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# Evidence: Developments in Character Evidence, Cross-Examination Rules, and Prior Consistent Statements

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# EVIDENCE: DEVELOPMENTS IN CHARACTER EVIDENCE, CROSS-EXAMINATION RULES, AND PRIOR CONSISTENT STATEMENTS

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> Practically the whole body of the law of evidence governing . . . trials in the federal courts has been judge-made . . . . Naturally these evidentiary rules have not remained unchanged. They have adapted themselves to progressive notions of relevance in the pursuit of truth through adversary litigation, and have reflected dominant conceptions of standards appropriate for the effective and civilized administration of law.[1]

With characteristic eloquence, Mr. Justice Frankfurter once observed that the "rules of evidence for . . . trials in the federal courts are made a part of living law and [are] not treated as a mere collection of wooden rules in a game."[2] Rather, they "are adopted for practical purposes in the administration of justice, and must be so applied, as to promote the ends for which they are designed."[3]

The force of these penetrating observations has not been dulled either by time's attrition or by Congress' adoption of the Federal Rules of Evidence in 1975.[4] Indeed, the rules themselves belie any notion that they were meant to sound the death knell for judicial involvement in the creative development of evidentiary concepts or that they were a kind of catechism, the mere invocation of which would automatically solve evidentiary problems.[5]

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1. United States v. Mitchell, 322 U.S. 65, 66 (1944) (Frankfurter, J.) (citations omitted).

2. *Id. See also* Donnelly v. United States, 228 U.S. 243, 277-78 (1913) (Holmes, J., dissenting) ("The rules of evidence in the main are based on experience, logic and common sense, less hampered by history than some parts of the substantive law.").

3. United States v. Reyburn, 31 U.S. (6 Pet.) 352, 367 (1832).

4. Although the United States Supreme Court promulgated the rules on November 20, 1972, to take effect on July 1, 1973, and although the proposed rules were transmitted to Congress on February 5, 1973, the rules did not become law until January 2, 1975, when President Ford signed Public Law 93-595 (effective date July 1, 1975). The rules govern all proceedings in the courts of the United States and before United States magistrates to the extent and with the exceptions stated in rule 1101. *See* FED. R. EVID. 101.

5. This does not mean, however, that the federal courts are wholly free to improvise. Work-

Rule 102 of the Federal Rules of Evidence provides that the 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." Rule 102 thus condemns Procrustean application of the Federal Rules of Evidence and makes clear that the rules contain sufficient breadth of view and flexibility of adaptation to achieve the desiderata of ascertainment of truth and the just and prompt determination of cases.[6]

The 1978-79 term of the United States Court of Appeals for the Seventh Circuit contained a number of interesting and significant cases which continued the process of interstitial development of the Federal Rules of Evidence. It would not be feasible, of course, to analyze here every case presenting evidentiary disputes. Instead, those cases have been selected which are likely to have an impact on future decisions or which present issues that recur with substantial frequency in cases tried in the federal courts. That most of the cases discussed are criminal rather than civil stems not from personal preference but merely from the fact that such cases predominated during the 1978-79 term.[7] However, since the rules generally apply equally to both civil and criminal cases, the decisions have applicability to both kinds of cases.

ing within the framework of the rules, judges will still be "confined from molar to molecular motions." Southern Pacific Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). For an example of a case where the Seventh Circuit felt itself confined by the language of the rules, *see* United States v. Werbrouck, 589 F.2d 273, 277 (7th Cir. 1978), *cert. denied*, 440 U.S. 962 (1979).

6. Four striking examples of the rules' capacity for and susceptibility to a kind of common law development are found in rules 403, 501, 803(24), and 804(b)(5). Rule 403 allows district courts to exclude relevant evidence where the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. Rule 501 leaves the question of privileges to be developed in "light of reason and experience." Rules 803(24) and 804(b)(5) invest in the federal courts the authority to fashion exceptions to the hearsay rule not provided for in the rules. *See* United States v. McPartlin, 595 F.2d 1321, 1350 (7th Cir.), *cert. denied*, No. 78-1751 (Oct. 1, 1979).

7. The overwhelming bulk of the civil cases decided by the Seventh Circuit simply did not present evidentiary issues. Even the appeals in Ohio-Sealy Mattress Mfg. Co. v. Sealy Inc., 585 F.2d 821 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979) and Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979), did not call upon the court to resolve evidentiary issues despite the fact that the trials in the cases lasted four and eighteen months, respectively. And the famous *In re* General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106 (7th Cir. 1979), contained only a single reference to the Federal Rules of Evidence in a brief footnote in which the court held that inquiry into the conduct of negotiations resulting in a settlement of the case was not barred by rule 408 since the inquiry was not designed to obtain information to be used in proving liability or damages. *Id.* at 1124 n.20. The few civil cases presenting evidentiary questions were not especially exciting. For example, in Durant v. Surety Homes Corp., 582 F.2d 1081 (7th Cir. 1978), the issue was whether the use of enlarged photographs of various defects in a home was proper. Not surprisingly, the court held that their use was not only proper but desirable. *Id.* at 1089.

## CHARACTER EVIDENCE AND RULES 403 AND 404

Character is never an issue in a criminal prosecution unless the defendant chooses to make it one. From the perspective of due process, a defendant starts his life afresh when he stands accused of a crime. Inflexibly, the law has set its face against an endeavor to fasten guilt upon a defendant by proof of character or experience predisposing to an act of crime.[8]

The principle of exclusion is not one of logic, but of policy. The law has not been blind to the argument that a man with a sordid past is more likely to commit future crimes than is one with a more laudable history; however, the law is equally sensitive to the peril to the innocent if character is accepted as evidence probative of guilt.

It has long been recognized that "the natural and inevitable tendency of the tribunal — whether judge or jury — is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge or to take the proof of it as justifying condemnation irrespective of guilt of the present charge."[9] In order to insure that the trier of fact is not overawed by evidence the sole relevance of which is to demonstrate that the defendant is an evil man and is thus predisposed to commit the offense charged, proof of such evidence is inadmissible. This policy of exclusion is not, however, irrecusable. Where the evidence has independent relevance, such as tending to prove motive, opportunity, intent, preparation, plan, knowledge, identity[10] or absence of mistake or accident, it may be received so long as its probative significance is not 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.[11]

New rules 404[12] and 403[13] of the Federal Rules of Evidence incor-

8. *See generally* 1 J. WIGMORE, EVIDENCE §§ 57, 192 (Chadbourn rev. 1972) [hereinafter referred to as WIGMORE].

9. People v. Zackowitz, 254 N.Y. 192, 198, 172 N.E. 466, 468 (1930) (Cardozo, C.J.), *quoting* WIGMORE, *supra* note 8, at § 194.

10. In Barksdale v. Sielaff, 585 F.2d 288 (7th Cir. 1978), *cert. denied*, 99 S. Ct. 2409 (1979), the state introduced in rebuttal evidence which conveyed to the jury the fact that the defendant was in jail at some earlier time in connection with a wholly unrelated offense. The Seventh Circuit sustained the introduction of this evidence since it tended to prove the identity of the defendant. *See also* United States v. Sutherland, 463 F.2d 641, 649 (5th Cir.), *cert. denied*, 409 U.S. 1078 (1972); United States v. Pentado, 463 F.2d 355 (5th Cir. 1972), *cert. denied*, 410 U.S. 909 (1973).

11. *See* United States v. Fairchild, 526 F.2d 185 (7th Cir. 1975) (Stevens, J.), *cert. denied*, 425 U.S. 942 (1976).

12. FED. R. EVID. 404 provides, in pertinent part:

porate these principles[14] and make them applicable to both civil and criminal cases tried in the federal courts.[15] On several occasions during the 1978-79 term, the Seventh Circuit spoke to the admissibility of character evidence under rule 404 and the relationship of that rule to rule 403.

In *United States v. Dixon*,[16] the Seventh Circuit approved the admission of evidence in the government's case-in-chief that the defendant had carried a knife at various times. The court held that since intent was an element of the offense,[17] proof of the prior similar behavior had independent relevance, and its admissibility was thus proper under rule 404.[18] However, the court did not decide whether under the federal rules, as under pre-rules practice, the proof of the prior conduct had to pass the "clear and convincing" test, nor did it discuss the scope of the duty of the district court under rule 403 when a party seeks to admit evidence having independent relevance under rule 404.[19] These questions were subsequently answered in *United States v. Dolliole*.[20]

In *Dolliole*, the defendant was convicted of aiding and abetting his brother-in-law in the robbery of a federally-insured savings and loan institution. The sole issue on appeal was the admissibility at trial of

> (a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion . . . .
>
> . . .
>
> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

13. FED. R. EVID. 403 provides:

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

14. United States v. Fairchild, 526 F.2d 185 (7th Cir. 1975), *cert. denied*, 425 U.S. 942 (1976).

15. Use of character evidence under rule 404 is to be distinguished from impeachment with evidence of convictions and misconduct under rules 608 and 609.

16. 596 F.2d 178 (7th Cir. 1979).

17. The defendant was charged with possessing a knife in a federal institution in violation of 18 U.S.C. § 1792 (1976).

18. 596 F.2d at 182.

19. The court merely cited one of its own pre-rules decisions for the proposition that the evidence had to be clear and convincing and that district courts were required to weigh the probative value of the evidence against the danger of prejudice. *See* United States v. Ostrowsky, 501 F.2d 318, 321 (7th Cir. 1974); United States v. Hampton, 457 F.2d 299, 302 (7th Cir.), *cert. denied*, 409 U.S. 856 (1972); United States v. Jones, 438 F.2d 461, 465-66 (7th Cir. 1971); United States v. Fierson, 419 F.2d 1020 (7th Cir. 1969); United States v. Phillips, 401 F.2d 301, 305 (7th Cir. 1968). In United States v. Vargas, 583 F.2d 380 (7th Cir. 1978), decided four months prior to *Dixon*, the court expressly noted that it was unclear whether the clear and convincing test was lowered by the federal rules. *Id.* at 386 n.5.

20. 597 F.2d 102 (7th Cir.), *cert. denied*, 99 S. Ct. 2894 (1979).

testimony by the brother-in-law and another individual that the defendant had previously planned the robbery of a second bank and had actually participated in the robbery of a third bank.[21]

In affirming the conviction, the Seventh Circuit unhesitatingly held that the evidence was clearly relevant to the issue of the defendant's intent and that it was thus admissible under rule 404. The more difficult question was whether, notwithstanding its independent relevance, the evidence was received in contravention of rule 403.

In what was perhaps the most comprehensive treatment of rules 403 and 404 during the 1978-79 term,[22] the Seventh Circuit in *Dolliole* held the evidence was properly admitted. The significance of *Dolliole* lies not in its result but in the court's careful exposition of the doctrinal basis which undergirded the decision.[23] In stressing that "[r]ules 403 and 404 do not represent a mechanical solution"[24] to evidentiary problems, the court demonstrated its sensitivity to the concept that "the process of judging is a phase of a never ending movement, and . . . something more is exacted of those who play their part in it than imitative reproduction, the lifeless repetition of a mechanical routine."[25]

The Seventh Circuit held, however, that evidence which qualifies for admissibility under rule 404 because it has independent relevance is not automatically admissible. Rather, rule 403 *requires* a district judge to balance the probative value of the evidence against the danger of unfair prejudice.[26] In an attempt to reify the amorphous standards of

21. This testimony was admitted in rebuttal after the defendant testified that he had no knowledge of the robbery committed by his brother-in-law. 597 F.2d at 104.

22. *See also* United States v. McPartlin, 595 F.2d 1321 (7th Cir.), *cert. denied*, No. 78-1751 (Oct. 1, 1979).

23. The necessity for craftsmanship and reasoned exposition in judicial decisions was adverted to by Mr. Justice Stone in a letter to Felix Frankfurter: "I can hardly see the use of writing judicial opinions unless they are to embody methods of analysis and exposition which will serve the profession as a guide to the decision of future cases. If they are not better than an excursion ticket, good for this day and trip only, they do not serve even as protective coloration of the writer of the opinions and would much better be left unsaid." Letter from Mr. Justice Stone to Felix Frankfurter *quoted in* A. MASON, THE SUPREME COURT FROM TAFT TO WARREN 105-06 (1958).

24. 597 F.2d at 105.

25. B. CARDOZO, THE GROWTH OF THE LAW 142-43 (1948). *See* Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908). *See also* H. SHANKS, THE ART AND CRAFT OF JUDGING: THE DECISIONS OF JUDGE LEARNED HAND (1968). At the proceedings of a special session in the Second Circuit in commemoration of his fifty years of federal judicial service, Judge Hand said:

> I like to think that the work of a judge is an art . . . . After all, why isn't it in the nature of an art? It is a bit of craftsmanship, isn't it? It is what a poet does, it is what a sculptor does. He has some vague purposes and he has an indefinite number of what you might call frames of preference among which he must choose; for choose he has to, and he does.

26. 597 F.2d at 106. While the court "encouraged" district judges to enter written findings in this regard, it followed the Ninth Circuit in United States v. Sangrey, 586 F.2d 1312 (9th Cir. 1978), in refusing to impose a mechanical recitation of rule 403's formula as a prerequisite to

rule 403, the Seventh Circuit held that among the objective factors to be considered are the need for the evidence and its "reliability" determined by whether it is "clear and convincing".[27] In the court's view, the latter requirement did not expand the grounds for exclusion, set forth in rule 403, which defines the sole basis upon which relevant evidence can be excluded.[28]

After articulating certain of the criteria to be employed in making decisions under rule 403, the court exhaustively explored the reasons why, in its view, the district court had not abused its discretion in admitting the evidence of the other crimes.[29] The most significant aspect of that analysis is the court's rejection of the argument that the evidence of the defendant's prior involvement in two other bank robberies was of such a "nature . . . [as to have] subjected the defendant to a substantial risk" of unfair prejudice.[30]

With the decision in *Dolliole*, the Seventh Circuit has rejected a construction of rule 403 which would have made substantial changes in the entrenched common law principle which allows evidence of prior similar acts or wrongs so long as they have independent relevance. The court also has made it clear that rule 403 does not invest in district courts a vagrant and unfettered freedom to exclude relevant evidence.[31] Rather, the discretion accorded by rule 403 must be regulated by prin-

admissibility. All that need be present is that the record as a whole makes clear that there was an adequate appraisal of the situation. It is not clear whether the court was encouraging district judges merely to make a specific finding which would mirror the language of rule 403 or whether it was encouraging a detailed exegesis of the reasons which underlay the decision to admit or exclude the challenged evidence. Requiring the former alternative would not be edifying, and requiring the latter would unduly prolong trials with no appreciable benefit to the due administration of justice. The situation is not comparable to that envisioned by rule 52 of the Federal Rules of Civil Procedure which requires district courts to make findings of fact and conclusions of law in cases where trial is to the court and in injunction cases. In these situations, findings of fact are imperative, for without them there can be no meaningful review pursuant to the "clearly erroneous" standard. Similarly, conclusions of law help to give a reviewing court a framework for its review. In cases involving rule 403, no comparable purpose is served, for the "finding" by the district court is not a finding of fact, nor is it strictly speaking a conclusion of law. It is rather a kind of mixed finding, the validity of which cannot retrospectively be ascertained without a complete review of the entire trial record by the reviewing court. Hence, to require district courts to enter findings which detail the reasons which prompted evidentiary determinations under rule 403 would serve no substantial purpose. The only merit would be in forcing district courts to actually engage in the balancing process required by rule 403.

27. 597 F.2d at 106. *Accord*, United States v. McPartlin, 595 F.2d 1321, 1344 (7th Cir.), *cert. denied*, No. 78-1751 (Oct. 1, 1979). *But see* United States v. Beechum, 582 F.2d 898 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920 (1979).

28. 597 F.2d at 106-07.

29. *Id.* at 107-08.

30. *Id.* at 108. The court cited the advisory note's definition of "unfair prejudice" as "an undue tendency to suggest decision on an improper basis." *Id.*

31. The Seventh Circuit's attempt to establish and formulate objective criteria for exercises of discretion under rule 403 recognizes that "[w]e must not incite the exercise of judicial impression-

ciple, the contours of which will be defined at least partially by prior case law.[32]

Finally, in *United States v. McPartlin*,[33] the Seventh Circuit has laid to rest any notion that rule 403 will result in fundamentally new or stricter standards of appellate review. On the contrary, the court in *McPartlin* emphasized the "heavy burden" an appellant must sustain when exercising a challenge to evidence under rule 403 and reaffirmed the pre-rules doctrine:

> [T]he careful balancing of the probative value of prior acts versus their probable unduly prejudicial effect is uniquely appropriate to the informed discretion of the trial judge . . . .
>
> The highly judgmental character of this test mandates that [a reviewing court] not restrike the balance [itself] but instead only examine the manner in which the district court exercised its discretion.[34]

## CROSS-EXAMINATION

### *1978-79 Seventh Circuit Decisions in General*

Today, a case is rarely the subject of appellate review where the court is not importuned to reverse an unfavorable judgment because of either the supposed presence or absence of restrictions placed on cross-examination. In such a case, the appellant either claims that the scope of his cross-examination of adverse witnesses was unduly circumscribed by the district court or that the appellee's cross-examination of the appellant's witnesses was not sufficiently restricted. The Seventh Circuit heard several such claims during the 1978-79 term.

Despite the vigor with which these claims of error were urged, the Seventh Circuit rejected all of them.[35] Implicit in these decisions is a

ism. Discretion without a criterion for its exercise is authorization of arbitrariness." Brown v. Allen, 344 U.S. 443, 496 (1953) (Frankfurter, J., alternative holding).

32. *But see* United States v. Hooper, 596 F.2d 219 (7th Cir. 1979) (repayment of money owed to University of Wisconsin admissible as an admission against interest, and its admission not barred by rule 403); United States v. McPartlin, 595 F.2d 1321, 1342-45 (7th Cir.), *cert. denied*, No. 78-1751 (Oct. 1, 1979) (rebuttal evidence that defendant made bribery payments to foreign officials in other unrelated matters properly admitted under rule 404(b) and not violative of rule 403).

33. 595 F.2d 1321 (7th Cir.), *cert. denied*, No. 78-1751 (Oct. 1, 1979).

34. 595 F.2d at 1345. While the court in *Dolliole* looked basically to the essential nature and content of the evidence to determine whether there was unfair prejudice, *McPartlin* focused on the procedures undertaken by the district court to minimize possible prejudice (*i.e.*, voir dire of rebuttal witness to determine testimony; careful selection of only parts of testimony allowed into evidence; careful limiting instructions). Although *Dolliole* established objective criteria to guide exercises of discretion under rule 403, while *McPartlin* spoke of the "highly judgmental character" of a district court's function under the rule, it is doubtful that there is anything more than a difference in accent and emphasis between the two cases. It is likely that these cases merely represent obverse sides of the same basic inquiry.

35. In addition to the cases discussed *infra*, *see* United States v. Werbrouck, 589 F.2d 273

reaffirmation of the concept that "cross-examination of a witness in matters pertaining to his credibility ought to be given the largest possible scope."[36]

Perhaps the most interesting of the cases is *United States v. Frankenthal*,[37] in which the defendant's conviction of conspiracy to intercept wire communications was affirmed.[38] The cynosure of the appeal was that the government's cross-examination of Myron Berk, a defense witness, irreparably prejudiced the defendant, thereby requiring a reversal of the conviction. In summary, the facts are as follows.[39]

Berk was a lawyer who had long been counsel to the defendant's deceased father and served as the president of the lucrative Frankenthal family businesses after the father's death.[40] Berk was called as a defense witness to testify that he had advised the Frankenthals that their plan to monitor the telephone conversations of their employees was not illegal.[41] If believed, this evidence might have provided a defense to one of the counts in the five-count indictment.[42]

On the direct examination of Berk, defense counsel elicited the fact that Berk had been a close and long-time friend of the Frankenthal family.[43] No testimony was elicited on direct examination about any meeting between Berk and district court Judge Gordon. On cross-examination, the government attempted to elicit the details of a meeting which Berk had initiated with Judge Gordon less than one month before the Frankenthal trial was scheduled to begin in Judge Gordon's court.[44]

(7th Cir. 1978), *cert. denied*, 440 U.S. 962 (1979); United States v. Watson, 587 F.2d 365, 369 (7th Cir. 1978); United States v. Muscarella, 585 F.2d 242 (7th Cir. 1978).

36. McConnell v. United States, 393 F.2d 404, 406 (5th Cir. 1968). *Accord*, Harris v. United States, 371 F.2d 365, 366 (9th Cir. 1967). *Cf.* Altom v. United States, 454 F.2d 289, 296 (7th Cir. 1971), *cert. denied*, 406 U.S. 917 (1972) (generally, a broad rule of admissibility is favored in the federal courts).

37. 582 F.2d 1102 (7th Cir. 1978).

38. *See* 18 U.S.C. §§ 371, 2511(1)(a), 2511(1)(b)(iv)(A) (1976).

39. The incredible facts of this case demonstrate how officious behavior by a person with little understanding of the rules of evidence can profoundly affect the outcome of a trial.

40. 582 F.2d at 1104-05.

41. *Id.* The monitoring was done in an attempt to detect whether any employees were transmitting information which could be damaging to the Frankenthals' business.

42. *Id.* at 1105.

43. Eliciting on direct examination facts which might bear on credibility is, of course, a legally permissible and strategically sound device, which is designed to prevent the opposition from creating the false impression that the direct examiner is trying to keep something from the jury. *See, e.g.*, United States v. Rothman, 463 F.2d 488, 490 (2d Cir.), *cert. denied*, 409 U.S. 956 (1972), (and cases cited therein); United States v. Stroble, 431 F.2d 1273, 1275 (6th Cir. 1970).

44. After the meeting with Berk, Judge Gordon quite rightly recused himself as the trial judge, and the case was thereafter handled by Chief Judge Reynolds. Judge Gordon also wrote to counsel for the government and the defense outlining what transpired at the meeting. 582 F.2d at 1105.

Over strenuous defense objection that the cross-examination was beyond the scope of the direct examination, the district court allowed the government to elicit from Berk the fact that he had told Judge Gordon that he, Berk, was president of the Frankenthal business and that if the trial went ahead on its presently scheduled date, the company's financial position could be jeopardized with ensuing harm to the company's 1800 employees. While Berk admitted that he had discussed the "timing" of the trial, he emphatically denied he had expressed any concern to Judge Gordon regarding the trial's outcome.[45]

In rebuttal, the government called Judge Gordon as a witness. In his brief testimony,[46] Judge Gordon summarized the May 26, 1977 meeting during which he insisted Berk had expressed concern over the results of the case.[47] The defendant was convicted. On appeal, a unanimous panel affirmed.

At the threshold of the opinion, the Seventh Circuit summarily rejected as "frivolous" the argument that the cross-examination was beyond the scope of the direct examination, for under rule 611(b) of the Federal Rules of Evidence, cross-examination is allowed on all "matters affecting the credibility of the witness."[48] Since the bias or interest of a witness is always relevant to discrediting the witness,[49] it is necessarily a proper subject of exploration on cross-examination. Moreover, since inquiry into the area of bias or interest is never collateral, the court properly held that the rule prohibiting impeachment on collateral matters is not violated by extrinsic proof of a witness' bias.[50] Finally, the fact that the witness' behavior was not induced by the defendant or his counsel was held not to bar the impeachment.[51]

In *Frankenthal*, the Seventh Circuit acknowledged that a district court had the discretion to limit the extent of proof even where bias or

45. *Id.*

46. The testimony occupied but five pages in the trial transcript. *Id.* at 1105-06.

47. Judge Gordon testified that Berk said "that, 'if there should be a conviction' the companies and the employees would suffer financially." *Id.* at 1106.

48. *Id.* at 1105 n.1. FED. R. EVID. 611(b) provides:

> Scope of cross-examination. Cross examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

49. 582 F.2d at 1106, *quoting* 3A WIGMORE, *supra* note 8, at § 940; Davis v. Alaska, 415 U.S. 308, 316 (1974); *see* Philadelphia and Trenton R.R. v. Stimpson, 39 U.S. (14 Pet.) 448, 461 (1840); *cf.* Reagan v. United States, 157 U.S. 301, 310-11 (1895) (the defendant has a deep personal interest in the result of the suit, and that should be considered by the jury).

50. 582 F.2d at 1106. Of course, the extent of such impeachment is subject to the court's discretion. United States v. Lawinski, 195 F.2d 1, 7-8 (7th Cir. 1952); *see* United States v. Garelli, 333 F.2d 649 (7th Cir. 1964), *cert. denied*, 380 U.S. 917 (1965); FED. R. EVID. 611(a).

51. 582 F.2d at 1106-07.

interest is involved, and that a proper exercise of this discretion would be where the proof was cumulative.[52] In the *Frankenthal* case, the court was unwilling to find the impeachment to have been cumulative. However, the opposite result was reached in *United States v. Fitzgerald*.[53]

In *Fitzgerald*, the defendants were convicted, after an eight week jury trial, for their part in the scheme which involved the unlawful payment of more than $2 million to public officials in connection with the building of a public works project.[54] On appeal, the defendants argued that the district court's restriction of cross-examination of one of the government's chief witnesses prevented them from fully demonstrating the witness' bias.[55] While the Seventh Circuit acknowledged that "[a] defendant may not be deprived of the right of 'effective' cross-examination where he is attempting to show bias on the part of a government witness,"[56] the court was equally faithful to the principle that a district court has "wide discretion to limit cross-examination, particularly when further cross-examination into the witness's subjective thoughts would not be meaningful because of previous testimony revealing the witness's bias."[57] According to the *Fitzgerald* court, the question is always "whether the jury had sufficient information to make a discriminating appraisal of the witness's motives and bias."[58] After reviewing the claimed errors in the context of the entire trial,[59] the Seventh Circuit rejected the claims of limitation on cross-examination and, as in *Frankenthal*, sustained the district court's exercise of discretion.

These same themes found further expression in *United States v.*

52. *Id.* at 1106. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 230 (1940); United States v. Kirby, 587 F.2d 876, 883 (7th Cir. 1978) (refusal to allow evidence of certain testing procedures in defendant's case-in-chief was within the district court's discretion under rule 403 where the defense had ample opportunity to cross-examine government's experts and to show thereby what was sought to be shown in the defense's case-in-chief).

53. 579 F.2d 1014 (7th Cir.), *cert. denied*, 99 S. Ct. 610 (1978).

54. 579 F.2d at 1016.

55. *Id.* at 1021.

56. *Id.*

57. United States v. Hansen, 583 F.2d 325, 332 (7th Cir.), *cert. denied*, 439 U.S. 912 (1978).

58. 579 F.2d at 1021. *See* Corpus v. Beto, 469 F.2d 953, 955 (5th Cir. 1972); United States v. Jordan, 466 F.2d 99, 102 (4th Cir.), *cert. denied*, 409 U.S. 1129 (1972).

59. According to the court, the witness testified for eleven days and was:

> exhaustively cross-examined on: his receipt of immunity; subsistence and expense payments from the government; his personal and corporate liability for civil tax assessments and fraud penalties; his tax liability, as well as that of his brothers; the attempts he made to get immunity for his Swiss associates; and his remaining interests in ITAG and BESSI.

579 F.2d at 1021. In light of the intensity, pervasiveness, and duration of the cross-examination, it is not surprising that the appellant could only find four questions which were disallowed.

*Ziperstein*.[60] There, Pepa, a government witness, gave extremely damaging testimony against one of five co-defendants. On cross-examination, the witness admitted he had made prior inconsistent statements to agents of the Federal Bureau of Investigation.[61] When the government, on re-direct examination, sought to elicit the reasons for the inconsistencies, the district court examined the witness out of the presence of the jury to avoid any prejudice to the defendants.[62]

During the course of the *voir dire* hearing, Pepa explained that he had lied to the FBI because he was frightened of what Ziperstein would do to him or his family if he told the truth. After deciding that there was a sufficient basis on which to allow the examination to proceed, the district court ruled that Pepa could testify that he was afraid of Ziperstein, but not about the reasons for that fear.[63] Thereafter, Pepa testified before the jury that he had falsified information to the FBI because of fear. However, despite the earlier ruling, the district court refused to allow Pepa to state that he was afraid of Ziperstein.[64] In response to Ziperstein's arguments on appeal that the above testimony was erroneously received, the Seventh Circuit responded: "The arguments by defendant Ziperstein that he was prejudiced by this interchange border on the frivolous."[65]

### *Previous Cross-Examination Decisions*

The cases discussed above are consonant with an undeviating line of decisions in the federal courts which recognize that the range of external circumstances from which probable bias or motivation can be inferred is as vast as human nature is diverse. These cases further demonstrate the law's abiding concern that all facts and circumstances which tend to show that a witness may shade his testimony for the pur-

60. 601 F.2d 281 (7th Cir. 1979). The defendants were charged with mail fraud and conspiracy to defraud the United States in connection with the running of certain medical clinics.

61. Hereinafter referred to as the FBI.

62. 601 F.2d at 291-92. To insure that there was a basis for this testimony, Judge Will required Pepa to substantiate his allegations with evidence of specific incidents. *Id.* at 292. From a purely theoretical perspective, it is questionable whether a showing of a rational and empiric basis for a witness' fear is really a prerequisite for admissibility. However, from a pragmatic perspective, a hearing will help to prevent mendacity and to prevent the government from being able unfairly to rehabilitate witnesses. The power of a district court to require such a hearing is scarcely open to doubt. *See* FED. R. EVID. 104 and 611(a). *See, e.g.*, United States v. Bohle, 445 F.2d 54, 75 (7th Cir. 1971); United States v. McPartlin, 595 F.2d 1321, 1345 (7th Cir.), *cert. denied*, No. 78-1751 (Oct. 1, 1979).

63. 601 F.2d at 292.

64. *Id.*

65. *Id. See* United States v. Franzese, 392 F.2d 954 (2d Cir. 1968), *vacated on other grounds*, 394 U.S. 310 (1969).

pose of helping to establish one side of a cause only, be brought to the attention of the trier of fact.[66] When the Seventh Circuit decisions on cross-examination issued during the 1978-79 term are compared with earlier decisions, it is immediately apparent that they do not signal any radical shift in doctrine or approach.

For example, in *Carbo v. United States*,[67] the defendant sought to impeach the credibility of one of the government's chief witnesses, Jackie Leonard, "by showing that he had through his wife corruptly expressed a willingness to suppress his testimony and depart the country if he were paid $25,000.00."[68] The government recalled Leonard to explain this offer as founded not on corruption but on fear.[69] Leonard testified, *inter alia*, that one Stanley, a friend of co-defendant Sicca, had called upon him "seeking to persuade [him] not to give testimony in the [forthcoming trial]."[70] On two occasions, Stanley was accompanied by one Steve Calla. Stanley told Leonard that Calla was a friend of Sicca's and a convicted murderer. In Leonard's words, "He said Mr. Calla had been in the penitentiary in Cleveland for murder; and I said, 'Murder?' He said, 'Yes, he beat them to death. He was a strong-arm man.' "[71] As in *Frankenthal* and *Ziperstein*, there was no evidence that the conduct was at the behest of, or under the direction of, the defendants.

Notwithstanding the absence of proof of causal connection between the witness' fears and acts of the defendants, and despite the fact that the jury might have inferred from Stanley's friendship with Sicca that the defendant had instructed him to threaten Leonard,[72] the Ninth Circuit held that Leonard's testimony was proper.[73]

66. The rule allowing impeachment to show bias or motivation seeks to protect the integrity of the fact-finding process by insuring that the fact-finder has at his disposal all relevant data which will enable him to render an informed judgment. The well-spring from which flows a witness bias or motivation is of no moment; it is the existence of a given mental state and its consequent impact on the fact-finding process which is important. *See generally*, C. MCCORMICK, LAW OF EVIDENCE § 40 (2d ed. 1972) [hereinafter referred to as MCCORMICK].

67. 314 F.2d 718 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964).

68. 314 F.2d at 744.

69. It is fundamental that a witness impeached with prior inconsistent statements may always endeavor to explain away the effect of the supposed inconsistency by whatever circumstances would naturally remove it, including fear. *See* United States v. Franzese, 392 F.2d 954, 960 (2d Cir. 1968), *vacated on other grounds*, 394 U.S. 310 (1969), *quoting* 3 WIGMORE, *supra* note 8, at § 1044; United States v. Pritchard, 458 F.2d 1036, 1039 (7th Cir.), *cert. denied*, 407 U.S. 911 (1972).

70. 314 F.2d at 744.

71. *Id.*

72. In *Frankenthal*, the defense unsuccessfully raised the same kind of objection. *See* 582 F.2d at 1107.

73. 314 F.2d at 744. *See also* United States v. Barone, 458 F.2d 1027, 1029-30 (3d Cir. 1972); United States v. Franzese, 392 F.2d 954 (2d Cir. 1968), *vacated on other grounds*, 394 U.S. 310 (1969).

A similar result was reached in *United States v. Schennault*.[74] There, Rodriguez, a co-defendant with Schennault, entered a plea of guilty before trial.[75] He was later called as a defense witness and assumed full responsibility for the crime, testifying that defendant was not a participant. In rebuttal, FBI agent Jordan "testified that Rodriguez had told him that he was afraid of Schennault and had to take the blame so that Schennault would not 'get me.' "[76] Despite the absence of any causal connection between the witness' fear and conduct of the defendant, and notwithstanding the potential for "prejudice" to the defendant, the conviction was affirmed.[77]

The question which immediately arises is whether the precedential contribution of these cases has been eroded by the Federal Rules of Evidence. There is nothing readily apparent in the rules which would bar the introduction of the impeachment evidence discussed earlier. Indeed, *United States v. Frankenthal*[78] supports this view. In sustaining conviction, the Seventh Circuit in *Frankenthal* rejected the argument that the probative value of the evidence regarding bias was "grossly outweighed by unfair prejudice".[79] While the Seventh Circuit suggested that this was a proper ground of attack under rule 403,[80] the court underscored the fact that defense counsel was fully aware of the potential impeachment when he voluntarily called Berk to the stand.[81]

74. 429 F.2d 852 (7th Cir. 1970).

75. *Id.* at 855.

76. *Id.*

77. *Id. Accord*, United States v. Cerone, 452 F.2d 274 (7th Cir. 1971), *cert. denied*, 405 U.S. 964 (1972).

78. 582 F.2d 1102 (7th Cir. 1978).

79. *Id.* at 1107. One aspect of this argument was that "injecting a federal judge into a criminal trial on the Government's side necessarily involves the prestige and authority of his office in support of a conviction." *Id.* The court rejected the argument in this case as swiftly as it had when a variant of it was earlier presented in United States v. Cerone, 452 F.2d 274 (7th Cir. 1971), *cert. denied*, 405 U.S. 964 (1972). In response to the claim that permitting the United States Attorney to testify for the government involved the prestige of the office on behalf of the government, the Seventh Circuit said: "As to the awesome-office theory, we do not agree that the mere fact that a witness holds an office of public trust should disqualify him as a witness if he would otherwise be able to offer relevant, competent and material evidence as to any issue in a trial." 452 F.2d at 288.

80. For the text of rule 403, *see* note 13 *supra*.

81. 582 F.2d at 1107. The court seemed to suggest that defense counsel could have avoided the whole problem by acquiescing in the district court's suggestion to have Berk's testimony stricken. *Id.* This begs the very question to be decided. Either the impeaching testimony was proper or it was not. It is idle to suggest that by giving up his constitutional right to call witnesses, the defendant could have avoided the prejudice. This kind of Hobson's choice cannot withstand scrutiny. *Cf.* Simmons v. United States, 390 U.S. 377 (1968) (defendant need not surrender one constitutional right in order to assert another); DeBeers Consolidated Mines Ltd. v. United States, 325 U.S. 212, 222 (1945) (where court is without authority to demand security under the circumstances presented, it is equally without authority to compel the proffer of a bond by the seizure of property).

The court also rejected the contention that the jury might have inferred that the defendant, her father, or her counsel must have prompted Berk to meet Judge Gordon. In sum, the court concluded that there was an absence of the *unfair* prejudice[82] required before rule 403 is operative.[83]

In its basic structure, the *Frankenthal* opinion echoes the earlier penetrating insights of Judge Friendly in *United States v. Briggs*[84] concerning objection to evidence offered by a witness, Jeffries, that defendant Briggs had threatened him:

> Whether the receipt of such threats be characterized as showing "bias," or "corruption," or "interest," their relevance as impeaching Jeffries' testimony is too apparent to require argument . . . . No doubt this evidence was "prejudicial" to Briggs in the sense that if the jury believed the agent, the evidence would tend strongly toward conviction. But it was also highly probative on the credit to be given the turncoat informer. This is not the kind of "prejudice" against which the law of evidence can or should protect.[85]

The *Frankenthal* opinion also implicitly recognizes the wisdom and applicability of Mr. Justice (then Judge) Stevens' observation, articulated in a different context, that "[t]he importance of minimizing . . . prejudice does not outweigh the necessity for preserving fair and accepted procedures."[86]

### *1978-79 Seventh Circuit Decisions Involving Extrinsic Evidence*

*Davis v. Freels*[87] dealt with a problem which daily plagues courts: namely, the extent to which a cross-examiner may go in order to prove, by *extrinsic evidence*, the mendacity of a witness who falsely testifies on direct examination to an arguably "collateral" matter. In *Davis*, the

82. It should not be forgotten that prior to rule 403, courts had the discretionary authority to exclude evidence the prejudicial effect of which unfairly outweighed the probative significance. *See, e.g.*, United States v. Ostrowsky, 501 F.2d 318, 321 (7th Cir. 1974); United States v. Hines, 470 F.2d 225, 228 (3d Cir. 1972), *cert. denied*, 410 U.S. 968 (1973).

83. *See* United States v. Brighton Bldg. & Maintenance Co., 598 F.2d 1101 (7th Cir. 1979) (impeachment with prior inconsistent statements before a grand jury pursuant to rule 801(d)(1)(A) not violative of rule 403). In a number of other cases during the 1978-79 term, the Seventh Circuit also rejected requests for reversal based on rule 403.

84. 457 F.2d 908 (2d Cir.), *cert. denied*, 409 U.S. 986 (1972).

85. 457 F.2d at 910-11; United States v. Cole, 463 F.2d 163, 168 (2d Cir.), *cert. denied*, 409 U.S. 942 (1972).

86. United States v. Davis, 437 F.2d 928, 933 (7th Cir. 1971). *See also* United States v. Franzese, 392 F.2d 954, 960 (2d Cir. 1968) (Friendly, J.), *vacated on other grounds*, 394 U.S. 310 (1969) ("[w]hile rehabilitation of this sort [*i.e.*, reference to witnesses' fear of defendants] may well have a spill-over effect, the process is essential to development of the truth and reliance must be placed on trial judges to prevent unfair tactics by the prosecution"); United States v. Allen, 159 F.2d 594, 598 (2d Cir.), *cert. denied*, 330 U.S. 838 (1947) (Frank, J.) ("the undoubtedly grave problem of providing adequate safeguards against convictions of the innocent must be solved in some way other than that of refusing to allow reasonable inferences to be made").

87. 583 F.2d 337 (7th Cir. 1978).

plaintiff brought a civil rights action against a Chicago police officer who shot Davis during an altercation. On his own direct examination, "apparently, to bolster his own credibility and to blunt the possible inference that he lacked any good reason to be where he was at the place and time of the incident,"[88] the plaintiff testified that he owned three businesses and at the time of the shooting he was on his way to one of them. On cross-examination, defense counsel asked whether the plaintiff had filed income tax returns for the years 1973-75. The avowed purpose of the cross-examination was to impeach the plaintiff's general credibility.[89]

On appeal, the defendant abandoned this theory of general character impeachment, and sought to justify the questioning on the basis that the plaintiff's failure to have reported any income from these businesses would be inconsistent with the claims of ownership.[90] The Seventh Circuit held that the issue was collateral and thus was not subject to impeachment by independent evidence, although the defendant could make inquiry on cross-examination.[91]

While the court recognized that the plaintiff had gratuitously injected the topic of ownership during his own direct examination, it still refused to sanction proof of the possible mendacity by independent evidence. The court's articulation of an apparently *per se* prohibition against collateral impeachment of possibly mendacious testimony volunteered on direct examination is unsound, and, especially in civil cases, will tend to encourage perjury.

The rule against collateral impeachment teaches that cross-examination on collateral matters is limited to the answer given by the witness.[92] However, notwithstanding the contrary positions of Professors Wigmore[93] and McCormick,[94] most courts, sensitive to the profound dangers that perjury poses to the integrity of the fact-finding process, have allowed such impeachment when the collateral matter has been injected into the fabric of the trial by the witness on his own direct examination. This has been the rule in the United States Supreme Court[95] and the Seventh Circuit.[96]

88. *Id.* at 342.
89. *Id.*
90. *Id.*
91. *Id.* *See* FED. R. EVID. 608.
92. Collateral matters are generally defined as those which are not independently provable regardless of the contradiction. *See* MCCORMICK, *supra* note 66, § 47 at 98-100.
93. 2 WIGMORE, *supra* note 8, at § 1007.
94. MCCORMICK, *supra* note 66, § 47 at 98.
95. *See, e.g.*, Walder v. United States, 347 U.S. 62 (1954).
96. *See* United States v. Bolin, 514 F.2d 554 (7th Cir. 1975) (doctrine of curative admissibil-

By sanctioning the cross-examination, *Davis* implicitly recognized the relevance of the questions. Hence, rather than having enunciated a *per se* rule of exclusion, the court would have been better advised to have committed the matter to the informed discretion of the district court, as envisioned by rule 403.[97]

A second and equally important part of the *Davis* opinion dealt with the instructions given to the district court for guidance in the retrial of the case. The court noted that since all the jury would hear were the question and answer regarding ownership of the businesses and the payment of taxes, in exercising discretion to allow the cross examination on such issues, the trial court must be satisfied that there is a basis in fact for the ultimate inferences defense counsel would have the jury draw.[98]

This satisfaction of the court is the vivifying principle which emerges from *Davis*: Before a cross-examiner can be allowed to ask questions containing negative prejudicial implications, the district court must satisfy itself that there is some basis for the questions. The point was perhaps most strongly made several years ago in *United States v. Bohle*.[99] There, the Seventh Circuit stated:

> Bearing in mind that attorneys are officers of the court, we would be, not only of the hope, but of the opinion, that the occasion of putting the prejudicial content before a jury with no intent to make use of the foundation thus laid would be indeed minimal. Nevertheless, the difficult question remains as to how the duty is to be enforced in the rare case to the contrary. . . .
>
> . . .
>
> Where a trial judge is aware of the possibility that counsel intends to ask an impeaching question having prejudicial implications, it is proper and advisable, in the interests of avoiding abuse and of insuring a fair trial to both the prosecution and the defendant, that the judge inquire of counsel whether the question on which he is about to embark is for the purpose of impeachment and whether and how counsel intends to follow up the question with impeaching proof. If there is no intention to introduce such impeaching proof, the question may, in the court's discretion, be properly excluded.[100]

ity); United States v. Jansen, 475 F.2d 312, 316 (7th Cir.), *cert. denied*, 414 U.S. 826 (1973). While *Jansen* did not deal with extrinsic proof, since the witness on cross-examination admitted the falsity of his direct examination, the court's reliance on Walder v. United States, 347 U.S. 62 (1954), which did allow extrinsic impeachment, indicates reacceptance of the Seventh Circuit's earlier preference for a rule which would allow independent contradiction. The court in *Davis* made no mention of *Jansen*.

97. *See* note 13 *supra* for the text of rule 403.

98. 583 F.2d at 342. The cross-examination of the plaintiff was not the basis for acquittal.

99. 445 F.2d 54 (7th Cir. 1971).

100. *Id.* at 74. *Accord*, United States v. Fowler, 465 F.2d 664, 666 (D.C. Cir. 1972). *See also* United States v. Dolliole, 597 F.2d 102 (7th Cir.), *cert. denied*, No. 78-6734 (June 18, 1979); Du-

In addition, Mr. Justice (then Judge) Stevens, in *United States v. Harding*,[101] quoted Professor Wigmore[102] on the matter:

> The same general principle governs the *putting of questions to witnesses*. The jury may under certain circumstances obtain an impression, from the mere putting of illegal questions which are either answered in the negative or are not answered because illegal and excluded, that there is some basis of truth for the question. When a counsel puts such a question, believing that it will be excluded for illegality or will be negatived, and also having no reason to believe that there is a foundation of truth for it, he violates professional honor.[103]

## PRIOR CONSISTENT STATEMENTS AND RULE 801(d)(1)(B)

### *United States v. Guevara*

*United States v. Guevara*[104] is one of those rare cases where the Seventh Circuit arrived at the right result for the wrong reasons and in the process may have sanctioned future use of the same kind of evidence which the court itself had sought to proscribe.[105] Mr. Justice Holmes long ago observed that "[o]ne may criticise even what one reveres."[106] It is in this spirit that the following examination of *Guevara* is undertaken.

In *Guevara*, the defendant contended that Ronald Segal, an informant for the Drug Enforcement Administration,[107] had entrapped him into committing the offenses charged in the indictment in order to obtain rewards from the DEA. At trial, on his direct examination, Segal related the details of an initial telephone conversation with the defendant and an ensuing face-to-face meeting with him. Then, apparently without objection from the defense, Segal testified that he called agent Nedoff of the DEA, and related the details of the meeting and phone conversation to Nedoff.[108]

On cross-examination, the defense sought "to establish a charge of

rant v. Surety Homes Corp., 582 F.2d 1081, 1089 (7th Cir. 1978); United States v. Jordan, 454 F.2d 323, 325 (7th Cir. 1971); United States v. Phillips, 217 F.2d 435, 443-44 (7th Cir. 1954).

101. 525 F.2d 84 (7th Cir. 1975).

102. 6 WIGMORE, *supra* note 8, at § 1808.

103. 525 F.2d at 91 n.17 (emphasis in original).

104. 598 F.2d 1094 (7th Cir. 1979).

105. Judges Bauer, Sprecher and Tone were in agreement that the district court had erred in admitting certain rebuttal testimony. Judges Bauer and Sprecher, however, felt that the error was harmless beyond a reasonable doubt. Judge Tone differed with the majority on the harmless error question and voted to reverse. *See id.* at 1101.

106. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 473 (1897).

107. Hereinafter referred to as the DEA.

108. 598 F.2d at 1099. The precise details were, of course, repeated for the jury's benefit. Thus, in essence, Segal was merely repeating what he had just told the jury.

improper motive underlying Segal's testimony as to the defendant's predisposition to engage in the narcotics transaction."[109] In rebuttal, over defense objection, the government called agent Nedoff, who testified that Segal had called him both prior and subsequent to the meetings with the defendant. Nedoff then related the contents of out-of-court conversations between himself and Segal in which Segal informed him what had transpired at the meetings. In short, Nedoff testified to Segal's prior consistent statements.

On appeal, the Seventh Circuit held that the testimony of Nedoff was hearsay and that its admission into evidence contravened rule 801(d)(1)(B).[110] The panel found that Nedoff's testimony, which related the contents of the conversations he had with Segal, contained inadmissible hearsay since the prior consistent statements of Nedoff did not remove the implication of improper motive from Segal's prior testimony.[111] This aspect of the decision was unquestionably correct. However, the majority inexplicably went on to hold that any error in the admission of Nedoff's testimony was harmless "*since it merely established that Ronald Segal's previous testimony* as to the initial telephone conversation and meeting with the defendant was consistent with Segal's statement to agent Nedoff in their telephone conversations before and after the meeting."[112]

It is difficult to quarrel with the ultimate finding of harmless error. Indeed, the writer is aware of no federal case, civil or criminal, in which a judgment was reversed because there had been a violation of the doctrine of prior consistent statements. What is troublesome about the *Guevara* opinion is that it radiates a doctrine without avowing it.

109. *Id.*

110. *Id.* at 1100. Rule 801(d) states, in pertinent part:

> Statements which are not hearsay. A statement is not hearsay if—
>
> (1) Prior statement by the witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . .
>
> (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper inference or motive. . . .

FED. R. EVID. 801(d)(1)(B).

The entire panel was also in agreement, 598 F.2d at 1099-1100, that the admissibility of the evidence could not be justified under rule 803(24), which excepts from the hearsay rule:

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

FED. R. EVID. 803(24).

111. 598 F.2d at 1100. Rule 802 prohibits the admission of hearsay except as provided in the Federal Rules of Evidence or by other rules prescribed by the United States Supreme Court.

112. 598 F.2d at 1100. (emphasis added).

By its phrasing of the conclusion, the court seems unwittingly to have given its imprimatur to *the direct testimony of Segal* in which he related his phone conversations with agent Nedoff.[113] The Seventh Circuit apparently failed to perceive that this testimony, no less than that of Nedoff, violated the rule which prohibits the introduction of prior consistent statements in advance of impeachment.

If *Guevara* was intended to hold that rule 801(d)(1)(B) is not violated merely because the declarant is the witness, since there is no violation of the hearsay rule, then *Guevara* was wrongly decided. There are several flaws in this thesis. Such a premise fails to recognize that the prohibition against the introduction of prior consistent statements on direct examination does not rest only or even chiefly on hearsay grounds. Indeed, prior to the Federal Rules of Evidence, accepted orthodoxy regarded the use of prior consistent statements for rehabilitation as not violative of the hearsay rule since they were not offered for the truth of the matters asserted.[114] Rather, such evidence was inadmissible because it is both logically and legally irrelevant.[115]

Prior to the adoption of rule 801(d)(1)(B), the federal courts were uniform in holding that prior consistent statements of a witness were inadmissible on direct examination to bolster the witness' in-court testimony in advance of a cross-examiner's contention or suggestion that the witness' direct testimony was one of recent fabrication or that he had a motive for testifying falsely. Even then, it was still impermissible to refute such imputation by proof that the witness' previous statements were consistent with his testimony unless the prior consistency antedated a motive to falsify.[116] Further, this prohibition applied regardless whether the witness was the declarant himself or some third person.[117]

113. In these calls, Segal told Nedoff the contents and details of his meetings with the defendant. *See* text accompanying note 109 *supra*.

114. 4 WIGMORE, *supra* note 8, at §§ 1122-32.

115. *Cf.* Mitchell v. American Export Isbrandtsen Lines, Inc., 430 F.2d 1023 (2d Cir. 1970) (witness' prior statements inadmissible even though qualifying under business records exception to the hearsay rule). Rule 402 mandates that irrelevant evidence shall not be received.

116. *See* United States v. Goodson, 502 F.2d 1303, 1307 (5th Cir. 1974); United States v. Lipton, 467 F.2d 1161, 1168 (2d Cir. 1972), *cert. denied*, 410 U.S. 927 (1973); United States v. Rodriguez, 452 F.2d 1146, 1148 (9th Cir. 1972); United States v. Bays, 448 F.2d 977 (5th Cir. 1971), *cert. denied*, 405 U.S. 957 (1972); United States v. DeLaMotte, 434 F.2d 289, 293 (2d Cir. 1970), *cert. denied*, 401 U.S. 921 (1971); United States v. Lewis, 406 F.2d 486, 492 (7th Cir.), *cert. denied*, 394 U.S. 1013 (1969). *See also* FED. R. EVID. 801(d)(1)(B)[01]; J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶¶ 607[08] (1978) [hereinafter referred to as WEINSTEIN & BERGER]; 4 WIGMORE, *supra* note 8, at § 1122; Annot., 75 A.L.R.2d 909 (1963).

117. *See* United States v. Scholle, 553 F.2d 1109, 1121-22 (8th Cir.), *cert. denied*, 434 U.S. 940 (1977); United States v. Alexander, 430 F.2d 904, 905 (D.C. Cir. 1970); 4 WIGMORE, *supra* note 8, at § 1132.

By sanctioning the use of prior consistent statements *as substantive evidence*, rule 801(d)(1)(B) removes the hearsay objection. It does not pretend to abrogate the pre-rules requirement that the prior consistency antedate a motive to falsify.[118] In fact, its very terms preclude any argument that the rule sanctions the introduction of prior consistent statements on the direct examination of a declarant. Properly understood, rule 801(d)(1)(B) does not abrogate earlier case law defining when and under what conditions prior consistent statements are admissible; it merely provides that once such statements are properly received, they may be used substantively without violating the hearsay rule.[119] Where these criteria are satisfied, it is equally proper to allow the declarant to testify to the prior statement as it is to allow testimony by a third party. Conversely, where these criteria are not met, as in *Guevara*, it is as improper to allow the declarant to testify to the statements as it is to permit their rendition by some third party.

In sum, guidance for future cases would have been better served had the majority in *Guevara* not appeared to have implicitly sanctioned the direct testimony of Segal. That testimony was no less violative of the prohibition against the premature introduction of prior consistent statements than was the testimony of Nedoff.

### *United States v. McPartlin*

The doctrine of prior consistent statements and rule 801(d)(1)(B) were again explored in perhaps the most celebrated criminal case tried during the 1978-79 term, *United States v. McPartlin*.[120] *McPartlin* involved charges of massive bribery of public officials in connection with an $18 million sludge hauling project undertaken by the defendants on behalf of the Metropolitan Sanitary District. At the trial, the government introduced evidence that one of the defendants, Weber, had made large cash deposits to an account controlled by him shortly after certain bribe payments had allegedly been made.[121]

In an attempt to rebut this evidence, Weber testified that he obtained the money from a safe-deposit box maintained by himself and his mother. In addition to his mother's testimony, which corroborated Weber's version of how the money was obtained, Weber sought to introduce the testimony of his accountant. The accountant was prepared to testify that in 1973, two years after the deposit, Weber had told him,

118. WEINSTEIN & BERGER, *supra* note 116, at 607-77.
119. *Id.*
120. 595 F.2d 1321 (7th Cir.), *cert. denied*, No. 78-1751 (Oct. 1, 1979).
121. 595 F.2d at 1351.

in connection with the preparation of an IRS audit, that the funds were obtained from Weber's mother.[122] Weber also sought to introduce a copy of the bank statement which contained the accountant's notation, "[o]verdraft covered and paid in cash from Mother (per FNW)."[123] The district court refused to admit this evidence.[124]

On appeal, the evidence was sought to be sustained on the ground that the accountant's testimony, which would have related Weber's prior consistent statement, was admissible as a prior consistent statement under rule 801(d)(1)(B). In properly rejecting this argument, the court recognized that to be admissible the allegedly prior consistent statement must "have some probative value in rebutting the implied charge of recent fabrication or improper motive . . . [h]owever, where a motive to falsify also existed at the time of the earlier statement, it possesses no such probative value"[125] and thus is inadmissible. Since Weber had as much or more of a motive to falsify at the time of the IRS audit as at trial, rule 801(d)(1)(B) could not warrant admissibility of the evidence.[126]

The court also rejected the argument that the bank statement was admissible as a business record under rule 803(6)[127] on the ground that the notations contained on the face of the deposit slip were made in anticipation of IRS litigation and thus lacked the requisite degree of reliability to warrant admissibility under the business records exception to the hearsay rule.[128]

The *McPartlin* case could have provided a further interesting facet of the doctrine of prior consistent statements, had it been brought to the attention of the Seventh Circuit. At trial, on the direct examination of its chief witness, the government introduced over strenuous defense objections what the Seventh Circuit described as "the desk calendar-appointment diaries" of Benton.[129] The objections raised to the introduction of the diaries both at trial and on appeal centered solely

122. *Id.*
123. *Id.*
124. *See id.* The defendant properly preserved the point by making an offer of proof in compliance with rule 103(a)(2).
125. *Id.*
126. *Id.* at 1352.
127. FED. R. EVID. 803(6).
128. *Id.* This holding mirrors prior case law, *see, e.g.*, Williams v. United States, 323 F.2d 90, 95 (10th Cir. 1963); Hartzog v. United States, 217 F.2d 706 (4th Cir. 1954), and is undoubtedly correct. The fact the excluded evidence was prepared in connection with a case other than the one for which the defendant was on trial is obviously of no significance, for the lack of reliability stems from the purpose prompting preparation not from the identity of the case in which it is to be used.
129. 595 F.2d at 1347.

around whether they qualified as business records and thus were receivable as an exception to the hearsay rule under rule 803(6). In sustaining the admissibility of the records, the Seventh Circuit explored at length the reasons why it believed the documents qualified under rule 803(6).[130] However, the question of whether the introduction of the evidence on Benton's direct examination contravened the doctrine of prior consistent statements apparently went unnoticed.

The Second Circuit had occasion to consider the interrelationship of the doctrine and the business records exception to the hearsay rule in *Mitchell v. American Export Isbrandtsen Lines, Inc.*[131] There the court held that the mere fact that a document fell within the business records exception to the hearsay rule did not justify its admissibility if the doctrine of prior consistent statements would be violated thereby. The *Mitchell* court stated:

> [I]f the person making the business entry is a witness at the trial and testifies from his own personal knowledge to the events he recorded there is no ostensible reason for admitting the hearsay written business record entry he made. The record's admission could only be useful to the party calling the witness for the purpose of bolstering the witness's credibility . . . .
>
> . . .
>
> But, of course, a witness while on the stand may examine his written record of an occurrence if it assists him to revive his present recollection of the occurrence and his recollection of the circumstances that caused him to be an actor therein. Therefore, after Dr. Bashline had testified from his personal knowledge of his conversation with the plaintiff and of the professional treatment he prescribed, his "Report of Illness" was not competent for any purpose . . . .[132]

In view of the fact that the arguments raised in *Mitchell* were not raised or considered by the Seventh Circuit in *McPartlin*, the *McPartlin* decision cannot aid in disposition of the question when it is properly presented to the Seventh Circuit; it is fundamental that "precedent" cannot be controlling unless there has been a deliberative consideration in the earlier case of the questions raised in the later one.[133]

130. *Id.* at 1347-51. The court also held that the diaries contained statements which were made by a conspirator during the course and in furtherance of the charged conspiracy and thus were admissible under rule 801(d)(2)(E) as non-hearsay. *Id.* at 1351.

131. 430 F.2d 1023 (2d Cir. 1970).

132. *Id.* at 1028-29 (footnote omitted). *See also* United States v. Baxter, 492 F.2d 150, 165 (9th Cir. 1973), *cert. denied*, 416 U.S. 940 (1974). *But see* Tracy v. Goldberg, 289 F.2d 467, 470 (3d Cir. 1961).

133. *See* United States v. Webb, 467 F.2d 1041, 1043 (7th Cir. 1972). *Accord*, City of Kenosha v. Bruno, 412 U.S. 507, 512-13 (1973); King Mfg. Co. v. Augusta, 277 U.S. 100, 134 n.21 (1928) (Brandeis, J., dissenting); Webster v. Fall, 266 U.S. 507, 511 (1925); United States v. More, 7 U.S. (3 Cranch) 159, 172 (1805); Kramer v. Scientific Control Corp., 534 F.2d 1085, 1090 (3d Cir. 1976);

## CONCLUSION

In the present era, crowded court dockets make it impossible for judges to be able to plumb the depths of the myriad problems that are pressed for resolution by anxious litigants. It is astonishing that under these conditions and in the face of ever-increasing demands on their energies, the federal courts of appeals consistently are able to render opinions of extraordinarily high quality.

A comparison of the Seventh Circuit decisions of the past term with those of a generation ago leads to the conviction that the craftsmanship on the court today is vastly superior to what it was in the past, notwithstanding geometric increases in the court's work load. If there is occasional fault to be found with the court's product, the bar should look to itself to see if it is performing its responsibilities before being unduly critical.

Mr. Justice Holmes once observed: "Shall I ask what a court would be, unaided? The law is made by the Bar, even more than by the Bench."[134] This history of mutual dependence between bench and bar imposes on counsel the responsibility of thoroughly and fully presenting competing views to the court, "[f]or a judge rarely performs his functions adequately unless the case before him is adequately presented."[135] Continued allegiance to and fulfillment of these responsibilities, coupled with the high quality of the Seventh Circuit, will insure that this court will continue to be one of the pre-eminent appellate tribunals in the nation.

United States v. Lowder, 492 F.2d 953, 956 (4th Cir.), *cert. denied*, 419 U.S. 1092 (1974); Knight v. St. Louis I.M. & S. Ry, 141 Ill. 110, 114, 30 N.E. 543, 544 (1892).

134. O. HOLMES, *The Law*, SPEECHES 16 (1913).

135. Brandeis, *The Living Law*, 10 ILL. L. REV. 461, 470 (1916). *See* Adamson v. California, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring).