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EVIDENCE: THE 1984-85 TERM—A SELECTIVE REVIEW OF SEVENTH CIRCUIT DECISIONS APPLYING THE FEDERAL RULES OF EVIDENCE

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INTRODUCTION

The Federal Rules of Evidence have now been in effect for over a decade.[1] It has become almost commonplace to observe that while some feared that codification of common law evidentiary principles would produce rigidity and an inability to deal with unforeseen circumstances, such fears were unfounded.[2] Indeed, some commentators feel that the broad discretion granted to the district courts by the Rules has resulted in too much flexibility and too few meaningful restraints on the admission of evidence. One commentator recently observed, referring to the unfounded fears just noted: "There was no need to worry. Judicial ingenuity has been stimulated, not stifled. When necessary (and sometimes when not), the courts have stretched or even disregarded the language of the rules and the intent of Congress. We have flexibility aplenty."[3] On the whole, despite certain continuing problem areas with the Rules, it may safely be said, as one commentator observed, that after a decade's experience with the Rules, "one's judgment must be that the Rules are doing very well indeed . . . ."[4]

During the 1984-85 term, the United States Court of Appeals for the

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1. The Federal Rules of Evidence were signed into law by President Ford on January 2, 1975, and became effective on July 1, 1975. Act of January 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (codified at 28 U.S.C. app. (1976 & Supp. V 1981)). The Federal Rules of Evidence are referred to herein as the Federal Rules or the Rules.

2. *See, e.g.*, Rossi, *The Silent Revolution*, 9 LITIGATION 13, 13 (1983); Rice and Orr, *Seventh Circuit Review— Evidence: Application and Refinement of the Federal Rules of Evidence in the Seventh Circuit*, 61 CHI.-KENT L. REV. 395 (1985).

3. Rossi, *The Silent Revolution*, 9 Litigation 13, 13 (1983).

4. Younger, *Introduction, Symposium: The Federal Rules of Evidence*, 12 HOFSTRA L. REV. 251, 254 (1984). For an excellent examination of how the Federal Rules have been working since the Rules' enactment, see SECTION OF LITIGATION, AMERICAN BAR ASSOCIATION, EMERGING PROBLEMS UNDER THE FEDERAL RULES OF EVIDENCE (1983) (hereinafter cited as EMERGING PROBLEMS). As its title suggests, the Report particularly focuses on recurring problem areas experienced under the Rules.

Seventh Circuit addressed challenges to evidentiary rulings by the district courts in over one hundred decisions. One difficulty with selecting decisions meriting discussion in this article is that the standard of review on evidentiary rulings is the abuse of discretion standard, and the trial courts are granted broad discretion by the Federal Rules. Two consequences of those facts are that, first, sometimes the appellate court's analysis of evidentiary issues is quite cursory, and second, very few decisions are reversed on evidentiary grounds. In addition, because the Federal Rules encourage flexibility,[5] and again because the standard of review is abuse of discretion, there are not widely varying precedents from term to term, which is commendable. One goal of codification is to promote consistency, and a review of the case law reveals that the Seventh Circuit largely achieves that goal without sacrificing flexibility or stifling creative solutions to new problems and novel factual situations. That is not to say that the Seventh Circuit mechanically applies its prior decisions to new cases. On the contrary, the court rendered a number of interesting and important decisions during the past term. This article focuses on decisions which are significant for one of the following reasons: (1) the decisions deal with issues which are frequently litigated; (2) the case presented the court with an issue of first impression; (3) the decision reveals a split of authority among the Circuit Courts of Appeals; or (4) the decision resolved an issue previously left open by the court.

RULE 403: EXCLUSION OF RELEVANT EVIDENCE

Rule 403 adopted the common law principle that in certain circumstances, relevant evidence may be inadmissible.[6] Rule 403 states that 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] The balancing test enunciated in Rule 403 is incorporated in several other Rules which apply the

5. FED. R. EVID. 102, "Purpose and Construction," states: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

6. *See* Michelson v. United States, 335 U.S. 469, 475-76 (1948) ("The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.") (footnotes omitted).

7. FED. R. EVID. 403.

test to specific, commonly recurring situations.[8] Rule 403 allows the trial court to balance the value of the evidence offered against its potential harmful effects in situations which are not covered by a specific Rule.[9]

The Seventh Circuit has recognized that application of Rule 403 occurs in a multitude of differing factual situations. To accomplish the fundamental goals of fairness and flexibility that are the cornerstones of the Federal Rules of Evidence,[10] the trial judge must be allowed great discretion in the application of Rule 403. Therefore, the court has consistently stressed that a trial judge's decision is to be accorded great deference and will not be overturned absent a clear abuse of discretion.[11]

However, allowing trial judges substantial discretion adds difficulty to the task of appellate review. Thus, in order for the appellate court to have an adequate basis for review of a trial judge's decision, the court has encouraged, without requiring, the trial judge to enter written findings on the results of the balancing test.[12] In most instances, the court has deferred to the trial judge's decision rather than attempting to apply a strict definition of what constitutes unfair prejudice.

The degree of deference the Seventh Circuit will accord a trial judge's decision is illustrated by *United States v. Medina*.[13] In *Medina*, the defendants challenged the admission of several statements, contending that the statements were unfairly prejudicial. The defendants were inmates convicted of first degree murder and conveying weapons within a penal institution.[14] The court began its analysis by first acknowledging the deference that the trial judge's decision is to be accorded and then addressed the balancing test of probative value versus unfair prejudice. The court defined probative value as the extent to which it makes the existence of a fact in issue more or less likely.

The court then focused on the challenged statements. The first statement was made by a fellow inmate and revealed that the defendant was angry with the deceased because the deceased refused to murder an-

8. FED. R. EVID. 403, Advisory Committee Note states: "The rules which follow in this Article are concrete applications evolved for particular situations."

9. FED. R. EVID. 403, Advisory Committee Note states that Rule 403 "is designed as a guide for the handling of situations for which no specific rules have been formulated."

10. FED. R. EVID. 102. *See supra* note 5.

11. The court's deference to the trial judge's decision is consistent with the Seventh Circuit's analysis in similar cases in the past. *See, e.g.*, United States v. Covell, 738 F.2d 847, 854 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 211 (1985); United States v. Serlin, 707 F.2d 953, 959 (7th Cir. 1983); United States v. Solomon, 688 F.2d 1171, 1178 (7th Cir. 1982).

12. *See* United States v. DeJohn, 638 F.2d 1048, 1053 (7th Cir. 1981); United States v. Dolliole, 597 F.2d 102, 106 (7th Cir.), *cert. denied*, 442 U.S. 946 (1979).

13. 755 F.2d 1269 (7th Cir. 1985).

14. Defendants Steven Medina and Ronald Crowder were inmates at the United States Penitentiary at Terre Haute, Indiana.

other inmate suspected of being an informant. The defendant contended that allowing this statement into evidence caused him unfair prejudice because it implicated the defendant in an uncharged crime. The government maintained that the statement was necessary to help show the defendant's motive. The court, with little discussion, found that since the purpose of the statement was to show the defendant's motive, the probative value of the statement outweighed its prejudicial effect.[15]

The defendant also objected to a statement made by a prison official. The prison official testified that after the defendant was taken from his cell and placed in the prison detention center, the defendant stated: "that's all right, I will beat you on the next one."[16] The government maintained that this statement clearly implicated the defendant in the murder. The court agreed with the defendant that this statement was prejudicial to his alibi. However, it was not the type of prejudicial statement which Rule 403 was designed to exclude.[17] The court concluded that all relevant evidence is inherently prejudicial, but such evidence will only be excluded when the prejudice substantially outweighs its probative value.

In contrast, in *Douglass v. Hustler Magazine, Inc.*,[18] the court reversed the trial court because certain evidence was found to be so prejudicial that it was an abuse of discretion not to exclude it under Rule 403. In *Douglass*, the plaintiff, an actress and model, brought an invasion of privacy action against *Hustler* magazine, alleging that it published nude photographs of her without her consent.[19] The plaintiff posed for nude photographs to be published in *Playboy* magazine. The photographs were published in *Playboy* and at a later date several photos from the same session were published in *Hustler*.[20] In an attempt to distinguish the two magazines, the plaintiff introduced 128 slides showing some of the vilest photographs and cartoons that were published in *Hustler*

15. 755 F.2d 1269, 1275 (7th Cir. 1985).

16. *Id.* at 1274. The defendant objected when the prison official began to testify regarding the statement. The government's offer of proof was as follows: "We expect the witness to testify that Defendant Crowder said at that time something to the effect that "that's all right, I'll beat you on the next one. I'm going to leave one at your office door and you won't know who did it. Yes, I'm going to cut his head off and leave him there and you won't know who did it." The trial court permitted Thomas to testify to Crowder's statement, but excluded as inflammatory the reference to the manner in which the "next one" would die.

17. *Id.* at 1275.

18. 769 F.2d 1128 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1489 (1986).

19. *Id.* at 1131-32.

20. *Id.* The plaintiff signed a release that authorized *Playboy* to publish or otherwise use the photographs in a lawful manner. However, *Hustler* could not produce a valid release signed by the plaintiff.

through the years.[21]

The defendant maintained that the slides were unfairly prejudicial and should have been excluded under Rule 403, and the appellate court agreed. The court found that selecting the 128 worst pictures from many years of the magazine was unfairly prejudicial to *Hustler*. The court found the slides unfairly prejudicial because they were not a random or representative sample of the magazine's content.[22] The court concluded that admission of the slides constituted reversible error because the defendant was a member of the press and therefore entitled to assiduous protection.[23]

The approach of the court in *Medina*[24] was typical of the Seventh Circuit's treatment of Rule 403 issues in the last term. The court, while analyzing the prejudicial value of the evidence, acknowledged the substantial discretion of the trial judge in ruling on the relevancy of the tendered evidence. However, as shown in *Douglass*,[25] the court will reverse the trial judge if it finds that the evidence was unfairly prejudicial. This approach has not created a uniform definition of unfair prejudice. However, the court's current approach is necessary to promote the goals of fairness and flexibility.

RULE 404: CHARACTER EVIDENCE

Rule 404 reflects the common law principle that evidence of other crimes, wrongs, or acts is not admissible to prove that the defendant had the propensity to commit a crime.[26] Evidence of other bad acts is generally not allowed because such evidence lacks probative force and has the tendency to create unfair prejudice and confusion.[27] Rule 404(b) does allow character evidence if it is offered for purposes other than to prove a propensity to commit the crime with which the defendant is charged.[28]

21. *Id.* at 1141-42. The court found that the viewer of the slide presentation would think the magazine was wholly given over to racially offensive cartoons, grotesque photographs, foul language and obscenities.

22. *Id.* at 1142. The court found that the pictures were selected with a view to highlighting the most offensive features of the magazine.

23. *See* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984).

24. 755 F.2d 1269 (7th Cir. 1985).

25. 769 F.2d 1128 (7th Cir. 1985).

26. FED. R. EVID. 404(a) states: "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. . . ."

27. *See supra* note 6 and accompanying text; *see also* United States v. Phillips, 401 F.2d 301, 305 (7th Cir. 1968) (prior crime evidence is "always unduly prejudicial").

28. Rule 404(b) provides that other crimes, wrongs, or acts "may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."

In several decisions the Seventh Circuit has discussed the criteria which must be met for evidence of bad acts to be admissible under Rule 404(b).[29] First, the evidence must be directed toward establishing a matter in issue other than the defendant's propensity to commit the crime charged. Second, the other act must be similar enough and close enough in time to be relevant to the matter at issue. Third, the evidence must be clear and convincing. Fourth, the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice.

During the 1984-85 term, the Seventh Circuit was faced with Rule 404 issues on several occasions. In each of these cases, the Seventh Circuit accorded great deference to the trial judge's assessment of the admissibility of tendered evidence because of "his firsthand exposure to the evidence and his familiarity with the course of the trial proceeding."[30] Thus, in most of the cases, the issues were uncomplicated and the court was unsympathetic to the appellants.[31] Other cases, however, presented interesting and important questions.

In *United States v. Williams*,[32] the court found that the admission of a police officer's testimony regarding defendant's nickname constituted reversible error. In *Williams*, the defendant was convicted of transporting stolen vehicles in interstate commerce.[33] Defendant maintained that the detective's testimony that he knew the defendant by the nickname "Fast Eddie" should not have been admitted. Defendant argued that the nickname suggested bad character and having a police detective testify intimated to the jury that the defendant was known to be involved in criminal activity.[34] The government contended that "Fast Eddie" is a neutral name that did not suggest that the defendant had a criminal reputation.

The court found it to be self-evident that the detective's testimony might suggest to the jury that the defendant had some sort of history or reputation of unsavory activity.[35] The court acknowledged that the pros-

29. This standard has been set out in numerous Seventh Circuit decisions. *See, e.g.*, United States v. Shackleford, 738 F.2d 776, 779 (7th Cir. 1984); United States v. Kane, 726 F.2d 344, 348 (7th Cir. 1984); United States v. Wormick, 709 F.2d 454, 459 (7th Cir. 1983).

30. United States v. Levy, 741 F.2d 915, 924 (7th Cir.), *cert. denied*, 105 S. Ct. 440 (1984).

31. *Id.* "This circuit, among others, has time and time again responded to the type of argument raised by appellant [admission of several items of bad act evidence] and should not have to do so again except in an appropriate case."

32. 739 F.2d 297 (7th Cir. 1984).

33. *Id.* at 298. The defendant was found guilty on four counts of transporting stolen motor vehicles in interstate commerce in violation of the Dyer Act, 18 U.S.C. § 2312 (1982) and of aiding and abetting the commission of Dyer Act violations, 18 U.S.C. § 2 (1982).

34. *Id.* at 299.

35. *Id.*

ecutor may introduce evidence of a defendant's alias or nickname if it aids in the identification of the defendant or is directly related to the proof of the acts charged. The court found the testimony regarding defendant's nickname to be completely unrelated to any of the other proof presented.[36] Therefore, the testimony violated Rule 404(a) and should not have been admitted because it caused undue prejudice and denied the defendant the opportunity to defend against the particular charge.[37]

In contrast, *United States v. Hattaway*[38] illustrates that evidence of egregious acts is admissible if it is necessary to prove the particular charge and is intricately related to the facts of the case. In *Hattaway*, five members of a motorcycle gang were convicted of various crimes[39] arising from the kidnapping of a woman. The defendants claimed that the admission of evidence of their lifestyle violated Rule 404(b) because it was submitted to prove the defendants' bad character.[40] The government maintained that the lifestyle evidence was introduced because it was intricately related to the charges against the defendants.[41]

The court held that evidence of the defendants' lifestyle, including information about their drug use, sexual activities, nicknames and other "socially unacceptable" activities, was admissible.[42] The court found that evidence of drug and alcohol use helped substantiate the government's allegation that defendants used psychological control over the victim. The court also found that the evidence of sexual activity was related to the Mann Act charges. The use of nicknames was also necessary because the defendants only used nicknames to identify themselves in the victim's presence.[43] Therefore, the evidence was not admitted to prove bad character because it was intricately related to the facts of the case. This case illustrates that the court will allow the introduction of "disgusting and offensive"[44] evidence if it is intricately related to the facts of the case and its probative value outweighs its prejudicial effect.

36. *Id.* at 299-300. The court stated that the prosecution's only possible purpose in eliciting the testimony was to create an impression in the minds of the jurors that the defendant was known by the police to be an unsavory character or even a criminal.

37. *See supra* note 6 and accompanying text.

38. 740 F.2d 1419 (7th Cir.), *cert. denied*, 105 S. Ct. 599 (1984).

39. *Id.* at 1423 n.3. All five defendants were charged with conspiracy to kidnap, kidnapping, conspiracy to violate the Mann Act, Mann Act violations, and unlawful firearms use.

40. *Id.* at 1424.

41. *Id.*

42. *Id.* at 1425.

43. *Id.* The court held that forbidding the victim from using the nicknames (such as Hitler, Mad Mad Dog, Scarface, and Crazy Horse) would have placed an undue burden on her testimony.

44. The defendants argued and the court agreed that the lifestyle evidence was disgustingly offensive. However, the defendants did not argue that it painted an inaccurate picture of life with the gang.

In *United States v. Chaimson*,[45] the court allowed evidence of other acts to be introduced to establish intent.[46] In *Chaimson*, the defendant was convicted of mail fraud and racketeering[47] in a scheme among employees of the Cook County Board of Appeals, Chicago area attorneys and Chicago area tax consultants to fraudulently reduce real estate assessments.[48] The defendant, a Chicago attorney, worked on a large number of real estate assessment cases between 1976 and 1979 which were fraudulently reduced after bribes were passed from the defendant to the Board of Appeals.

At trial, the defendant took the stand and denied any knowledge of the fraudulent scheme, denied participating in the scheme, and denied paying any bribes. The govenment then put on testimony that showed the defendant made bribe payments in 1971. The defendant contended that the trial court erred in allowing testimony about prior bribe payments because it was introduced for the sole purpose of demonstrating his propensity to commit the crime charged. The government mantained that the evidence was introduced to show intent.

The defendant acknowledged that mail fraud is a specific intent crime and that evidence of previous bribe payments is relevant to the issue of intent.[49] However, the defendant contended that intent was not at issue because his defense was that he had no knowledge of the fraudulent reduction scheme. In support of this argument, the defendant cited a line of Second Circuit cases.

In both *United States v. O'Connor*[50] and *United States v. Benedetto*,[51] the defendants were federal meat inspectors accused of taking bribes, and the prosecution used evidence of other bribes not charged in the indictment to show intent. In both cases, the Second Circuit found that the "other acts" evidence was not admissible to show intent. "Defendant did not claim that he took the money . . . innocently or mistakenly. He claimed that he did not take the money at all. Knowledge and intent, while technically at issue, were not really in dispute. . . ."[52]

The defendant in *Chaimson* also relied on *United States v.*

45. 760 F.2d 798 (7th Cir. 1985).

46. FED. R. EVID. 404(b). Other crimes, wrongs, or acts may be admissible for purposes such as proof of motive, opportunity or intent.

47. 760 F.2d at 800. The defendant was convicted of fifteen counts of mail fraud in violation of 18 U.S.C. § 1340 and one count of racketeering in violation of 18 U.S.C. § 1962(c).

48. *Id.*

49. *Id.* at 805.

50. 580 F.2d 38 (2d Cir. 1978).

51. 571 F.2d 1246 (2d Cir. 1978).

52. *Id.* at 1249, *quoted in* United States v. O'Connor, 580 F.2d at 41.

Manafzadeh,[53] in which the defendant was charged with two counts of unlawfully transporting fraudulent checks in interstate commerce. As a defense to this specific intent crime, the defendant claimed that he had never been involved in the creation or negotiation of the fraudulent checks at all.[54] The prosecution introduced evidence that four months after the crime in question, the defendant attempted a similar scheme.[55] The defendant offered to stipulate that if the jury found that he participated in the creation of forged checks, he would concede the issue of intent. The Second Circuit therefore ruled that the "other acts" evidence was inadmissible to prove intent because intent was not at issue.[56] In cases subsequent to *Manafzadeh*, the Second Circuit has emphasized the defendant's willingness to stipulate that if the jury found the defendant participated in the crime charged, he would concede the issue of intent.[57]

The Seventh Circuit Court of Appeals in *Chaimson* rejected the defendant's argument and the Second Circuit's reasoning because it allows the defendant to remove intent as an element of the crime charged.[58] The court then stated that where the government must prove specific intent as an element of the crime charged, it is well established that evidence of other acts may be introduced to establish that intent,[59] if it meets the four-pronged test.

The court in *Chaimson* found that the evidence met the first requirement because it was directed toward establishing intent. The court found that passing bribes in 1971 was sufficiently related in time to bribe payments from 1976 to 1979 to satisfy the closeness in time requirement.[60] The defendant contended that the government failed to prove by clear and convincing evidence that the earlier bribe payments were in fact a crime. The court stated that the clear and convincing standard is designed to prevent the admission of circumstantial evidence of the mere inference of participation in a prior crime.[61] The clear and convincing standard was met by direct testimony of two witnesses that the defendant participated in the prior crime. The final test is the balancing test of Rule

53. 592 F.2d 81 (2d Cir. 1979).
54. *Id.* at 85.
55. *Id.*
56. *Id.* at 87.
57. *See* United States v. Mohel, 604 F.2d 748, 752-54 (2d Cir. 1979); United States v. Danzey, 594 F.2d 905, 912 n. 5 (2d Cir.), *cert. denied*, 441 U.S. 951 (1979).
58. 760 F.2d at 805.
59. *See* United States v. Shackleford, 738 F.2d 776, 781 (7th Cir. 1984); United States v. Price, 617 F.2d 455, 459-60 (7th Cir. 1979).
60. *See* United States v. Rudseck, 718 F.2d 233, 236-37 (7th Cir.), *cert. denied*, 465 U.S. 1029 (1984) (five years); United States v. Zeidman, 540 F.2d 314, 319 (7th Cir. 1976) (five years).
61. *See* United States v. Hyman, 741 F.2d 906, 913 (7th Cir. 1984); United States v. Berkwitt, 619 F.2d 649, 655 (7th Cir. 1980).

403.[62] The court acknowledged the deference accorded the trial judge in this decision.[63]

The Seventh Circuit's approach to the admissibility of "other acts" evidence is preferable to the view of the Second Circuit. The Second Circuit, in effect, allows the defendant to remove the element of intent from the case. The Seventh Circuit allows the introduction of evidence of other acts when the crime charged requires proof of specific intent and the requirements of Rules 404(b) and 403 are satisfied.[64] However, the Seventh Circuit does not allow intent to automatically become an issue, where intent is inferable from the nature of the act charged.[65] To do so would create an exception that would virtually swallow the rule against admission of evidence of prior misconduct.[66] Therefore, where intent is only a formal issue, so that proof of the proscribed act gives rise to an inference of intent, the court will not admit evidence of other acts during the government's case-in-chief, unless the government has reason to believe that the defense will raise intent as an issue.[67] The approach followed by the Seventh Circuit strikes the proper balance between the conflicting interests while following the intent of the Federal Rules of Evidence.

RULE 609: IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

During the 1984-85 term, the Seventh Circuit reviewed three interesting cases in which the evidentiary issue on appeal concerned the trial court's exclusion or admission of prior convictions pursuant to Rule 609.[68] At issue in *Christmas v. Sanders*,[69] a civil rights action, was Rule 609(a)(1).[70] The Seventh Circuit ultimately affirmed the trial court's exclusion of evidence concerning plaintiff's prior rape conviction. In its opinion, the court discussed the differing views of courts and commentators on the question of what Rule or Rules govern the admissibility of

62. 760 F.2d at 808.
63. *Id.*
64. *See* United States v. Shackleford, 738 F.2d 776, 781 (7th Cir. 1984).
65. *Id.*
66. United States v. Ring, 513 F.2d 1001, 1009 (6th Cir. 1975).
67. 738 F.2d at 781.
68. FED. R. EVID. 609. "Impeachment by Evidence of Conviction of Crime".
69. 759 F.2d 1284 (7th Cir. 1985).
70. FED. R. EVID. 609(a)(1) provides:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, ...

prior felony convictions in civil cases.[71] The court, however, found it unnecessary to take a position on the question.[72]

The evidentiary issue on appeal in *United States v. Kuecker*[73] concerned the proper interpretation of Rule 609(a)(2).[74] In *Kuecker*, the Seventh Circuit addressed the issue of "whether district courts retain the residual discretion under Rule 403 to exclude a prior conviction admissible under Rule 609(a)(2),"[75] an issue which the Seventh Circuit had expressly left open in *United States v. Papia*.[76] The Seventh Circuit in *Kuecker*, joining "all circuits that have decided the issue,"[77] held that evidence of prior convictions for crimes involving dishonesty or false statement is admissible without a balancing of probative value against prejudicial effect.[78]

In *United States v. Noble*,[79] the Seventh Circuit had occasion to apply its holding in *Kuecker* to an unusual factual situation. In *Noble*, the Seventh Circuit held that once the defendant had placed his credibility in issue, the trial court properly allowed the government to impeach the defendant with his prior counterfeiting conviction without balancing the conviction's probative value against its prejudicial effect.

The use of prior convictions to impeach was an extremely controversial issue at the time the Federal Rules were enacted.[80] Both subdivisions (1) and (2) of Rule 609(a) have caused the courts considerable problems and, not surprisingly, have been inconsistently interpreted by the courts.[81] The commentators appear to agree that the problems are

71. Christmas v. Sanders, 759 F.2d at 1290-91.

72. *Id.* at 1293.

73. 740 F.2d 496 (7th Cir. 1984).

74. FED. R. EVID. 609(a)(2) provides:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime . . . involved dishonesty or false statement, regardless of the punishment.

75. United States v. Kuecker, 740 F.2d at 501 (quoting United States v. Papia, 560 F.2d 827, 845 n. 10 (7th Cir. 1977)).

76. 560 F.2d 827 (7th Cir. 1977).

77. United States v. Kuecker, 740 F.2d at 501.

78. *Id.* at 501.

79. 754 F.2d 1324 (7th Cir.), *cert. denied*, 106 S. Ct. 63 (1985).

80. 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE at 609-14 (1985).

81. For example, *compare* Diggs v. Lyons, 741 F.2d 577, 582 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 2157 (1985) (*held*, in civil cases, district judge has no discretion under either Rule 403 or Rule 609(a)(1) to exclude prior felony convictions when offered to impeach plaintiff) *with* Christmas v. Sanders, 759 F.2d 1284, 1291-92 (7th Cir. 1985) (although appellate court found it unnecessary to decide which Rule governs prior convictions in civil cases, appellate court found no abuse of discretion where trial court excluded evidence of plaintiff's prior rape conviction pursuant to Rule 609(a)(1)). Rule 403 grants the trial court discretion to exclude relevant evidence on the grounds of prejudice, confusion, or waste of time.

caused by poor drafting,[82] which in turn is explained by the Rule's legislative history.[83] The legislative history reveals that the drafters of the Rule were primarily concerned with evidence of prior convictions used to impeach criminal defendants.[84] The fact that the Rule specifically requires judicial balancing of the conviction's probative value against its prejudicial effect *to the defendant*,[85] accounts for the problems encountered when a prior conviction is offered to impeach either the plaintiff in a civil case[86] or a government witness in a criminal case.[87]

82. *See, e.g.*, EMERGING PROBLEMS, *supra* note 4, at 172 ("drafting of Rule 609(a)(1) is as weak as the drafting of any rule, ..."); Younger, *Introduction, Symposium: The Federal Rules of Evidence*, 12 HOFSTRA L. REV. 251, 252-53 (1984) (Younger points to Rule 609 as one instance where the Rules are "sometimes incoherent." He notes that Rule 609(a) begins by referring to "a witness" but goes on in its first conditional clause to speak of "the defendant." The Rule, therefore, according to Younger, is incoherent on the question of exactly what impeachment is permissible of a mere witness as opposed to the defendant in a criminal case.); Berger, *The Federal Rules of Evidence: Defining and Refining the Goals of Codification*, 12 HOFSTRA L. REV. 255, 270 (1984) (the relationship between Rule 609 and Rule 403 is in need of clarification).

83. EMERGING PROBLEMS, *supra* note 4, at 172, bluntly attributes the weak drafting of Rule 609(a)(1) "to the last ditch compromise reached between House and Senate conferees." Subdivision (a) of the Rule as prescribed by the Supreme Court was revised successively in the House, in the Senate, and in the Conference. Note by Federal Judicial Center, *reprinted in* FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES, Rule 609 at 71. (West 1984). The foregoing West publication contains all of the Federal Rules of Evidence plus useful legislative history materials on each Rule, including portions of the Report of the House Committee on the Judiciary, the Report of the Senate Committee on the Judiciary, the Conference Report, and the Advisory Committee's Notes. For a more exhaustive account of Rule 609's legislative history, including Congressional debates, see 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 609 at 609-2 to -40 (1985). According to Weinstein and Berger, "Congress considered the prior conviction to impeach issue more fully than any other single rule . . . ." 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 609[04] at 609-70 (1985).

84. It is clear, however, that the drafters also considered the issue of prior convictions used against witnesses other than defendants. The Conference Report states, in relevant part:

> With regard to the discretionary standard established by paragraph (1) of rule 609(a), the Conference determined that the prejudicial effect to be weighed against the probative value of the conviction is specifically the prejudicial effect *to the defendant*. The danger of prejudice to a witness other than the defendant (such as injury to the witness' reputation in his community) was considered and rejected by the Conference as an element to be weighed in determining admissibility. It was the judgment of the Conference that the danger of prejudice to a nondefendant witness is outweighed by the need for the trier of fact to have as much relevant evidence on the issue of credibility as possible. Such evidence should only be excluded where it presents a danger of improperly influencing the outcome of the trial by persuading the trier of fact to convict the defendant on the basis of his prior criminal record. [Emphasis in original.]

H.R., FED. R. EVID., CONF. REP. No. 1597, 93d Cong., 2d Sess., p. 9 (1974), *reprinted in* FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES, Rule 609 at 75 (West 1984).

85. FED. R. EVID. 609(a)(1), *supra* note 70.

86. *See, e.g.*, Christmas v. Sanders, 759 F.2d 1284 (7th Cir. 1985).

87. Rule 609(a) does not expressly address the issues of impeachment of prosecution witnesses or civil plaintiffs. One reading of the Rule is that the language "and the court determines that the probative value of admitting this evidence [of a prior conviction] outweighs its prejudicial effect to the defendant" implies that no such balancing is required or even allowed where the witness is not a defendant. The legislative history does support the foregoing interpretation. *See supra* note 84. Some circuits have adopted that interpretation. *See, e.g.*, United States v. Nevitt, 563 F.2d 406, 408-

The disputed evidence in *Christmas v. Sanders*[88] was the plaintiff's prior rape conviction. *Christmas* arose from the shooting of the plaintiff by the defendant Sanders, an off-duty police officer. Plaintiff brought a civil rights action against defendant claiming that Sanders' unprovoked assault deprived him of liberty without due process of law, constituted use of excessive force, and resulted in an arrest without probable cause. The facts were sharply disputed. Under the defendant's version of the events, plaintiff and his friends verbally harassed her (Sanders), plaintiff resisted defendant's attempts to arrest him for disorderly conduct by striking her in the face and chest, the pair struggled, and defendant's gun accidentally discharged into plaintiff's abdomen.[89] The trial judge instructed the jury that if it believed the plaintiff's version of the events, under which defendant Sanders had intentionally and without provocation shot plaintiff, then it should find in plaintiff's favor. The jury returned a verdict in favor of plaintiff for $20,000 and judgment was entered.[90]

The trial judge had granted plaintiff's motion *in limine* under Rule 609(a)(1) to prohibit the defendant from introducing any evidence regarding plaintiff's conviction for rape in May 1983.[91] On appeal, defendant argued that the trial judge improperly excluded the evidence of plaintiff's prior conviction. The Seventh Circuit rejected that argument and affirmed the judgment for plaintiff.

In *Christmas*, the trial judge granted plaintiff's motion to exclude his prior conviction on the grounds that a rape conviction was only minimally probative of plaintiff's credibility and would very likely prejudice plaintiff "inasmuch as jurors might be unwilling to award damages to an incarcerated felon."[92] On appeal, defendant challenged that evidentiary ruling, arguing first that Rule 609(a)(1) was inapplicable to the case, and second, even if the Rule was applicable, the trial judge abused her discretion in applying that Rule in that she should have found that the probative value of the conviction was not outweighed by its prejudicial effect.[93]

09 (9th Cir. 1977), *cert. denied*, 444 U.S. 847 (1979) (*held*, Rule 609(a) deprives the court of all discretion to exclude impeachment by convictions when offered by criminal defendants against prosecution witnesses). *But see* 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 609[06] at 609-89 to -90 (1985) (noting that it is still an open question whether Rule 403 might ever afford the trial court discretion to exclude prior convictions of prosecution witnesses and witnesses in civil cases, though expressing the opinion that "the discretion, if it exists, should be narrowly circumscribed since Congress spoke so clearly on the point").

88. 759 F.2d 1284 (7th Cir. 1985).
89. *Id.* at 1286.
90. *Id.* at 1287.
91. *Id.* at 1289.
92. *Id.* The trial court did not issue an opinion.
93. *Id.*

In addressing the defendant's arguments, the Seventh Circuit began by stating that "[t]he questions of what rule governs the admissibility of prior felony convictions in civil cases and whether a district judge has discretion to exclude such evidence are sharply disputed."[94] The court then surveyed the various viewpoints on the foregoing questions. First, several courts, including the Seventh Circuit, have assumed without deciding that the balancing test of Rule 609(a)(1) applies in civil cases.[95] Recently, however, the Third Circuit has taken a different view. In *Diggs v. Lyons*,[96] a civil rights action, the Third Circuit held that Rule 609(a)(1) governs the admissibility of prior felony convictions in civil cases and that the court has no discretion under that Rule to exclude prior felony convictions when offered to impeach a plaintiff. Several commentators support the Third Circuit's position.[97] Under a third view, some authorities take the position that Rule 403 may be invoked in civil cases to exclude evidence of a party's prior felony conviction, although as the court in *Christmas* noted, those authorities offer differing rationales for that position.[98]

The Seventh Circuit found it unnecessary to decide which of the foregoing views is the better one because defendant waived her right to reversal on the ground of the exclusion of the prior conviction. Neither party had raised the issue of the inapplicability of Rule 609(a)(1) before the district judge and the issue was presented to the appellate court for the first time in defendant's reply brief. Defendant apparently conceded that it is well established that an issue not first presented to the district court may not be raised before the appellate court as a ground for reversal.[99] However, defendant argued that the appellate court should reach the issue because the court's failure to consider it would work a manifest injustice on her. The appellate court disagreed, although its reasoning on this point is somewhat confused.[100] Ultimately, although the court held

94. *Id.* at 1290.

95. The court in *Christmas* cited as examples the following decisions: Leonard v. Argento, 699 F.2d 874, 895 (7th Cir.), *cert. denied*, 464 U.S. 815 (1983); Howard v. Gonzales, 658 F.2d 352, 358-59 (5th Cir. 1981); Calhoun v. Baylor, 646 F.2d 1158, 1163 (6th Cir. 1981); Shingleton v. Armour Velvet Corp., 621 F.2d 180, 183 (5th Cir. 1980) (per curiam), *cited in Christmas*, 759 F.2d at 1290.

96. 741 F.2d 577 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 2157 (1985).

97. The court cited as examples the following commentators: LOUISDELL & MUELLER, 3 FEDERAL EVIDENCE § 316 at 322, 324-35 (1979 & Supp. 1984); MCCORMICK, EVIDENCE § 43 at 11 (Supp. 1978), *cited in Christmas*, 759 F.2d at 1291.

98. For example, one authority concludes that Rule 403 may be invoked because although the language of Rule 609(a) suggests no discretion, that interpretation leads to absurd and unfair results. 10 MOORE'S FEDERAL PRACTICE § 609.03 (1982), *cited in Christmas*, 759 F.2d at 1291.

99. *Christmas*, 759 F.2d at 1291 [citations omitted].

100. The defendant argued that the balancing test of Rule 403 (relevant evidence should be excluded if its prejudicial effect *substantially* outweighs probative value) rather than that of Rule 609(a)(1) (which does not include the word "substantially") should have been applied. The court

that defendant had waived the issue, and although it appeared to assume without deciding that the balancing test of Rule 609(a)(1) applied to the instant case,[101] the court nevertheless conducted its own analysis of the exclusion of the prior conviction under Rule 403. According to the court, even if Rule 403 was the applicable rule, the conviction was properly excluded because, although probative, it was merely cumulative.[102]

Finally, the Seventh Circuit affirmed on equitable grounds, reasoning that reversal would work a greater injustice on plaintiff than on defendant.[103] Given the amount of discussion the court devoted to an issue that it declined to decide (particularly where the court could have dismissed the issue simply on the basis that defendant had waived it), it appears that the court would be inclined to take a position, given the right vehicle.[104] Absent an amendment of the Rule clarifying the use of prior convictions to impeach witnesses in civil cases,[105] it would be help-

stated that "if we were to agree that Rule 403 should have been applied, then we would probably have had to reverse" but later stated that "it is not at all clear that if the district judge had decided to exclude the evidence under Rule 403, we would have found that decision to be an abuse of discretion." *Christmas*, 759 F.2d at 1292. The court correctly noted that the difference in language in Rules 403 and 609(a)(1) is:

> not necessarily a semantic difference. [Citations omitted]. Under Rule 609(a)(1), a prior felony conviction may only be admitted if the probative value is not outweighed by the prejudicial effect; it must be admitted under Rule 403, however, unless the prejudicial effect *substantially* outweighs probative value. Thus, Rule 609(a)(1) leans heavily toward exclusion, while Rule 403 leans heavily toward admissibility.

Id.

101. The court never expressly stated that this was its position. However, in setting forth the various viewpoints on the issue of which rule governs the admissibility of prior convictions in civil cases, the court noted that the Seventh Circuit "has assumed without deciding that the balancing test of Rule 609(a)(1) applies . . . ." *Christmas*, 759 F.2d at 1290. Since the court expressly declined to take a position on the issue, presumably the governing principle in the Seventh Circuit after *Christmas* continues to be that the court assumes without deciding that the balancing test of Rule 609(a)(1) applies.

102. Christmas, a young man, admitted that he had been unemployed most of his adult life due to no disability. "Even without the rape conviction, Christmas presented the image of a man unlikely to lead a traditional upstanding life." *Christmas*, 759 F.2d at 1293. It is debatable whether the conviction was properly excluded on the ground that it was merely cumulative, since it appears there was no evidence concerning plaintiff's lifestyle other than his lack of employment. It is at least quite ironic that in a case involving the prior conviction rule, designed primarily to prevent undue *prejudice* to persons with prior convictions, the exclusion of such evidence was upheld on the ground that the evidence was cumulative.

103. Defendant was represented by Corporation Counsel of Chicago. Plaintiff, an individual, would be put to the expense, uncertainty, and delay of further proceedings in a case already three and one-half years old on a ground that required the court to decide a difficult issue, solely because of defendant's "inexcusable failure" to raise the issue below. *Christmas*, 759 F.2d at 1293.

104. The court noted that the district court did not issue an opinion, there had been no briefing in the Seventh Circuit, and plaintiff had no opportunity to respond to the issue. *Id.*

105. Writers have urged that such an amendment be enacted. *See, e.g.*, EMERGING PROBLEMS, *supra* note 4, at 172 ("Clarification by amendment would be useful to indicate what protection, if any, . . . civil litigants are entitled to under the rule.")

ful for the district courts to have a definitive ruling from the Seventh Circuit on the issue.

In contrast to *Christmas v. Sanders*, the Seventh Circuit in *United States v. Kuecker*[106] took a definite stand on another issue raised by Rule 609. The evidentiary issue on appeal was whether a trial court has any discretion to prevent the introduction, for impeachment purposes, of evidence of prior convictions of crimes involving dishonesty or false statement. The Seventh Circuit held that a trial court has no discretion to prevent introduction of such evidence.[107]

In *Kuecker*, defendant was convicted on twelve counts of mail fraud and three counts of wire fraud. Prior to trial, defendant made a motion *in limine* to prevent the government from introducing evidence of defendant's prior mail fraud conviction. In his motion, defendant argued that the trial court should balance the prejudice to him against the conviction's probative value, pursuant to Rule 403. The defendant also asserted that Rules 404[108] and 609 supported his position. The government, in its response to defendant's motion, asserted that the sole purpose for the introduction of the prior conviction was to impeach the defendant should he choose to testify, and that the probative value of the evidence substantially outweighed the danger of prejudice. The government also asserted that Rule 404 was inapplicable because it applies only to evidence introduced to prove character, not to impeach credibility.[109]

106. 740 F.2d 496 (7th Cir. 1984).

107. *Id.* at 502. The one caveat to the court's holding is that the admissibility of prior convictions for crimes involving dishonesty or false statement is subject to the ten-year time limit embodied in FED. R. EVID. 609(b). That Rule provides in relevant part:

> Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for the conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

108. For the text of FED. R. EVID. 404, *see supra* notes 26 and 28. Generally, character evidence is not admissible for the purpose of proving that a person acted "in conformity therewith on a particular occasion," but such evidence may be used for other purposes, including for impeachment of a witness's (including a defendant's) credibility. An analysis of the policy considerations raised by the interplay of Rules 404 and 609 is beyond the scope of this article. It is well established that the government may introduce prior bad acts, including convictions, of an accused if it can establish that the evidence is offered for a purpose *other than* to prove the defendant's propensity to commit crimes. *See supra* notes 28 to 46 and accompanying text. At the same time, it is generally agreed that once a defendant's criminal record is revealed to the jury, a limiting instruction that the evidence is only to be considered for the purpose of evaluating the defendant's credibility rather than as evidence of his guilt is practically useless. *See, e.g.*, Note, *To Take the Stand or Not to Take the Stand: The Dilemma of the Defendant with a Criminal Record*, 4 COLUM. J.L. & SOC. PROB. 215, 218-19 (1968).

109. *See supra* note 108. The correctness of the government's assertion is so firmly established that the Seventh Circuit did not even address the issue in its opinion.

The trial court denied defendant's motion. The defendant, accordingly, did not take the stand.

On appeal, the Seventh Circuit noted that in *United States v. Papia*,[110] it had specifically reserved the issue of whether district courts retain discretion under Rule 403 to exclude a prior conviction admissible under Rule 609(a)(2). Rule 609(a)(2) provides that evidence of a prior conviction may be used to attack the credibility of a witness "but only if the crime . . . involved dishonesty or false statement." As a preliminary matter, the Seventh Circuit noted that the balancing test incorporated in Rule 609(a)(1) is specifically omitted from 609(a)(2). Also, the defendant in *Kuecker* conceded that mail fraud involves "dishonesty or false statement" for Rule 609 purposes.[111] Thus, according to the court, Rule 609(a)(2) was the applicable rule, and the only issue was whether that Rule is subject to the balancing test of Rule 403.

The Seventh Circuit first noted that since its decision in *Papia*,[112] "all circuits that have decided the issue have ruled that evidence of prior convictions for crimes involving 'dishonesty or false statement' is admissible without a balancing of probative value versus prejudicial effect."[113] The Seventh Circuit carefully reviewed the rationales of the two leading cases. In *United States v. Wong*,[114] the Third Circuit thoroughly examined the legislative history of Rule 609(a) to reach its conclusion that a trial court has no discretion to exclude 609(a)(2) crimes. In adopting the holding of *Wong*, the Seventh Circuit in *Kuecker* simply stated, without further discussion, that two citations from the legislative history of Rule 609(a) "suffice[d] to demonstrate the propriety of the prevailing view."[115] The Conference Report states: "The admission of prior convictions involving dishonesty and false statement is not within the discretion of the court. Such convictions are peculiarly probative of credibility and, under this rule, are always to be admitted."[116]

110. 560 F.2d 827, 845 n. 10 (7th Cir. 1977).

111. The courts have had no difficulty in finding that crimes involving fraud are crimes of "dishonesty or false statement." *See, e.g.*, United States v. Brashier, 548 F.2d 1315 (9th Cir. 1976), *cert. denied*, 429 U.S. 1111 (1977) (mail fraud); United States v. Cohen, 544 F.2d 781 (5th Cir.), *cert. denied*, 431 U.S. 914 (1977).

112. 560 F.2d 827 (7th Cir. 1977).

113. *Kuecker*, 740 F.2d at 501 (citing United States v. Wong, 703 F.2d 65, 66-68 (3d Cir.), *cert. denied*, 464 U.S. 842 (1983); United States v. Kiendra, 663 F.2d 349, 354 (1st Cir. 1981); United States v. Leyva, 659 F.2d 118, 122 (9th Cir. 1981), *cert. denied*, 454 U.S. 1156 (1982); United States v. Toney, 615 F.2d 277, 279 (5th Cir.), *cert. denied*, 449 U.S. 985 (1980)).

114. 703 F.2d 65 (3d Cir.), *cert. denied*, 464 U.S. 842 (1983).

115. *Kuecker*, 740 F.2d at 501.

116. H.R. REP. No. 1597, 93d Cong., 2d Sess. 9, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7098, 7103, *quoted in Kuecker*, 740 F.2d at 501. The second citation from the legislative history quoted in *Kuecker* is to the same effect.

The court in *Kuecker* also relied on another leading case, *United States v. Kiendra*,[117] finding that "the First Circuit in *Kiendra* persuasively resolves any residual doubt about the possible conflict between rules 403 and 609(a)(2) upon which the defendant [Kuecker] bases his claim that a trial court must always balance probativeness against prejudice."[118] The Seventh Circuit first noted that Rule 403 is the general evidentiary provision that permits the exclusion of relevant evidence that "is substantially outweighed by the danger of unfair prejudice" to the defendant. According to the Seventh Circuit, the First Circuit in *Kiendra* correctly concluded that Rule 609 controls any conflict between the provision in Rule 403 that provides "although relevant, evidence *may be excluded* if its probative value is substantially outweighed" and the provision in Rule 609(a)(2) that provides that "evidence that he has been convicted of a crime *shall be admitted* . . . but only if the crime . . . involved dishonesty or false statement."[119] The Seventh Circuit agreed with the *Kiendra* court's rationale for the conclusion that Rule 609 controls any possible conflict between Rules 609 and 403. That rationale was stated by the *Kiendra* court as follows: "Rule 403 is a general provision intended to govern a wide landscape of evidentiary concerns; Rule 609 is a narrow provision intended to regulate the impeachment of witnesses who have been convicted of prior crimes."[120] After quoting the foregoing passage with approval, the Seventh Circuit added that as a general rule of statutory construction, specific language in one provision controls over the general language of another. Thus, in this context, the specific language of Rule 609 controls over the general language of Rule 403.

Finally, the Seventh Circuit found additional support for its holding in the fact that certain language in a draft of Rule 609 was eliminated from the final version. In a draft version of the Rule, the balancing of prejudice versus probativeness specifically applied to felonies *and* to crimes involving dishonesty or false statement, regardless of the punishment. In the final version of Rule 609(a)(2), the language requiring balancing for crimes of dishonesty or false statement was omitted.[121]

The rule adopted by the Seventh Circuit in *Kuecker* is undoubtedly in accord with the legislative intent,[122] and the court's adoption is a pre-

117. 663 F.2d 349 (1st Cir. 1981).
118. *Kuecker*, 740 F.2d at 502.
119. *Id.* (emphasis added by the court).
120. *Kiendra*, 663 F.2d at 354, *quoted in Kuecker*, 740 F.2d at 502.
121. *Kuecker*, 740 F.2d at 502 (citing 51 F.R.D. 315 at 391, 393 (1973)).
122. *See supra* notes 116, 120 and accompanying text.

dictable and sound result.[123] Indeed, in light of the Rule's legislative history, perhaps the only surprising aspect is that it has taken the Circuit Courts of Appeals ten years (the length of time the Rules have been in effect) to reach a consensus on the matter. Again, the courts' previous indecision is probably attributable to the controversy surrounding the entire issue of the use of prior convictions, the many revisions of the Rule, and perhaps most importantly, defendants' strenuous efforts to exclude such damaging evidence.

The Seventh Circuit during the 1984-85 term had occasion to apply the rule it adopted in the *Kuecker* decision in *United States v. Noble.*[124] While *Noble* broke no new ground, it is an excellent example of the interwoven nature of the Federal Rules of Evidence. Very few of the Rules may be considered in isolation; the possible interplay between two or more rules must always be considered.

In *Noble*, defendant was convicted of counterfeiting Federal Reserve Notes; he did not testify. At trial, defense counsel introduced a taped conversation between an undercover agent and defendant, wherein defendant denied having any knowledge of counterfeiting operations or of his (Noble's) prior counterfeiting activities with a Mr. Handelman. The government then moved to impeach the defendant's taped statements with the introduction of his prior counterfeiting conviction. The district court admitted the prior conviction pursuant to Rules 806[125] and 609(a)(2).[126]

The Seventh Circuit affirmed that evidentiary ruling. The appellate court noted that the Advisory Committee Note to proposed Rule 806 states that "[T]he declarant of a hearsay statement which is admitted into evidence is in effect a witness. His credibility should in fairness be

123. *But see supra* note 108 regarding some of the policy considerations raised by the rule the Seventh Circuit has adopted. The defendant with a criminal record is placed in the dilemma of either taking the stand and being impeached with his prior convictions, in which case the jury is likely to, despite limiting instructions, regard the convictions as evidence of guilt, or not taking the stand, risking the danger that the jury will conclude he is guilty. Some commentators have suggested that such a "choice" runs counter to our traditional notions of justice. *See, e.g.*, Note, *Constitutional Problems Inherent in the Admissibility of Prior Record Conviction Evidence for the Purpose of Impeaching the Credibility of the Defendant Witness*, 37 U. CINN. L. REV. 168 (1968). Of course, no one denies that there are competing interests at stake, which is precisely why prior conviction evidence is so controversial.

124. 754 F.2d 1324 (7th Cir.), *cert. denied*, 106 S. Ct. 63 (1985).

125. FED. R. EVID. 806 provides that when a hearsay statement (in *Noble*, defendant's tape-recorded statement) has been admitted into evidence, the credibility of the declarant may be attacked by evidence "which would be admissible for those purposes if declarant had testified as a witness." The Rule is infrequently invoked; *Noble* is the only Seventh Circuit decision this term which addressed it. As seen in that case, the Rule provides the government with a means for bringing to the attention of the jury a defendant's prior convictions even where the defendant does not testify.

126. *Noble*, 754 F.2d at 1330.

subject to impeachment and support as though he had in fact testified. *See* Rules 608 and 609 . . . ."[127] The court found that when defense counsel introduced into evidence the taped conversation containing the defendant's exculpatory hearsay statements, counsel placed the defendant's credibility in issue. Thus, Rule 806, which allows impeachment of a non-testifying defendant, was properly applied by the district court.[128] Next, the Seventh Circuit examined the specific evidence used to impeach — the prior counterfeiting conviction — and held that it was properly admitted, without any judicial balancing, under Rule 609(a)(2) and the Seventh Circuit's holding in *United States v. Kuecker*.[129]

With respect to Rule 609(a)(2), *Noble* is simply a straightforward application of *Kuecker*. The interplay between Rules 806 and 609(a)(2), however, provides the government with a powerful tool that can be used against an unwary defendant.[130] The existence of that tool points up the competing interests at stake when prior conviction evidence is sought to be introduced. On the one hand is the jury's need to assess relevant evidence, including the defendant's credibility, in its search for the truth. On the other hand is our system's fundamental notion that the defendant is presumed innocent until proven guilty. The admission of prior convictions to impeach poses the grave danger that the jury will view that evidence as evidence of guilt. A balance had to be struck somewhere, however, by the legislature; the decision it reached on convictions involving dishonesty or false statement, as revealed by the legislative history and as interpreted by the courts, is a reasonable one. The legislature determined that because such convictions are peculiarly probative of credibility, the admission of those convictions is not within the discretion of the court.[131] While alternative solutions to the problems posed by prior conviction evidence have been advanced,[132] no solution is free of problems. The Seventh Circuit in *Kuecker* and *Noble* commendably adopted the legislature's solution, as it has been interpreted by all the Circuit Courts of Appeals that have addressed the issue.

127. *Id.* at 1331 (quoting FED. R. EVID. 806, Advisory Committee Note).

128. *Id.*

129. *Id.* (citing United States v. Kuecker, 740 F.2d 496, 501 (7th Cir. 1984)).

130. The court in *Noble* noted that defense "counsel's comment when he learned that the court was allowing the use of the conviction was: 'quite frankly, I have to admit to being caught flatfooted as to this . . . . I am totally shocked and absolutely unprepared that this would happen and that this would be admitted . . . .'" *Noble*, 754 F.2d at 1335 n. 10. The Seventh Circuit also rejected Noble's ineffective assistance of counsel claim. *Id.* at 1335-36.

131. *See supra* note 116 and accompanying text.

132. *See* 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 609[02] at 609-58 to -60 (1985) (summarizing the "four main solutions" that have been proposed by courts, commentators, and the Uniform Rules of Evidence, including the advantages and disadvantages of each).

RULE 701: OPINION TESTIMONY BY LAY WITNESSES

Rule 701 provides that a lay witness may testify to an opinion or inference that is rationally based on his perception and helpful either to a clear understanding of his testimony or to the determination of a fact in issue.[133] The Rule assumes that a lay witness will testify in as "raw a form as practicable" but permits inferences or opinions if it aids the trier of fact.[134] Article VII, in general, and Rule 701, in particular, reflect the general philosophy of the Federal Rules of Evidence which favors the admissibility of relevant evidence.[135] The Seventh Circuit has traditionally held that the decision concerning whether opinion testimony is admissible is within the discretion of the trial court.[136] Consequently, the review of the application of Rule 701 in most cases is cursory and the analysis is usually limited to a search for an abuse of discretion by the trial court.

An example of the limited amount of review the Seventh Circuit will perform when Rule 701 is at issue is illustrated in *Kelsay v. Consolidated Rail Corporation*.[137] In *Kelsay*, the plaintiff appealed from a jury verdict in favor of the defendants.[138] The suit arose out of an accident between plaintiff's decedent and a train. A white line was painted on the street before the railroad crossing where the accident occurred.[139] The plaintiff claimed that the trial judge erred in allowing two witnesses to testify regarding the legal significance of the white line.

The testimony of the two witnesses was important to the defendants' attempt to show that the plaintiff was contributorily negligent.[140] The first witness was the county sheriff. On cross-examination the defendant

133. FED. R. EVID. 701 states:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are: (a) rationally based on the perception of the witness; and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

134. *See* 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 701[01] (1982).

135. FED. R. EVID. 704, Advisory Committee Note states: "Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admissions of opinions which would merely tell the jury what result to reach, ..."

136. *See* United States v. Baskes, 649 F.2d 471, 478-79 (7th Cir. 1980), *cert. denied*, 450 U.S. 1000 (1981); United States v. Jackson, 688 F.2d 1121, 1123 (7th Cir. 1982).

137. 749 F.2d 437 (7th Cir. 1984).

138. *Id.* at 440. One defendant, Amtrak, owned and the other defendant, Conrail, operated the train involved in the accident.

139. *Id.* at 446. The white line was painted on the street thirty-one feet south of the railroad crossing.

140. *Id.* Evidence of a failure to abide by regulations that require motorists to stop could lead the jury to conclude that the plaintiff was contributorily negligent, especially in light of the court's instructions that violation of a safety regulation or statute is presumptively an act of negligence.

asked the sheriff about the white line. Over plaintiff's objection, the trial court allowed the witness to answer that the white line, in his opinion, is a place to stop.[141] The second witness was a safety manager.[142] The defendant again asked what the white line meant. The witness responded that "the state law means slow down."[143] Plaintiff contended that this testimony should be categorized as lay opinion testimony about the law and should not have been allowed because the witnesses did not meet the requirements set out in Rule 701.[144]

The court began its analysis by stating that it believed that the jury understood that the two witnesses were merely expressing their own personal opinions. The court then stated that the decision of whether to admit testimony under Rule 701 is within the sound discretion of the trial court and will not be reversed absent a finding that the trial court abused its discretion.[145] After refusing to analyze the Rule in detail, the court assumed without deciding that the trial court erred in allowing the testimony. The court suggested that it would have been preferable to have given a specific jury instruction on the legal significance of the white line.[146] However, the court held that no reversible error occurred because the court found the testimony ambiguous and the testimony at issue "encompassed only a few lines in a five-day trial."[147]

In *Kelsay*, the court fashioned an analysis that basically rubberstamped the lower court's decision. Rule 701 explicitly limits lay testimony in the form of opinion to testimony which is rationally based on the perception of the witness and helpful to a clear understanding of his testimony or to determination of a fact in issue.[148] It does not appear that the opinions at issue here met either criteria. The testimony that the white line means to stop is not an opinion rationally based on the perception of the witness. This is testimony that should have been elicited from an expert.[149] This is even more apparent since the court found that no state statute imposed a duty to stop at a white line.[150] Finally, the court's finding that no reversible error occurred because of the brevity of

141. *Id.* at 446.
142. *Id.* at 439. The safety manager was employed by the G.T.E. Corporation, the plaintiff's employer.
143. *Id.* at 446-47.
144. *See supra* note 133.
145. *See supra* note 136.
146. *Kelsay*, 749 F.2d at 448.
147. *Id.*
148. FED. R. EVID. 701. *See supra* note 133.
149. *See* Hintz v. Jamison, 743 F.2d 535 (7th Cir. 1984) (district court did not abuse its discretion in allowing the plaintiff's expert witness, a civil engineer, to help explain the Illinois road sign requirements).
150. *Kelsay*, 749 F.2d at 448.

the testimony disregards the importance of the testimony and fails to take into account the vagaries that may guide a jury.

In *Gorby v. Schneider Tank Lines, Inc.*,[151] the Seventh Circuit again deferred to the trial judge's decision regarding the admissibility of opinion testimony by a lay witness. In contrast to *Kelsay*,[152] where the trial court allowed opinion testimony that appeared to be outside the witnesses' firsthand knowledge or observation, the trial court in *Gorby* excluded opinion testimony that appeared to be within the witness' observation.

In *Gorby*, the plaintiff was severely injured when the defendant's semi-tanker truck collided with the plaintiff's pick-up truck at a highway intersection.[153] The jury rendered a verdict in favor of the plaintiff. The defendant contended that excluding certain lay opinion testimony constituted reversible error. At trial, the defendant offered the testimony of an eyewitness to the collision. The witness testified that he had been a licensed driver for twenty-nine years and that visibility was good on the night of the accident.[154] The defendant then sought two opinions from the witness. The witness was prepared to testify that, in his opinion, the truck driver had insufficient time to avoid the accident.[155] The court characterized this testimony as stating that the defendant did everything he could to avoid the accident.[156] The court then determined that the witness did not have firsthand knowledge because he was not present in the truck with the driver. Therefore, the witness could not know the exact measures the defendant took to avoid the accident. In addition, the witness was not familiar with the safety equipment on the truck and he lacked other specific information about the defendant's truck. Thus, the court concluded that the witness did not have the personal knowledge necessary to formulate an admissible lay opinion.[157]

The witness was also prepared to testify that the plaintiff could have avoided the accident.[158] The appellate court found that this was a closer question because the plaintiff's pick-up truck was similar to a vehicle with which the witness was familiar. However, limiting its review to identifying an abuse of discretion, the court concluded that there was no

151. 741 F.2d 1015 (7th Cir. 1984).
152. 749 F.2d 437 (7th Cir. 1984).
153. *Gorby*, 741 F.2d at 1016.
154. *Id.* at 1020. The accident occurred at approximately 11:00 p.m. on October 5, 1977.
155. *Id.* at 1021.
156. *Id.*
157. *Id.*
158. *Id.*

abuse by the trial court.[159] The court found nothing in the record to show that the witness was familiar with the particular type of pick-up truck the plaintiff drove or the safety features of the truck. Therefore, the trial judge could have found that the witness's testimony was based upon speculation and not firsthand knowledge.[160] Consequently, the appellate court found no reversible error.

This decision appears to be opposed to the general philosophy of the Federal Rules, which favors the admissibility of relevant evidence.[161] In addition, the court's analysis appears to misconstrue the rationale underlying Rule 701. Rule 701 allows opinion testimony by a lay witness if it will aid the trier of fact and is rationally based on his perception.[162] The witness in *Gorby* was not testifying as an expert witness. Thus it is not important whether he was familiar with the safety equipment on the vehicles. The witness was testifying to what he perceived to have occurred. Clearly the court could have excluded the testimony if it found that it was not helpful to a clear understanding of his testimony. However, no such finding was made by either court. Thus it appears that the trial court confused expert testimony and opinion testimony by lay persons. Furthermore, the appellate court's limited review failed to fully analyze the relevant issues in this case.

RULE 702: EXPERT TESTIMONY

Rule 702 allows an expert witness to testify if his knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.[163] The Rule is broad in scope and recognizes that it is often difficult to evaluate facts without the help of specialized knowledge.[164] Therefore, the Rule allows testimony in any specialized field of knowledge, not just in scientific or technical areas. The definition of expert is also broad since it includes persons qualified by knowledge, skill, experience, training or education.[165] Thus, an expert need not be qualified by education alone but may be qualified through special knowledge or expe-

159. *Id.*
160. *Id.* at 1022.
161. FED. R. EVID. 402.
162. *See supra* note 133.
163. FED. R. EVID. 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise."
164. *See* FED. R. EVID. 702, Advisory Committee Note.
165. FED. R. EVID. 702, Advisory Committee Note states: "The rule is broadly phrased . . . the expert is viewed, not in a narrow sense, but as a person qualified by 'knowledge, skill, experience, training, or education.' "

rience. During the 1984-85 term, the Seventh Circuit decided several cases that dealt with Rule 702. In each case the Seventh Circuit read the Rule in a broad manner.

An example of an expert qualified by experience is illustrated in *Western Industries, Inc. v. Newcor Canada, Ltd.*[166] In *Western Industries*, the plaintiff purchased custom-built welding machinery from the defendant.[167] The machines did not work correctly and the plaintiff brought a breach of contract action against defendant. The defendant claimed that the custom in the specialty welding machine trade is not to give a disappointed buyer consequential damages.[168] Therefore, the defendant argued that the district court erred in refusing to allow the defendant to introduce testimony concerning the existence of such a trade custom.

The appellate court held that the trial court erred in not allowing the defendant to put on three witnesses to testify to the alleged custom.[169] The court began its analysis by stating that under the "liberal definition" of an expert in Rule 702, all of the witnesses could have been readily qualified as expert witnesses on the question of trade custom. The court referred to the Advisory Committee Note which states that "within the scope of the rule are . . . the large group sometimes called skilled witnesses."[170] Two of the witnesses were experienced executives of companies that manufactured specialty welding machinery, with almost seventy-five years of experience in selling the type of machinery involved. The other witness was a former executive of Western Industries and had extensive experience buying welding machinery. Furthermore, each had negotiated many sales contracts similar to the one in issue. Therefore, the existence of the alleged custom was a matter which they could infer from their own observation and experience. Thus, the court concluded that the witnesses should have been allowed to testify under Rule 702 because their testimony would have assisted in the determination of a fact in issue and they were qualified by their knowledge and experience.[171] The court's decision in *Western Industries* is consis-

166. 739 F.2d 1198 (7th Cir. 1984).

167. *Id.* at 1201. The machinery was needed to manufacture the cavities for microwave ovens.

168. *Id.* The defendant contended it was not liable for any damages in excess of the purchase price.

169. *Id.* at 1201-02.

170. FED. R. EVID. 702, Advisory Committee Note states: "Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g. physicians, physicists, and architects, but also the large group sometimes called skilled witnesses, such as bankers or landowners testifying to land values."

171. 739 F.2d at 1202.

tent with the broad definition of expert witness found in Rule 702.[172]

Douglass v. Hustler Magazine, Inc.[173] also illustrates the broad scope of the definition of expert witness that the Seventh Circuit continued to embrace during the last term. In *Douglass*, the plaintiff alleged that the defendant had invaded her right of privacy by publishing nude photographs.[174] The plaintiff had authorized *Playboy* magazine to publish the photographs but did not authorize the defendant to use the photographs. The plaintiff used an expert witness to distinguish the two magazines.[175] On appeal, the defendant claimed that the trial court erred in allowing the plaintiff to use an expert to testify to the tastelessness and vulgarity of the defendant's magazine.

The court began its analysis by noting that experts are allowed to testify in obscenity cases.[176] The court could find no basis for distinguishing a defamation case from obscenity cases.[177] The court also noted that although expert testimony is not required on matters of taste, it is not forbidden.[178] Finding no constitutional reason to preclude the expert testimony, the court then looked to see if the testimony was admissable under Rule 702.[179]

The court noted that Rule 702 defines experts broadly to include skilled laymen. The court found that the expert was more than a skilled lay person since he was an experienced English teacher, writer and editor. The court was skeptical, however, as to whether an expert should be allowed to testify on as vague and impressionistic an issue as offensiveness.[180] However, the court acknowledged that expert testimony is admissible whenever it concerns a topic on which a lay jury would be assisted by such testimony. The court concluded that a jury cannot be assumed to be familiar with the type of magazines at issue. Therefore, the court could not find as a matter of law that the testimony could not have helped the jury make the distinction upon which the plaintiff's case depended and held the expert testimony was admissible. The court's analysis in *Douglass*, while brief, was consistent with the broad and inclusive nature of Rule 702.

172. *See supra* notes 163-164 and accompanying text.
173. 769 F.2d 1128 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1489 (1986).
174. *Id.* at 1131-32.
175. *Id.* at 1441.
176. *Id.* at 1442. *See* United States v. Bagnell, 879 F.2d 826, 833-34 (11th Cir. 1982).
177. 769 F.2d at 1442.
178. *See* Pinkus v. United States, 436 U.S. 293, 302 (1978).
179. *See supra* note 163.
180. *Douglass*, 769 F.2d at 1138.

HEARSAY

Hearsay[181] issues are probably the most litigated of all the evidentiary issues addressed by the Federal Rules of Evidence. The area is fraught with conceptual problems. The courts struggle with it,[182] lawyers and judges are spurred to creativity by it,[183] and the commentators are endlessly fascinated by it.[184] A concise, useful overview of the hearsay problem is presented in the Advisory Committee Note to Article VIII of the Federal Rules of Evidence.[185]

The Seventh Circuit addressed numerous hearsay issues during the 1984-85 term. A review of the case law reveals that no more specific conclusion can be drawn than that the Seventh Circuit applies the hearsay rules liberally and flexibly, favoring admissibility. In that regard, the Seventh Circuit is in line with the general trend among the federal courts.[186] In some areas, notably the co-conspirator exception,[187] the court seems to go too far, refusing to even consider confrontation clause[188] challenges to evidence admissible under the Federal Rule.[189]

181. Article VIII of the Rules, FED. R. EVID. 801-806, addresses hearsay. The approach to hearsay in the Rules is that of the common law, *i.e.*, a general rule excluding hearsay, with exceptions under which evidence is not required to be excluded even though hearsay. FED. R. EVID. 801 provides definitions of "statement," "declarant," "hearsay," and "statements which are not hearsay." FED. R. EVID. 801(c) defines "hearsay" as follows: " 'Hearsay' 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."

182. For example, in Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984), the trial court admitted certain statements into evidence as prior inconsistent statements under FED. R. EVID. 801(d)(1)(A). The Seventh Circuit decided that the foregoing Rule was inapplicable. *Bell*, 746 F.2d at 1274 n. 83. The Seventh Circuit considered the applicability of two other Rules, ultimately concluding that the statements were admissible because they were non-hearsay. *Id.* at 1274-75.

183. Particularly interesting arguments are advanced where the proponent of an out-of-court statement offers it into evidence on the theory that the statement is not offered to prove the truth of the matter asserted and thus is admissible as non-hearsay. *See, e.g.*, United States v. Irwin, 736 F.2d 1489 (11th Cir. 1984). In that case, defendants were charged with bank robbery. An FBI agent testified that an eyewitness, who had previously stated that he had made no prior identification of defendant from photographs, had in fact selected defendant's picture from a photograph spread. The FBI agent's testimony was admitted as non-hearsay on the theory that the testimony was not offered to prove the identity of the person the witness saw leaving the bank, but rather was offered to show that the witness had made a prior identification.

184. *See, e.g.*, AMERICAN ASSOCIATION OF LAW LIBRARIES, 4 CURRENT LAW INDEX 303 (1983) (selective index to law review articles lists over 50 articles on hearsay evidence published in 1983).

185. Advisory Committee Note, Introductory Note: The Hearsay Problem, *reprinted in* FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES 99-103 (West 1984).

186. *See, e.g.*, Rossi, *The Silent Revolution*, 9 LITIGATION 13, 13 (1983) ("Three words describe the direction in which the Federal Rules of Evidence have taken us: *discretion, creativity*, and *admissibility*." [Emphasis in original]).

187. FED. R. EVID. 801(d)(2)(E) provides that a statement is not hearsay if it is offered against a party and is "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."

188. The confrontation clause secures an accused's right to confront witnesses against him. U.S. Const. amend. VI.

For the most part, however, the Seventh Circuit has succeeded in resolving the many difficult problems raised by the hearsay rules reasonably, fairly, and conscientiously.

RULE 804(B)(1): FORMER TESTIMONY

United States v. Feldman,[190] an important decision, was a case of first impression.[191] The issue before the appellate court was whether a deposition taken in an earlier civil proceeding was admissible in a later criminal prosecution. In *Feldman*, defendants Feldman and Martenson were found guilty of several counts of wire fraud from practices in connection with the sale of precious metal futures. The government's case relied heavily on the deposition of a former business associate, Sanburg, taken without any cross-examination in an earlier civil proceeding. The defendants in the civil proceeding were Sanburg, Feldman and Martenson. Unknown to Feldman and Martenson, Sanburg had agreed with the government the day before his deposition to testify against Feldman and Martenson in return for a promise that Sanburg himself would not be a target of any later legal proceedings. This agreement was not disclosed for almost a year, until just a short time before Feldman's and Marten-

189. Although the Seventh Circuit dealt with numerous co-conspirator cases this past term, those decisions are not discussed herein. For an excellent discussion of the Seventh Circuit's decisions on the co-conspirator exception during the 1983-84 term, as well as the Seventh Circuit's leading cases on the subject, *see Seventh Circuit Review—Evidence: Application and Refinement of the Federal Rules of Evidence in the Seventh Circuit*, 61 CHI.-KENT L. REV. 415-25 (1985). The court's decisions of the 1984-85 term mark no departure from precedent; rather, they illustrate that the court continues to clearly favor the admission of co-conspirator statements. Generally, it may be said that if a co-conspirator made the statement, it comes into evidence, under Seventh Circuit case law. Illustrative cases include the following: United States v. Koopmans, 757 F.2d 901 (7th Cir. 1985) (*held*, error for district court to admit certain hearsay statements under the co-conspirator exception where the statements were not made during the course of a conspiracy that the defendant later joined, but error was harmless); United States v. Zabic, 745 F.2d 464 (7th Cir. 1984) (in arson case, conspiracy continues until the conspirators collect the insurance proceeds; therefore, statements made after the building was burned but before the money was obtained are admissible under the co-conspirator exception); United States v. Magnus, 743 F.2d 517 (7th Cir. 1984) (trial court admitted certain statements under the co-conspirator exception; appellate court ruled that the statements were admissible as non-hearsay, because they were not offered to prove the truth of the matter asserted, even though the government had not argued that theory).

190. 761 F.2d 380 (7th Cir. 1985).

191. The Seventh Circuit in *Feldman* stated: "We have been unable to find any case squarely addressing the use of an uncross-examined civil deposition in a criminal proceeding. We therefore undertake our own analysis under both Fed. R. Evid. 804(b)(1) and the Confrontation Clause to determine if [the] deposition was properly admitted." *Id.* at 384. FED. R. EVID. 804(b)(1) provides:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: Testimony given as a witness at another hearing of the same or a 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.

son's criminal trial. At the time of Sanburg's deposition, the government had not returned a criminal indictment against Feldman or Martenson. Sanburg, whom the government knew to be terminally ill, died less than a month after his deposition. Both Feldman and Martenson received notice of Sanburg's deposition through counsel. Neither Feldman, Martenson, nor their attorneys attended the Sanburg deposition.

On appeal, the defendants argued that the admission of Sanburg's deposition violated their constitutional right to confront witnesses against them. The Seventh Circuit reversed the convictions, holding that the trial court erred in admitting the deposition under Rule 804(b)(1)[192] and that the admission of that evidence violated the confrontation clause.[193]

Rule 804(b)(1) requires that a defendant have sufficient notice[194] and opportunity for cross-examination of the declarant whose testimony is offered against him. The Seventh Circuit, relying on *United States v. Franklin*,[195] reasoned that "[m]ere 'naked opportunity' to cross-examine is not enough; there must also be a perceived 'real need or incentive to thoroughly cross-examine' at the time of the deposition."[196] Under the circumstances of the case, the court found that the defendants did not have the opportunity to cross-examine Sanburg. But, the court continued, even if the defendants had sufficient notice and opportunity to cross-examine, Rule 804(b)(1) also requires that the defendants had a "similar motive to develop the testimony by direct, cross, or redirect examination." The court looked to *Zenith Corp. v. Matsushita Electric Industrial Co.*,[197] which set forth four circumstances or factors which influence motive to develop testimony. Two of those factors are trial strategy and the potential penalties or financial stakes.[198] According to the Seventh Circuit, "[c]onsideration of [those two factors] persuades us that under Fed.R.Evid. 804(b)(1)'s 'similarity of motive' test, Sanburg's deposition was inadmissible in the criminal trial."[199]

With respect to the trial strategy factor, the court noted that in the

192. *See supra* note 191.

193. *Feldman*, 761 F.2d at 390.

194. The court in *Feldman* was not convinced that the notice given to the defendants met the requirements of FED. R. CIV. PRO. 30(b) but found it unnecessary to decide that issue. *Id.* at 385 n.5.

195. 235 F. Supp. 338 (D.D.C. 1964).

196. *Feldman*, 761 F.2d at 385 (quoting United States v. Franklin, 235 F. Supp. 338, 341 (D.D.C. 1964)).

197. 505 F. Supp. 1190 (E.D. Pa. 1980), *aff'd in part, rev'd in part*, 723 F.2d 319 (3d Cir. 1983).

198. Zenith Corp. v. Matsushita Electric Industrial Co., 505 F. Supp. 1190, 1252 (E.D. Pa. 1980).

199. *Feldman*, 761 F.2d at 385.

civil proceeding, neither of the defendants contested the government's motion for a permanent injunction. Their strategy was not to contest any of the government's claims. In contrast, in the criminal case, defendants vigorously sought to prove their innocence. The admission of Sanburg's testimony also failed under the criterion set forth in *Zenith* regarding the similarity of potential penalties or financial stakes. In the civil proceedings, neither defendant had any exposure to personal liability. According to the court, it was thus understandable that neither party attended Sanburg's deposition. In contrast, in the criminal proceeding, the defendants faced, and received, fines and imprisonment. (Each defendant had been sentenced by the trial court to twelve years of imprisonment and fined $38,000.)[200]

In short, at the time of the Sanburg deposition, no criminal charges were pending against the defendants, they had no reason to suspect that they should cross-examine Sanburg, and there was no party at the deposition who could be deemed a predecessor in interest to either defendant. For these reasons, the court held that the trial court erred in admitting the deposition under Rule 804(b)(1).[201]

The constitutional challenge to the admission of the deposition required a different analysis. The United States Supreme Court's test for admissibility where the declarant is unavailable is whether the testimony bears sufficient "indicia of reliability."[202] In *United States ex rel. Haywood v. Wolff*,[203] the Seventh Circuit set forth a test, derived from *Ohio v. Roberts*,[204] under which "statements are admissible even where there was no cross-examination if it is clear (1) that the declarant actually made the statement . . . and (2) there is circumstantial evidence supporting its veracity."[205] The court in *Feldman* found "Sanburg's testimony of dubious credibility,"[206] in part because of the agreement between the government and Sanburg. The government on appeal attempted to show that there was circumstantial evidence supporting Sanburg's deposition, but the court found that parts of the deposition were unsupported by any external evidence. Accordingly, the court concluded that sufficient indicia of reliability were not present; therefore, the admission of the deposition violated the confrontation clause.[207]

200. *Id.* at 383.
201. *Id.* at 384-85.
202. *Id.* at 387 (citing Ohio v. Roberts, 448 U.S. 56, 65-66 (1980)).
203. 685 F.2d 455 (7th Cir. 1981), *cert. denied*, 454 U.S. 1088 (1981).
204. 448 U.S. 56 (1980).
205. *Feldman*, 761 F.2d at 387.
206. *Id.* at 387.
207. *Id.* at 388.

Feldman is one of the few cases this past term in which the Seventh Circuit reversed a criminal conviction on an evidentiary ground. In *Feldman*, unlike most criminal appeals, the principal issue on appeal was the evidentiary one; moreover, the deposition was the government's main piece of evidence against the defendants. (The Seventh Circuit variously referred to the deposition as the "centerpiece" and "heart" of the government's case, and noted the deposition's "devastating effect at trial.") The decision is a well-reasoned one, properly focusing on the purposes and policy considerations behind the Federal Rule and the constitutional provision at issue, on basic principles of fairness, and on the circumstances surrounding Sanburg's deposition.

With respect to Rule 804(b)(1), the court in *Feldman* did not simply look at the language in the Rule that requires an "opportunity" to develop the former testimony by direct, cross, or redirect examination and then conclude that since the defendants received notice of Sanburg's deposition, the Rule was satisfied. Rather, the court properly focused on whether, at the time of the deposition, the defendants had a motive to cross-examine the deponent that was similar to the motive they had at the criminal trial to cross-examine the now unavailable declarant. Clearly, the Rule contemplates that where a defendant had an opportunity and similar motive to develop the prior testimony by cross-examination, it is fair to that defendant to allow that testimony to be used against him.[208] Thus the Seventh Circuit in *Feldman* was correct in looking to the circumstances surrounding the taking of the civil deposition to determine, in essence, whether it was fair to allow the Sanburg deposition to be used against the defendants.

Similarly, in conducting its constitutional analysis, the court focused on the circumstances surrounding the civil deposition to determine whether the deposition bore sufficient indicia of reliability to be admissible. The court noted that it has allowed uncross-examined testimony into evidence under certain circumstances.[209] In *Feldman*, however, Sanburg gave testimony which exculpated himself in exchange for immunity that would preserve his estate from any civil judgment, costs, or attorneys' fees. The court noted that when an immunity agreement is involved, there is substantial likelihood that the statements are self-serving and therefore unreliable.[210] Furthermore, the court found that the

208. The Advisory Committee Note to Rule 804(b)(1) states that the question of the admissibility of prior testimony "resolves itself into whether fairness allows imposing, upon the party against whom now offered, the handling of the witness on the earlier occasion."

209. *Feldman*, 761 F.2d at 387.

210. *Id.* at 388 (citing United States v. Turner, 475 F. Supp. 194, 198 (E.D. Mich. 1978)).

government produced insufficient external evidence to support Sanburg's deposition. In short, the court was clearly suspicious of Sanburg's motives in giving his deposition. The court properly focused on whether, under the circumstances, Sanburg's deposition could be considered reliable enough to satisfy the constitutional mandate of the Sixth Amendment.[211]

RULE 803(6): BUSINESS RECORDS

During the 1984-85 term, the Seventh Circuit addressed the business records exception to the hearsay rule[212] on several occasions and in a variety of factual contexts. In all the cases reviewed, the appellate court affirmed the trial court's evidentiary ruling admitting the record being challenged. The decisions illustrate that the district courts continue to construe the business records exception broadly and that the Seventh Circuit continues to accord great deference to the district courts' determinations in this area. Although most of the results reached are sound, at least one decision, *United States v. Kasvin*,[213] suggests that the district courts may be applying the exception too liberally, giving inadequate attention to the Rule's proviso that records which otherwise meet the Rule's requirements should be excluded if the circumstances of their preparation indicate lack of trustworthiness.

211. One other decision in the 1984-85 term addressed FED. R. EVID. 804(b)(1). In United States v. Pizarro, 756 F.2d 579 (7th Cir.), *cert. denied*, 105 S. Ct. 2686 (1985) (*Pizarro II*), the court held that the trial court did not abuse its discretion in finding that the declarant was not unavailable for purposes of FED. R. EVID. 804(b)(1) and thus the declarant's prior testimony was not admissible under that Rule. The trial court had found that the proponent of the statement, defendant Pizarro, had procured the absence of the declarant by threats; thus the declarant was not unavailable pursuant to FED. R. EVID. 804(a). The Seventh Circuit's decision in a prior proceeding of the *Pizarro* case, United States v. Pizarro, 717 F.2d 336, 349 (7th Cir. 1983) (*Pizarro I*) was one of the cases relied upon by the Seventh Circuit in United States v. Feldman, 761 F.2d 380 (7th Cir. 1985) on the issue of whether Feldman and Martenson had a "similar motive" to cross-examine Sanburg at his deposition. In *Pizarro I*, the Seventh Circuit held that the trial court erred in refusing to admit the proffered prior testimony, because the government did have both the opportunity and motive to develop the testimony at the prior proceeding.

212. FED. R. EVID. 803(6) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: 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, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances or 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.

213. 757 F.2d 887 (7th Cir.), *cert. denied*, 106 S. Ct. 592 (1985). *See infra* notes 223 to 242 and accompanying text.

In *United States v. Croft*,[214] defendant argued that the trial court erred in admitting into evidence computer printouts containing the University of Wisconsin's payroll records. Defendant contended that the Seventh Circuit's decision in *United States v. Weatherspoon*[215] required that the government must establish the accuracy of the input procedures before computer printouts can be introduced into evidence. The court acknowledged that even where a proper foundation[216] is established for a business record, it is inadmissible if "the source of information or the method or circumstances of preparation indicate lack of trustworthiness."[217] In *Croft*, defense counsel thoroughly cross-examined the witness testifying to the records concerning the accuracy of the computer and the input procedures. The printouts were reviewed and audited for accuracy on a regular basis and were relied upon by the University to complete tax forms for the Internal Revenue Service. Accordingly, the court found that the records' accuracy and reliability had been established and thus the trial court did not abuse its discretion in admitting the printouts.[218]

The only surprising aspect of *United States v. Croft* is that the Seventh Circuit found that the hearsay issue raised by defendant merited any discussion at all. Some state courts do have much more restrictive rules for the admission of computer printouts as opposed to other business records.[219] A few commentators have argued that the admissibility requirements are too lenient.[220] The federal courts, however, properly treat computer printouts the same as any other business record. *United*

214. 750 F.2d 1354 (7th Cir. 1984).

215. 581 F.2d 595 (7th Cir. 1978). In *Weatherspoon*, the Seventh Circuit held that computer printouts were properly admitted into evidence following the government's proof of "what the input procedures were, . . . that the input procedures and printouts were accurate within two percent, . . . that the computer was tested for internal programming errors on a monthly basis, and . . . that the printouts were made, maintained and relied on . . . in the ordinary course of . . . business activities." 581 F.2d at 598, *quoted in* United States v. Croft, 750 F.2d 1354, 1365 n.7.

216. The foundation elements for introducing a business record into evidence are contained in FED. R. EVID. 803(6), *supra* note 212. These elements include (1) that the record was kept in the course of a regularly conducted business activity and (2) that it was the regular practice of that business activity to make the record.

217. FED. R. EVID. 803(6).

218. *Croft*, 750 F.2d at 1354.

219. For a good discussion of the contrast between the federal courts' approach to computer printouts and the more restrictive approach of some state courts, particularly Illinois, *see* Comment, *Admitting Computer Generated Records: A Presumption of Reliability*, 18 J. MAR. L. REV. 115 (1984). *See, e.g.*, Grand Liquor Co. v. Department of Revenue, 67 Ill.2d 195, 367 N.E.2d 1238 (1977) (failure to present evidence of input procedures, programming and operation of computer affects admissibility of computer records).

220. *See, e.g.*, Note, *A Reconsideration of the Admissibility of Computer Generated Evidence*, 126 U. PA. L. REV. 425, 437-51 (1977).

States v. Croft[221] laid to rest any doubt left by *United States v. Weatherspoon*[222] that the proponent of a computer printout must establish with mathematical precision that the record is accurate.

As in *United States v. Croft*, the evidentiary issue on appeal in *United States v. Kasvin*[223] concerned the clause in Rule 803(6) that provides for the exclusion of a business record if "the source of information or other circumstances indicate lack of trustworthiness."[224] Defendant Kasvin, along with seven others, was indicted for various drug offenses, including conspiracy to knowingly and intentionally distribute and possess with intent to distribute marijuana. Six of Kasvin's co-defendants pled guilty. The evidence showed that in 1977 or 1978 four of Kasvin's co-defendants named in the indictment agreed to purchase, sell and distribute marijuana. Over the next five years, some twenty individuals were associated with the conspiracy. The headquarters for the operation became a house in Ingleside, Illinois, which was raided by federal law enforcement officers on April 9, 1982; Kasvin and seven others were arrested inside. A valid search warrant produced a large quantity of drugs and records of numerous drug transactions. Those records became an important part of the government's case against defendant Kasvin. A reconstruction of the records showed that in the eight months prior to the raid on April 9, 1982, defendant (identified as customer No. 5) obtained approximately 3,600 pounds of marijuana from the organization and delivered to it well over $1,000,000 in cash.[225]

Aside from the organization's records of drug transactions, the primary evidence that the government produced to link the defendant to the conspiracy was the testimony of several of Kasvin's co-defendants who had entered guilty pleas and one or more unindicted co-conspirators. Those witnesses testified as follows: Kasvin was known to them as "Smith" or "Smyth;" the persons associated with the operation were given numbers and Kasvin's number was 5; No. 5 was the single largest "customer" of the operation but at times he provided it with some high-quality marijuana; and for more than a year Kasvin was seen at the organization's place of business several times weekly.[226]

It is apparent, although the Seventh Circuit did not specifically state it, that the business records evidence substantially strengthened the gov-

221. 740 F.2d 1354 (7th Cir. 1984).
222. 581 F.2d 595 (7th Cir. 1978).
223. 757 F.2d 887 (7th Cir.), *cert. denied*, 106 S. Ct. 592 (1985).
224. FED. R. EVID. 803(6).
225. *Kasvin*, 757 F.2d at 889.
226. *Id.* at 889.

ernment's case against Kasvin. Without the link between the business records (showing transactions by customer No. 5) and the witnesses' testimony that the number assigned to Kasvin (whom the witnesses knew only as "Smith") was No. 5, it is likely that the government could not have proven its case against Kasvin. In fact, the district court had dismissed the count against defendant charging him with conspiracy and intentional possession with intent to distribute the 234 pounds of marijuana seized in the raid, on the ground that the government's evidence was insufficient.[227] After a jury trial, defendant was convicted of aiding and abetting the conspiracy.[228] In *Kasvin*, then, unlike many cases where the business records exception is an issue, the outcome of the case likely turned on the admission or exclusion of the records.

The drug organization had begun keeping records of marijuana purchases and sales approximately nine months prior to the raid. The records were entered in a general ledger by one of the defendants named in the indictment, Rodger, who was the girlfriend of the conspiracy's leader, Ashenfelter. Among those records were numerous receipts showing transactions between a "No. 5" and the organization, and witnesses had identified Kasvin as being No. 5. After extensive questioning of Ashenfelter by counsel for the government and for Kasvin, the trial judge found the records to have been made and kept in the course of a regularly conducted business activity by a person with knowledge as a regular practice of the business activity, and that the records were trustworthy for the purpose for which they were offered.[229] The trial judge accordingly admitted the records as business records under Rule 803(6). The trial judge also assigned Rule 803(24)[230] as an additional basis for admit-

227. *Id.*

228. One judge dissented "because the defendant could not have been convicted as an aider and abettor of the conspiracy and because the defendant was acquitted by the trial judge of being a member of the conspiracy." *Id.* at 893 (Swygert, J., dissenting). Judge Swygert did not address the business records issue.

229. *Id.* at 892.

230. FED. R. EVID. 803(24) is commonly referred to as one of the two residual exceptions to the rule against hearsay. Rule 803(24) provides that the following is not excluded by the hearsay rule, even though the declarant is available as a witness:

> 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 interest 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.

The second residual exception is found in FED. R. EVID. 804(b)(5). The language of 804(b)(5) is

ting the records.

Defendant Kasvin's argument on appeal that the records should have been excluded had considerably more merit than the defendant's argument in *United States v. Croft*.[231] According to the court in *Kasvin*, defendant "strenuously contend[ed] that the records were shown not to have been reliable and that the trustworthiness requirements of Rule[s] 803(6) and 803(24) were not satisfied."[232] In support of his contention, Kasvin pointed to the following evidence. First, Ashenfelter testified that at times the records were made by persons who may have been under the influence of cocaine; thus, according to defendant, it was probable that the records contained errors. Second, even if Ashenfelter's girlfriend, Rodger, who lived in the house with him at the organization's headquarters, had made errors in keeping the records, she would not have been subject to discharge. Third, Ashenfelter himself was mistaken as to the number assigned to Kasvin on the books. Fourth, unlike a legitimate business, there was no consistency in the organization's records.[233] Finally, Ashenfelter himself did not consider the records to be reliable.

The Seventh Circuit responded to defendant's argument first by noting that although Ashenfelter did not keep the records for income tax purposes, he did keep them to show the amount of money owed by people to whom he distributed drugs; that when errors were found, "hopefully they were corrected,"[234] according to Ashenfelter; and that the records would more accurately reflect the quantities of marijuana which passed through the headquarters than would Ashenfelter's memory. After setting forth the foregoing evidence, the court went on to hold, with little discussion, that there was no error in the admission of the business records.[235] The court acknowledged that business records may be excluded in the trial court's discretion if the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The court then quoted Rule 102[236] (without explaining its specific appli-

identical to the language of 803(24), quoted above. The only difference between the two rules is that Rule 804 applies where the declarant is unavailable as a witness, whereas the exception contained in Rule 803 may apply whether or not the declarant is available. The practical effect is that the availability of the declarant is immaterial where a party (or the court) invokes the residual exception to the hearsay rule.

231. 750 F.2d 1354 (7th Cir. 1984) (defendant argued that computer printouts were inadmissible under Rule 803(6) because the government had not proven that the data used to generate the printouts were completely accurate). *See supra* notes 214 to 222 and accompanying text.

232. *Kasvin*, 757 F.2d at 892.

233. Kasvin conceded that the fact that the records reflected illegal transactions did not bar their admissibility. *Id.*

234. *Id.* at 893.

235. *Id.*

236. FED. R. EVID. 102 states:

cability to the issue under discussion) and finally held that the evidence fully justified the trial court's finding that all the requisites of Rule 803(6) were satisfied. That conclusion, according to the court, made it unnecessary to address the admissibility of the records under Rule 803(24).[237]

Of all the decisions this past term addressing the business records exception, *Kasvin* presented the strongest facts for exclusion of the proffered evidence, particularly since the evidence was so damaging. Although the admission of the business records probably did not rise to the level of an abuse of discretion, it seems clear that the district court would have been equally justified in excluding the records. The underlying rationale for the business records exception to the hearsay rule is that such records are reliable.[238] Given the evidence the defendant produced in opposing the admission of the records, it can be argued that the district court largely ignored the language in Rule 803(6) which requires exclusion if "the source of information or the method or circumstances of preparation indicate lack of trustworthiness."[239] On the other hand, the scope of the Rule is very broad, clearly favoring admissibility.[240] Furthermore, the Seventh Circuit's holding in *Kasvin*[241] that the district

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

237. The legislative history of Rules 803(24) and 804(b)(5) clearly shows that those residual exceptions were intended to be used only in exceptional situations. "It is intended that the residual exceptions will be used very rarely and only in exceptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in rules 803 and 804(b)." S. REP. NO. 1277, 93d Cong., 2d Sess. 18 (1974), *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 7051, 7065, *reprinted in* FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES, Rule 803 at 147-48 (West 1984).

Both the district courts and the Seventh Circuit have commendably followed the foregoing legislative intent. *Kasvin* was the only case in the 1984-85 term in which the trial court invoked the residual exception, and the Seventh Circuit expressly declined to rest its decision in that case on the residual exception. This sparing use of the residual exceptions directly contradicts some commentators' observations that the courts have ignored the legislature's intent. *See, e.g.*, M. GRAHAM, FEDERAL RULES OF EVIDENCE 320 (West 1981) ("Reported decisions . . . have interpreted Rule 803(24) in light of its express requirements, ignoring in large measure the 'very rarely' and 'exceptional circumstances' gloss contained in the Senate Committee's Report.") *See also* McElhaney, *A Quick Review of the Federal Rules*, 9 LITIGATION 8, 12 (1983) (author refers to the residual exceptions as "catchall exceptions," implying, at least, that the courts are free to utilize those exceptions whenever a hearsay statement does not conveniently fit within one of the other exceptions).

238. The Advisory Committee Note to Rule 803(6) states:

> The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation.

239. FED. R. EVID. 803(6).

240. For example, the Rule encompasses records of opinions or diagnoses, and the term "business" specifically includes non-profit organizations. FED. R. EVID. 803(6).

241. 757 F.2d 887 (7th Cir.), *cert. denied*, 106 S. Ct. 592 (1985). Other cases decided during the past term similarly rejected arguments that records were improperly admitted under Rule 803(6)

court properly admitted into evidence the records of drug transactions is consistent with Seventh Circuit case law favoring a liberal construction of Rule 803(6).[242] However, it is suggested that the courts take a more conservative approach towards business records evidence, to insure that Rule 803(6) does not become a blanket rule of admissibility, regardless of the presence of factors indicating that the evidence is untrustworthy.

because the records were unreliable. *See, e.g.*, Coates v. Johnson & Johnson, 756 F.2d 524 (7th Cir. 1985). In *Coates*, plaintiffs alleged racial discrimination in employment practices. Defendant employer introduced into evidence certain disciplinary memoranda. Plaintiffs argued that the disciplinary memoranda were prepared and kept primarily for use in the defendant's grievance procedure, and that consequently there was a high risk that the memoranda were biased. The Seventh Circuit held that the district court's determination that the memoranda had sufficient indicia of reliability so as to be admissible under Rule 803(6) was not an abuse of discretion. *Coates*, 756 F.2d at 550. The Seventh Circuit noted that the memoranda were part of the systematic conduct of running a business. The records were kept according to a regular procedure and for a routine business purpose — memorializing employee performance — that tended to insure accuracy. In that way, they were "not prepared primarily with a view toward their use in a subsequent adversarial proceeding." *Id.* Accordingly, the appellate court found no abuse of discretion.

242. *See, e.g.*, United States v. McPartlin, 595 F.2d 1321 (7th Cir. 1979), *cert. denied*, 444 U.S. 833 (1979) (businessman's personal diary listing sporadic payments of bribes to public officials properly admitted as business record).