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MODERNIZING AND LIBERALIZING THE LAW OF EVIDENCE

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It has been more than five years since the Federal Rules of Evidence became effective on July 1, 1975. When the rules were proposed and later adopted, many feared a mechanistic approach to the law of evidence. The development of the law since their adoption has demonstrated the opposite.[1] Rather than merely applying black letter law, the United States Court of Appeals for the Seventh Circuit in its 1979-80 term carefully analyzed the evidence problems with an eye not only on the immediate case, but also upon the development of this significant area. No survey article can, or should attempt to, dissect each opinion during the term dealing with evidence. The purpose of this brief article is solely to show the areas of concentration and major decisions of the court during its last term.

CHARACTER EVIDENCE AND RULE 404

One of the most perplexing and constantly recurring problems facing trial judges and lawyers concerns the introduction of character evidence, which standing alone would be inadmissible as an attempt to show that a party acted in conformance with the character trait, but may well have some other and more probative evidentiary value. It is a well established and long-standing rule that unless an accused puts his character in issue, the prosecution is forbidden to introduce evidence of his bad character, lest the jury be unduly prejudiced and sidetracked on this issue rather than focusing solely on the evidence relating to the offense charged.[2] This view is codified in the Federal Rules of Evidence.[3]

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1. *See* Crowley, *Illinois Evidence—The Question of Codification*, 10 LOY. CHI. L.J. 297 (1979).

2. *See* C. MCCORMICK, EVIDENCE § 190 (2d ed. 1972); 1 J. WIGMORE, EVIDENCE §§ 57, 192 (Chadbourn rev. 1972).

3. FED. R. EVID. 404(a). FED. R. EVID. 404 provides:

CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT: EXCEPTIONS; OTHER CRIMES

(a) **Character evidence generally.** Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

However, such evidence may be clearly relevant on several other issues and its exclusion would frustrate, rather than advance the fact-finding process. In *United States v. Dolliole*,[4] the Seventh Circuit's most comprehensive opinion on rule 404 during the 1978-79 term,[5] the court held that in admitting such evidence as probative on other relevant issues, the courts must apply the balancing test of rule 403.[6] *Dolliole*, however, did not stop a flood of questions from being presented to the court on the same issue during the 1979-80 term.

In order to satisfy the requirements of rule 404(b),[7] evidence of prior criminal acts must generally meet four separate and distinct tests: it must be similar enough and close enough in time to be relevant, it must be clear and convincing, its probative value must outweigh the risk of prejudice, and it must be related to an issue which is disputed by the defendant.[8] In several cases the court applied these requirements, but did so in a somewhat elastic manner.

In *United States v. Price*,[9] the defendant, an electrical inspector, was indicted for extortion. He allegedly accepted payments from electrical contractors while acting as an inspector. In addition to introducing evidence of the payments charged in the indictment, the government, in its case-in-chief, introduced evidence of other payments. The other payments were made by the same victims, but prose-

(1) **Character of accused.** Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;
(2) **Character of victim.** Evidence of a pertinent trait of character of the victim of a crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
(3) **Character of witness.** Evidence of the character of a witness, as provided in rules 607, 608 and 609.

(b) **Other crimes, wrongs, or acts.** 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.

4. 597 F.2d 102 (7th Cir.), *cert. denied*, 442 U.S. 946 (1979).

5. *See* Cole, *Evidence: Developments in Character Evidence, Cross Examination Rules and Prior Consistent Statements*, 56 CHI.-KENT L. REV. 279 (1980) [hereinafter cited as Cole].

6. FED. R. EVID. 403 provides:

EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

7. For the text of this rule, *see* note 3 *supra*.

8. United States v. Feinberg, 535 F.2d 1004, 1009 (7th Cir.), *cert. denied*, 429 U.S. 929 (1976).

9. 617 F.2d 455 (7th Cir. 1979).

cution apparently was barred by the statute of limitations. The defendant argued that he was unduly prejudiced by this testimony insofar as it related solely to his intent in receiving the payments, and because he denied receiving any payments, intent, therefore, was not an issue.[10] In rejecting this argument the court pointed out that the evidence was not admitted solely to show the defendant's intent, but also to show the state of mind of the alleged victim, which is always an issue in an extortion case.[11] In spite of the defendant's contention that intent was not an issue, the court pointed out that opening argument and cross-examination of the victims had raised the issue. As an alternative holding, the court upheld the admissibility on the premise that the government is required to prove criminal intent on the part of the accused even if the defense does not treat it as a real issue. The prior acts tended to prove that the defendant accepted the payments knowing their purpose and, thus, possessed the requisite intent.[12]

The question of whether the defendant must have affirmatively placed his intent in issue before evidence of other criminal activity may be admitted was addressed in *United States v. Miroff*.[13] The defendants were charged with conspiracy to transport and with transporting stolen property in interstate commerce.[14] The government, in its case-in-chief, introduced evidence of the defendant's admissions of his participation in other thefts. The evidence was received solely for the purpose of showing the defendant's intent and knowledge. The defendant contended that he never put these matters in issue. The Seventh Circuit did not look for any suggestion in the record that he had, but instead held that since the government had a substantial need for the evidence of intent and knowledge as having a direct bearing upon the crime charged, the evidence was admissible.[15] While recognizing that the issue was "close,"[16] the court did not require what had previously seemed to be one of the predicates for the admission of this kind of testimony.

10. *Id.* at 459.

11. *Id.* *See* United States v. Braas, 505 F.2d 139, 151 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975).

12. 617 F.2d at 459-60. The court previously authorized admissibility on this basis in United States v. Weidman, 572 F.2d 1199 (7th Cir.), *cert. denied*, 439 U.S. 821 (1978). The court also approved the admission of prior acts to show a pre-existing plan or modus operandi in United States v. Grzywacz, 603 F.2d 682 (7th Cir. 1979), *cert. denied*, 100 S. Ct. 2152 (1980).

13. 606 F.2d 777 (7th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980).

14. A telephone book found when Miroff was arrested formed the basis for the discussion of the definition of hearsay in United States v. Aleman, 609 F.2d 298 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980). *See* text accompanying notes 28-33 *infra*.

15. 606 F.2d at 780.

16. *Id.*

In *United States v. O'Brien*,[17] the court had occasion to consider what type of evidence would satisfy the "clear and convincing" standard of rule 404(b).[18] The court held that where an alleged participant in the prior acts testified on the basis of first-hand knowledge, this testimony would meet the standard, even though the testimony is uncorroborated.[19] While the court indicated a preference for specific findings by the trial court when balancing the interests of rules 404 and 403, it did not reverse in the absence of such findings when the reasons for the trial court's actions would otherwise be apparent.[20]

Near the end of the term the Seventh Circuit reiterated the four basic requirements[21] for the admission of evidence of other crimes in *United States v. Berkwitt*.[22] In that case, defendants accused of violating the copyright laws objected to the admission of testimony of persons previously having purchased recording tapes from them. Their testimony indicated that the FBI had confiscated these tapes for copyright violations, and that Berkwitt had been informed of the confiscation.[23] After the seeming relaxation of the requirement that the defense somehow put in issue the matter to which the evidence is addressed, the requirement was again reinforced. However in *Berkwitt*, the defendant had clearly put the matter in issue during his opening statement when his attorney emphasized that knowledge that the tapes were stolen is an essential element of the Government's *prima facie* case.[24]

A reading of the court's opinions, however, leaves the impression that the fourth requirement, that the evidence must be related to an issue disputed by the defendant, need not always be clearly delineated by the defense. If the issue is not collateral, and if it relates to an essential element of the proof and there is some indication that the trial court weighed the probative value against the presumed prejudice, the admission of the evidence will be approved.[25] Whether the Seventh Cir-

17. 618 F.2d 1234 (7th Cir. 1980).

18. *See* text accompanying notes 7-8 *supra*. It is now apparent that the court, at least by implication, has adopted the position that this standard survives the Federal Rules. *See* Cole, *supra* note 5, at 282-84.

19. 618 F.2d at 1239.

20. United States v. Watson, 623 F.2d 1198 (7th Cir. 1980).

21. *See* text accompanying note 8 *supra*.

22. 619 F.2d 649, 655 (7th Cir. 1980).

23. *Id.* at 654.

24. *Id.* at 655.

25. In each of the relevant cases decided this term, it appeared that the jury had been clearly instructed on the limited use of the evidence. The Seventh Circuit Committee on Federal Criminal Jury Instructions has recently proposed that the following instruction be given:

3.08 *Proof of Other Crimes or Acts*

You have heard evidence of acts of the defendant other than those charged in the

cuit will require specific findings, as it has already done on the question of the admissibility of evidence of prior convictions and rule 609,[26] will have to await further reflection and consideration by the court.

HEARSAY

Under the Federal Rules of Evidence, hearsay is defined as, "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."[27] In order to qualify as hearsay, the statement must satisfy all the requirements of the rule. If the evidence is offered for any relevant purpose other than to prove the truth of the matter asserted, it is not hearsay and, of course, not governed by the hearsay rules.

In *United States v. Aleman*,[28] the court carefully analyzed the truth requirement of the hearsay rule. The defendant and his co-defendant, Foresta, were charged in a nine-count indictment with violations of the Racketeer Influenced and Corrupt Organizations Act[29] and with transportation of stolen goods in interstate commerce. The evidence disclosed that in the planning of the robbery, which was the subject of both the RICO and interstate transportation counts, Foresta and another robber went to the home of a Leo Miroff, a friend of Aleman. Miroff was the apparent source of information about cash in the home of the victim. Foresta and the other robber committed the crime and then drove with Miroff to Aleman's home in Chicago with the stolen goods. They were paid for their service by Aleman, and Miroff was told to sell the stolen goods. Miroff then remained in the home of Robert Harder. A lawful search of the Harder home recovered the loot and a small address book containing three telephone numbers next to the name "Harry."[30] Independent evidence established that the book was Miroff's and that two of the numbers were those of places that Aleman frequented. Records of the telephone company showed that the third number had been assigned to a Ruth Aleman.

indictment. You may consider this evidence only on the question of _____. This evidence is to be considered by you only for this limited purpose.

26. *See* United States v. Mahone, 537 F.2d 922, 928 (7th Cir.), *cert. denied*, 429 U.S. 1025 (1976). In *Mahone*, the 7th Circuit urged trial judges to conduct hearings on the record prior to determining whether to admit evidence of a defendant's prior convictions. Such an explicit finding on the record would enable the appellate court to easily determine whether the strictures of rule 609 relating to impeachment by evidence of conviction of other crimes had been followed by the trial court. *Id.* at 929.

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

28. 609 F.2d 298 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980).

29. 18 U.S.C. §§ 1961-1968 (1976) [hereinafter referred to as RICO].

30. 609 F.2d at 308.

The government offered the book as evidence in support of its theory that Aleman and Miroff were engaged in an enterprise relationship, an element of the RICO offense. The defendants argued that the book was hearsay when offered for that purpose.[31] This argument was rejected by the court. Although the court did not examine the question of whether the entries were a "statement,"[32] it concentrated its analysis on the purpose for which the book was offered. The court was careful to point out that the book was not offered to prove the truth of the matter, *i.e.*, "Harry's" telephone number, but only to indicate that Miroff was acquainted with Aleman and that he had knowledge of "Harry."[33] The evidence was relevant for a purpose other than its truth and was, therefore, admissible.

Having resolved the definition of hearsay, the court was faced with several interesting and difficult questions concerning the exceptions to the rule. In *United States v. Blakey*,[34] the court was presented with the difficult concept of the present sense impression.[35] The defendants Blakey and Berry, Chicago police officers, were indicted for extortion. Blakey and Berry had entered the tire and auto shop of a man named Dyer. Unknown to them, the F.B.I. had planted a microphone inside the shop. The officers were observed searching the shop and finding stolen property and heroin. They then went to a back room and had a conversation with the declarant. They were also seen picking up a roll of money that Dyer had placed in view. When they left the shop, they took some merchandise but left the heroin.[36] It was the government's theory that they had extorted money from Dyer in return for not placing him under arrest.[37]

The government introduced a tape recording of a conversation between Dyer, who was dead at the time of trial, and a woman. The conversation took place after the defendants left the shop, but it was unclear how long after. The tape recorded the following:

2ND WOMAN: I bet they were gonna bribe you anyway.
DYER: What'd you say?
2ND WOMAN: I bet you were gonna bribe them anyway so we wasn't worried about it (inaudible).

31. *Id.*
32. FED. R. EVID. 801(a) provides that a "statement" is "an oral or written assertion. . . ."
33. 609 F.2d at 306.
34. 607 F.2d 779 (7th Cir. 1979).
35. FED. R. EVID. 803(1) provides that among the hearsay exceptions is one for:
Present sense impressions. A statement describing an event or condition, made while the declarant was perceiving the event or condition, or immediately thereafter.
36. 607 F.2d at 781.
37. *Id.* at 780.

* * *

DYER: You see one piece they, they take one piece (inaudible) they take everything you got they take everything you got that stuff like tonight cost me a thousand dollars.[38]

The defendants argued that since Dyer was not available for cross-examination, the statement should not have been admitted.[39] There is no explicit requirement under rule 803 that the declarant be available; indeed, availability is immaterial under the rule 803 exceptions to the hearsay rule. However, the court seemed to require some independent corroboration of the statement when the declarant was unavailable for cross-examination.[40] It found the corroboration in the testimony of witnesses who saw the defendants and Dyer immediately before and after they had their back-room conversation.[41]

Rule 803(1) includes as present sense impressions declarations made "immediately thereafter." The court noted that this phrase was not static, but somewhat elastic, and was not circumscribed by a definite measure of time but depended upon the facts of each case.[42] There was evidence from which it could be concluded that the declaration was made from a few mintues to twenty-three minutes after the defendants left the store and, therefore, the court found that under the circumstances of the case,[43] the conversation occurred "immediately thereafter."

Public Records, Recorded Recollection, and Business Records

The Seventh Circuit during its 1979-80 term was also called upon to consider the interrelationship of rule 803(8)[44] with rules 803(5)[45] and

38. *Id.* at 784.

39. The defendants also raised sixth amendment objections to the evidence. These were rejected based upon the two-part test developed in United States v. Cogwell, 486 F.2d 823, 832-34 (7th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974), which required that it must be clear that the declarant made the statement and that there must be circumstantial evidence supporting its truth. 607 F.2d at 785.

40. The court relied on a commentator, E. Morgan, BASIC PROBLEMS OF EVIDENCE 340-41 (1962).

41. 607 F.2d at 785.

42. *Id.* Some commentators would place a more restrictive view on the spontaneity requirement. *See, e.g.*, Foster, *Present Sense Impressions: An Analysis and a Proposal*, 10 LOY. CHI. L.J. 299, 316-22 (1979).

43. Chestnut v. Ford Motor Co., 445 F.2d 967, 972-73 (7th Cir. 1971).

44. FED. R. EVID. 803(8) makes an exception to the hearsay rule for:

(8) **Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceed-

803(6)[46]. In *United States v. Sawyer*,[47] the defendant was prosecuted for willful failure to file income tax returns. In an attempt to establish the essential element of willfulness, the government introduced a memorandum of an Internal Revenue Agent which stated "a phone call was made to the taxpayer's husband who stated that the 1040 returns . . .1971 and 1972 had been filed."[48] The agent had no independent recollection of the conversation, but testified that it was his routine practice to record such conversations immediately after they were held. The government contended that the husband's statement to the agent was false and, therefore, evidence of consciousness of guilt.[49]

Rule 803(8)(B)[50] would seem to require the exclusion in criminal cases of any report or memorandum prepared by law enforcement personnel, since it is obvious that the circumstances of preparation do not always indicate trustworthiness or lack of bias. Indeed this position has been adopted by the Second Circuit.[51] However, the court looked to the legislative history, rather than to the language of the rule itself, and

> ings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.
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> 45. FED. R. EVID. 803(5) provides:
>
> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (5) **Recorded recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.
>
> 46. FED. R. EVID. 803(6) provides:
>
> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (6) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.
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> 47. 607 F.2d 1190 (7th Cir. 1979), *cert. denied*, 445 U.S. 943 (1980).
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> 48. *Id.* at 1194 (Swygert, J., concurring).
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> 49. *Id.* at 1190, *citing* United States v. Riso, 405 F.2d 134, 138 (7th Cir.), *cert. denied*, 394 U.S. 959 (1968).
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> 50. *See* note 44 *supra* for the text of this rule.
>
> 51. United States v. Ruffin, 575 F.2d 346 (2d Cir. 1978); United States v. Oates, 560 F.2d 45 (2d Cir. 1977); Imwinkelried, *Constitutionality of Introducing Evaluative Laboratory Reports Against Criminal Defendants*, 30 HAST. L.J. 621 (1979).

held that the purpose of the exclusionary provisions of 803(8)(B) was to avoid prosecutions based solely upon the reports of law enforcement personnel, without producing them for cross-examination. The court then held that the report qualified as recorded recollection under rule 803(5) and, therefore, had an independent basis of admissibility. Only time will tell whether *Sawyer* will open the floodgates for the government to consistently evade the prohibition of 803(8)(B).

In *United States v. King*,[52] the defendant was convicted of making false statements in applications for Social Security benefits. Each of the four counts was based on applications and statements made by King. Each of the applications or statements was prepared by a claims representative from information supplied by King, and two of them were signed by King.[53] At trial, the forms were admitted under the provisions of rule 803(6) as business records of the Social Security Administration.

The defendant claimed that the forms were excludable under 803(8)(B). The court, assuming without deciding that they were covered by the exclusionary provisions of the rule, applied the *Sawyer* principle and held that they were, nevertheless, admissible as business records under 803(6).[54] The court's reasoning was somewhat troubling. There was no indication that the Social Security personnel who prepared the forms, unsigned by King, were law enforcement personnel, and the exclusionary provisions of rule 803(8)(B) apply only to such personnel.[55] Secondly, if they were "factual findings resulting from an investigation made pursuant to authority granted by law,"[56] they would have been excludable.

A careful analysis of the statements demonstrates that it should not have been necessary to resort to an extension of *Sawyer*. The statements in the unsigned forms were not factual findings but merely a recordation of King's own statements to the government employees. The statements signed by King were similarly not the agent's statements but were King's own. As such, under the Federal Rules they were admissions and not hearsay at all.[57]

52. 613 F.2d 670 (7th Cir. 1980).
53. *Id.* at 672.
54. *Id.* at 673.
55. *See* note 44 *supra*.
56. FED. R. EVID. 803(8)(C).
57. FED. R. EVID. 801(d) provides:

Statements which are not hearsay. A statement is not hearsay if—

. . . .

(2) **Admissions by party-opponent.** The statement is offered against a party and is (A)

Privity Based Admissions

In *Huff v. White Motor Corp.*,[58] the court encountered, in a case of first impression, the admissibility of privity based admissions.[59] Plaintiff, administratrix of the estate of a deceased truck driver, brought a wrongful death action against White Motor, alleging that defective design of the truck's fuel tank was responsible for the fire which killed the driver following a collision. There was no dispute that there was a fire in the cab of the truck. At issue was whether the fire started before or after the collision and whether the ruptured fuel tank was the cause of the fire.[60] The defendant attempted to introduce a statement made to a friend by plaintiff's decedent, three days after the accident while he was hospitalized, describing how the accident occurred: "[H]e told us as he was approaching the curve or starting into it his pant leg was on fire and he was trying to put his pant leg out and lost control and hit the bridge abutment and then the truck was on fire."[61]

In the trial court, the defendant argued that the statement was an admission under rule 801(d)(2) or admissible under the residual exception of rule 803(24).[62] The trial court excluded the evidence as inadmissible hearsay. On appeal, the defendant also urged that the statement was admissible as a statement against interest under rule 804(b)(3).[63] The court refused to consider the 804(b)(3) claim since it

his own statement. . . or (B) a statement in which he has manifested his adoption or belief in its truth. . . .

See, e.g., United States v. Rios Ruiz, 579 F.2d 670 (1st Cir. 1978).

58. 609 F.2d 286 (7th Cir. 1979).

59. Privity, or identity of interest between the declarant and the party against whom the declaration is being offered, was regarded at common law as justification for admission of evidence. C. MCCORMICK, EVIDENCE § 268 (2d ed. 1972).

60. 609 F.2d at 294.

61. *Id.* at 290.

62. FED. R. EVID. 803(24) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . . .

(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. However a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

63. FED. R. EVID. 804(b)(3) provides:

(b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

had not been raised in the trial court. The court held that although rule 103(a) required specific grounds for objecting to the admission of evidence and has no specific provision for urging error in the exclusion of evidence, rule 46 of the Federal Rules of Civil Procedure requires a party to specifically advise the court of its theory of admissibility.[64]

The court then turned to the defendant's alternative theories of admissibility. Although privity based admissions were admissible at common law,[65] the court held that they were to be tested solely by the Federal Rules of Evidence. An examination of the specific provisions of rule 801(d)(2) led the court to the conclusion that Congress did not intend to authorize the courts to expand the definitions of admissions.[66] However, the court held that the residual exceptions could provide an independent basis for admission, and it carefully considered the five factors present in the residual exception: trustworthiness, materiality, probative importance of the evidence, interests of justice, and notice.[67]

In examining the issue of trustworthiness, the court emphasized that the issue is the circumstances under which the statement was made,[68] in contrast to the theory of admissions whose probative value is based on an inconsistency with a party's present position.[69] The court found some guarantee of trustworthiness in the content of the statement itself, since there appeared to be no reason to concoct the story of the fire on his clothing. However, since the record was unclear as to whether the decedent possessed the mental competency to make a trustworthy statement, the court remanded the issue to the trial court to make that determination.[70] The court reasoned that this was not a jury question, but one to be preliminarily resolved by the trial judge, be-

. . . .

(3) **Statement against interest.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

64. 609 F.2d at 290 n.2. FED. R. CIV. PRO. 46 provides:

For all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor.

65. *See* note 59 *supra*.

66. 609 F.2d at 291.

67. *See* note 62 *supra*.

68. 609 F.2d at 292.

69. *See* Strathorn, *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. PA. L. REV. 484, 493 (1937).

70. 609 F.2d at 293-94.

cause the determination of admissibility was his in the first instance.[71] After making a strong case for the trustworthiness of the statement, the court then analyzed each of the other requirements of rule 803(24)[72] and found them to be present.

Huff does not signify any relaxation of the hearsay rules in the Seventh Circuit; indeed, the court took pains to point out that the residual exception is not to be considered broadly but is to be used in rare, exceptional circumstances.[73] However, when those circumstances are present, the court will not hesitate to use its provisions.

ATTORNEY-CLIENT PRIVILEGE

Recently, there has been some concern that the principles of the attorney-client privilege are being eroded, especially when an attorney is called before a grand jury as a witness in an investigation concerning the client.[74] Nevertheless, occasions will arise when the government, in good faith, will seek to obtain from the attorney information which is not covered by the privilege. The 1979-80 term provided the Seventh Circuit with an opportunity to consider these issues.

In *In re Walsh*,[75] an attorney was subpoenaed to appear before the grand jury and to produce certain records. The focus of the investigation centered around allegations that the home of Anthony Accardo had been burglarized. The burglary was not reported to the police. Shortly thereafter, a number of persons who were "known burglars" were found dead.[76] Mr. Accardo and his handyman, Michael Volpe, were subpoenaed to testify before the grand jury. Both were represented by the same attorney, Carl Walsh. After Mr. Volpe's grand jury appearance, he disappeared. The grand jury then began investigating his disappearance. Walsh was subpoenaed to appear and to bring any records in his possession relating to accounts receivable from Volpe,

71. FED. R. EVID. 104(a) provides:

> (a) **Questions of admissibility generally.** Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination, it is not bound by the rules of evidence except those with respect to privileges.

72. The court concluded that rules 803(24) and 804(5) are identical and, therefore, 804(5) is redundant since 803(24) applies whether or not the declarant is available. 609 F.2d at 291 n.4.

73. 609 F.2d at 291.

74. *See In re* Sturgis, 412 F. Supp. 943 (E.D. Pa. 1976); *In re* Stolar, 397 F. Supp. 520 (S.D.N.Y. 1975); *In re* Kinoy, 326 F. Supp. 400 (S.D.N.Y. 1970); *In re* Terkeltoub, 256 F. Supp. 683 (S.D.N.Y. 1966).

75. 623 F.2d 489 (7th Cir. 1980).

76. *Id.* at 491. An interesting and enlightening statement of the facts is contained in a related case, United States v. One Residence and Attached Garage, 603 F.2d 1231 (7th Cir. 1979).

time sheets reflecting services for Volpe, any memoranda relating to any meetings with Volpe, copies of bills and payments for legal services, and any retainer contracts between himself and Volpe.[77]

Walsh filed a motion to quash, which was denied. He then went to the grand jury room but refused to enter. When the government moved to hold him in contempt, the district court held that the burden was upon the government to establish that the information sought was not privileged and, further, that there was a particularized need for the material in addition to a showing that it was not available from any other source.[78] The government submitted an affidavit describing the need for the information along with seventy-three questions it proposed to ask. The district court ruled that the "cumulative effect" of the questions violated the attorney-client privilege, quashed the subpoenas and denied the contempt motion.[79]

The Seventh Circuit reversed, again adopting the attorney-client privilege as defined by Wigmore:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.[80]

After holding that the privilege must be strictly construed within those parameters, the court established a step-by-step procedure to be followed before the grand jury. First, the court held that the party seeking to invoke the privilege has the burden of establishing its existence. In this case, because of the multiple representation, the court recognized that the burden was complicated. In order to determine whether the relationship existed, the government would be allowed to inquire as to the length of the relationship and the general nature of the services rendered.[81] If, under the general supervision of the district court,[82] the attorney-client relationship is established, the burden will be upon the attorney to establish that any question calls for the disclosure of a communication made in confidence.

Relying on *Fisher v. United States*,[83] the court held that the privilege protects only communications and disclosures made to obtain in-

77. 623 F.2d at 491-92.
78. *Id.* at 492.
79. *Id.*
80. 8 J. WIGMORE, EVIDENCE § 2292 at 594 (McNaughton rev. 1961).
81. 623 F.2d at 494.
82. *See* Branzburg v. Hayes, 408 U.S. 665, 709 (1972).
83. 425 U.S. 391 (1976).

formed legal advice. The court specifically held that the fact of a communication, as distinguished from its contents, would not be privileged.[84] The whereabouts of the client and his contacts with the attorney were similarly held non-privileged,[85] as were matters involving the receipt of fees,[86] or who paid them.[87] If a third party was present, presumably including the attorney's other client, Accardo, the privilege would not apply.[88]

Walsh thus demonstrates that while the court does not encourage the calling of attorneys before the grand jury, it sees no impropriety whatsoever in calling those who may have been trying to serve two masters.

In *In re Special September 1978 Grand Jury (II)*,[89] the court had occasion to consider both the fraud exception[90] to the attorney-client privilege and the interrelationship between the privilege and the "work-product" doctrine.[91]

The grand jury in its investigation of the Community Currency Exchange Association had subpoenaed the records of two law firms which had done work for the association. After holding that fraud by

84. 623 F.2d at 494. *See, e.g.*, United States v. Kendrick, 331 F.2d 110 (4th Cir. 1964).

85. 623 F.2d at 494. *See, e.g.*, *In re* Field, 408 F. Supp. 1169 (S.D.N.Y. 1976).

86. 623 F.2d at 494. *See, e.g.*, *In re* January 1976 Grand Jury, 534 F.2d 719 (7th Cir. 1976).

87. 623 F.2d at 494. *See, e.g.*, *In re* Michaelson, 511 F.2d 882 (7th Cir.), *cert. denied*, 425 U.S. 974 (1975).

88. The presence of a third party, not the agent of the attorney or client, destroys the element of confidentiality. 8 J. WIGMORE, EVIDENCE § 2311 at 601-02 (McNaughton rev. 1961). The dual representation presented here serves only to highlight the problem of the applicability of the privilege in situations with actual or potential conflicts of interest. C. MCCORMICK, EVIDENCE § 91 at 190-91 (2d ed. 1972).

89. No. 79-1218 (7th Cir. Apr. 30, 1980).

90. *See* United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950).

91. The "work product" doctrine was enunciated in Hickman v. Taylor, 329 U.S. 495, 511 (1947):

> Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case as the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

the client destroys the attorney-client privilege,[92] the court turned to the much more difficult question of whether fraud would destroy the work product rule.

The court recognized that while the attorney-client privilege is held by the client alone, both the client and the attorney can be protected from disclosure under the work product doctrine. Because it was only the lawful interests of the client that the doctrine was designed to protect, the court refused to extend its protection to a client engaged in a *prima facie* fraud. However, the court felt that the attorney's assertion of the doctrine stood on a different footing and refused to require disclosure of the attorney's mental impressions, conclusions, or legal theories about the case.[93] The Seventh Circuit, however, left open the question as to whether even this protected material could be compelled if the grand jury demonstrated an extraordinary need for production and remanded the case for the trial court to make such a determination.[94]

CONCLUSION

During its 1979-80 term, the Seventh Circuit continued its trend of modernizing and liberalizing the law of evidence. In the hearsay field the court concentrated on both the issues of reliability and need for the evidence, without the strictures of restrictive rules, but with the idea that the rules should be interpreted to secure a just result. In other areas, such as privilege and work product, the court did not hesitate to break new ground in order to allow full disclosure, without doing violence to underlying concepts.

92. *In re* Special September 1978 Grand Jury (II), No. 79-1218, slip op. at 16, 17 (7th Cir. Apr. 30, 1980).

93. *Id.* at 18. The court was persuaded that the protection of the work product doctrine was necessary "in order to avoid an invasion of the attorney's necessary privacy in his work, an invasion not justified by the misfortune of representing a fraudulent client." *Id.*

94. *Id. See also*: United States v. Pfizer, Inc., 560 F.2d 326, 336 (8th Cir. 1977), where although recognizing that "an attorney's thoughts are inviolate," the Eighth Circuit nonetheless refused to adopt a rule of absolute immunity out of consideration for the rare, extraordinary, yet unencountered situations "where weighty considerations of public policy and a proper administration of justice would militate against the nondiscovery of an attorney's mental impressions"; Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1199 (D.S.C. 1975), where the court suggested, in dicta, since only factual work product material was actually ordered produced, "[o]bviously mental impressions, 'are (not) necessarily free from discovery in all cases.' . . . There are obviously degrees of mental impression. . . . It is illogical to state that all degrees of mental impressions, varying from totally creative thought to recognition of accepted fact, require the identical demonstration of need and hardship. . . ."