently forecloses any use of former testimony against the prosecution,[281] the Seventh Circuit approach,[282] now applicable in the Fifth Circuit,[283] is a balanced and principled approach which takes into consideration the possibility that in some cases, a sufficient similarity of motive may exist to permit the defendant to offer the former testimony against the prosecution.

VII. CONCLUSION

These cases are for the most part unremarkable. In none of them was there a dissenting opinion on the evidentiary issues. However, in some respects, they do represent a continuing refinement of the Federal Rules of Evidence and to that extent provide helpful assistance to the bench and the bar who must apply the rules. In at least one instance the court addressed an issue for the first time — the admissibility of former testimony from a civil proceeding in a subsequent criminal case.[284] In another it adopted a three-part test for determining the admissibility of mug shots.[285]

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277. *Id.* at 1292-93.
278. *Id.* at 1293.
279. *Id.*
280. *Id.*
281. *See supra* note 272 and accompanying text.
282. *See supra* notes 273-74 and accompanying text.
283. *See supra* note 275 and accompanying text.
284. *See supra* note 257-80 and accompanying text.
285. *See supra* note 40-61 and accompanying text.

Throughout, the court continued its reputation for careful and prudent analysis of difficult evidentiary issues.