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EVIDENCE: APPLICATION AND REFINEMENT OF THE FEDERAL RULES OF EVIDENCE IN THE SEVENTH CIRCUIT

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Almost a decade has now passed since the Federal Rules of Evidence were enacted[1] in response to the persistent urgings from a federal bar and bench straining under the burden of an unmanageable number of evidentiary doctrines.[2] Although some feared that the codification of common law evidentiary principles would encourage and result in a wooden application of black letter law,[3] time has proven these fears unfounded. The Federal Rules are anything but a rigid black letter code.[4] The federal courts have recognized that the Rules are largely comprised of general principles or guidelines which are to be construed with sufficient flexibility to promote the development of the law of evidence to the ends of justice as Rule 102[5] mandates.

During the 1983-84 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 Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (codified at 28 U.S.C. app. (1976 & Supp. V 1981)).

2. *See* Green, *Drafting Uniform Federal Rules of Evidence*, 52 CORNELL L.Q. 177, 181 (1967).

3. Perhaps the most notable critic of the Federal Rules was Judge Henry J. Friendly who stated, while testifying before Congress in opposition to the Federal Rules:

> [O]ne may fairly ask what harm there is in a code of evidence, provided it is a good code. My first answer is that evidence is not the kind of subject that lends itself to codification. It is peculiarly a subject for the common law system of judicial development by examination of the actual facts in each case in an adversary setting. . . . The Proposed Rules would tend to freeze the federal law of evidence, except at the intervals, necessarily long, when the Rules were revised. To be sure, Rule 102 instructs the courts to "construe" the Rules so as to promote "growth and development of the law of evidence." But there is not much room for "growth and development" when a judge is firmly bound by 161 pages of rules and commentary.

Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Law of House Comm. on the Judiciary, 93rd Cong., 1st Sess., at 262 (1973) (statement of Henry J. Friendly).

4. For a recent discussion on the positive and negative consequences of codifying the law of evidence after almost a decade of experience with the Federal Rules, see Berger, *The Federal Rules of Evidence: Defining and Refining the Goals of Codification*, 12 HOFSTRA L. REV. 255 (1984).

5. FED. R. EVID. 102 provides: "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."

Seventh Circuit decided a number of interesting and important cases which continued the process of developing and refining the Federal Rules of Evidence.[6] This article presents a selective examination of cases from the 1983-84 term which illustrate the evolving evidentiary jurisprudence of the Seventh Circuit. Since evidentiary questions were routinely presented and ruled upon in numerous cases during the Seventh Circuit's last term, this article highlights only those decisions which either indicate a trend, depart from precedent or the Federal Rules, or are otherwise likely to have a substantial impact upon future decisions.

RULE 403: EXCLUSION OF RELEVANT EVIDENCE

An important method utilized in the Federal Rules of Evidence to accomplish its fundamental goals of fairness and flexibility[7] is its broad theory of relevancy. Under these rules, all relevant evidence is admissible[8] and is defined in Rule 401 as any "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[9] Conversely, Rule 403 provides trial courts with a practical device to control or limit the flood of evidence flowing from the broad application of Rules 401 and 402.[10] Thus, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion," or "waste of time."[11]

Although the language of Rule 403 is discretionary, it too favors admission of relevant evidence,[12] and trial judges are necessarily given broad powers in balancing the probative value of questionable evidence

6. FED. R. EVID. 101-1103.
7. FED. R. EVID. 102.
8. FED. R. EVID. 402.
9. FED. R. EVID. 401.
10. FED. R. EVID. 403. Advisory Committee Note states:

> The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all of the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission.

11. 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.

12. "The phrasing of Rule 403 makes it clear that the discretion to exclude does not arise when the balance between the probative worth and the countervailing factors is debatable; there must be a significant tipping of the scales against the evidentiary worth of the proffered evidence." 22 WRIGHT & GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5221, 309-10 (1978).

against its prejudicial impact.[13] The variety of situations giving rise to the balancing of questionable evidence is so broad that reference to any particular fact patterns in previously decided cases is of little value.[14] Indeed, maintaining the flexibility inherent in Rule 403 requires the exercise of discretion by the trial judge based on the particular facts of each case.[15] This need for discretion unfortunately has made it difficult for appellate courts on review and has prompted them to encourage, without requiring, trial judges to enter written findings on the balance between probity and unfair prejudice.[16] However, the case by case decisions have not led to the development of a generally accepted idea of what constitutes unfair prejudice.[17] The courts' failure to develop a consistent definition of unfair prejudice through the current *ad hoc* approach has led some to question the usefulness of Rule 403.[18]

During the 1983-84 term the Seventh Circuit had several opportunities to review decisions involving the Rule 403 balancing test. An interesting but unusual example was presented by *Wilk v. American Medical Association*,[19] where the court reversed the trial court because certain evidence was so prejudicial that it was an abuse of discretion not to exclude it under Rule 403.[20] In *Wilk*, the plaintiffs, who were chiropractors, brought a civil antitrust action against the AMA and other medical groups alleging that they engaged in a combination and conspiracy to eliminate the chiropractic profession by refusing to deal with the plaintiffs on a professional basis and by denying them access to hospital, labo-

13. *See, e.g.*, United States v. Brown, 688 F.2d 1112, 1117 (7th Cir. 1982); United States v. Lea, 618 F.2d 426, 431 (7th Cir.), *cert. denied*, 449 U.S. 823 (1980); United States v. Dolliole, 597 F.2d 102, 107 (7th Cir.), *cert. denied*, 442 U.S. 946 (1979).

14. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 403.1, at 183 n.16 (1981).

15. *Id.*

16. United States v. Dolliole, 597 F.2d 102, 106 (7th Cir.), *cert. denied*, 442 U.S. 946 (1979).

17. FED. R. EVID. 403, Advisory Committee Note defines unfair prejudice as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."

18. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497 (1983). The author concluded:

> As the number and variety of cases applying Rule 403 mounts, the cost of the failure to develop a coherent definition of unfair prejudice becomes increasingly clear. Without a guide to identifying or measuring the danger of unfair prejudice, the balancing required by Rule 403 cannot meaningfully be conducted. How the courts use their discretion to exclude evidence under Rule 403 can neither be predicted nor effectively reviewed. The claim of unfair prejudice has become the closing shot of every objection, trivializing an important principle while unduly increasing the number of legal issues that must be decided before the presentation of evidence may proceed. The efficacy of Rule 403, which is a basic assumption behind the expansion of admissibility under the Federal Rules, has become doubtful.

Id. at 498.

19. 719 F.2d 207 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 2398 (1984).

20. *Id.* at 232.

ratory, and other diagnostic services.[21] The plaintiffs, who were unconcerned with the motives of the defendants, contended that at various times each of the defendants had done certain things designed to affect the chiropractors' ability to compete with medical doctors. The defendants did not deny these activities but attempted to prove that their actions arose in good faith as a result of their sincere, genuine belief that chiropractic was dangerous quackery. They asserted that their conduct was undertaken in the interest of the public health, safety, and welfare rather than for any commercial benefit.

Prior to trial, the district judge struck the defendants' affirmative defenses of public interest, non-commercial conduct, and clean hands. However, he denied the plaintiffs' motion *in limine* to exclude all evidence pertaining to the public health, safety, or welfare. It was the judge's opinion that this evidence was relevant to determining whether the defendants did or did not actually conspire; whether there was a per se violation of the Sherman Act; and whether the equitable relief sought by the plaintiffs was an available remedy. As a result, the trial was "a free-for-all between chiropractors and medical doctors, in which the scientific legitimacy of chiropractic was hotly debated and the comparative intensity of the avarice of the adversaries was explored."[22]

Although the appellate court agreed that the public interest evidence was relevant to the defendants' genuine belief that chiropractic is quackery and that this belief had some legal significance at trial, the court objected to the "extravagant volume of evidence" permitted by the trial judge as well as its emphasis on alleged financial greed and lack of integrity among chiropractors.[23] Expressing concern that this evidence created such a danger of unfair prejudice and confusion of issues, the court reluctantly held that it was an abuse of discretion not to exclude it under rule 403.[24]

21. According to the evidence presented at trial, the alleged boycott had its beginning in 1963 when the AMA Board of Trustees established the Committee on Quackery. Its prime mission was the containment and then the eventual elimination of chiropractic. In 1966, upon the Committee's recommendation, the AMA House of Delegates adopted a resolution asserting that chiropractic was "an unscientific cult whose practitioners lack the necessary training and background to diagnose and treat human disease." *Id.* at 213-14. The Committee used this resolution as a basis to solicit and induce cooperation from the codefendant organizations in professionally ostracizing chiropractors. As a result, chiropractors were denied access to hospital facilities, X-ray and laboratory facilities, and clinical research and educational activities. Moreover, referrals and diagnostic help from the medical doctors were reduced to a point where public demand for chiropractic services was negatively affected. *Id.* at 214.

22. *Id.* at 216.

23. *Id.* at 232. For example, volumes of evidence were admitted concerning one plaintiff's arrangement with a furniture store for the sale of mattresses to his patients.

24. *Id.*

The decision in *Wilk* is an uncommon example of the application of Rule 403 to reverse a decision of the trial court. Balancing was not discussed in the decision, and the appellate court did not refer to any previous cases with similar facts or cite any other authority. The court simply reviewed the evidence admitted at trial and reached the opposite conclusion of the district court. Consequently, this case does not provide any particular insight into the meaning of "unfair prejudice" or the proper application of Rule 403.

In contrast, the court's interpretation of Rule 403 in *United States v. Gutman*[25] is based closely and predictably on familiar Seventh Circuit evidentiary principles. In *Gutman*, the former president pro tem of the Indiana Senate was prosecuted under the Hobbs Act for using his official position to extort $333 a month for five years from a railroad association in exchange for his help in getting the state's "full crew" law repealed. The prosecution presented testimony of an earlier payment of $40,000 to Gutman by the same railroad association under circumstances strongly suggestive of extortion. Gutman objected to the admission of this evidence, pointing out that the $40,000 payment was not part of the indictment. He contended that the admission of evidence of another crime was improper and unfairly prejudicial.

Although the court agreed that evidence of the prior payment was indeed prejudicial, the Seventh Circuit upheld its admissibility under Rule 403.[26] Gutman did not deny receiving the monthly checks but claimed they were payments for legal services rendered. The court noted that the facts surrounding the $40,000 payment which Gutman also claimed was payment for legal services tended to discredit his testimony concerning the monthly checks and was therefore material to the current extortion charge. Moreover, because he received the monthly payments through a third person, the evidence was necessary to connect Gutman with the association. Finally, the evidence was clear and convincing since it was admitted through the direct testimony of an officer of the association.[27] Consequently, the appellate court held that the district judge did not abuse his discretion in determining that the probative value

25. 725 F.2d 417 (7th Cir.), *cert. denied*, 105 S. Ct. 244 (1984).

26. *Id.* at 421. All effective evidence is necessarily prejudicial in that it is damaging to the party against whom it is offered. However, "rule 403 is not contravened by evidence that might show only that the defendant is guilty of the crime charged." United States v. Monahan, 633 F.2d 984, 985 (1st Cir. 1980). To be excluded, the evidence must be unfair. Dollar v. Long Mfg., N.C., Inc., 561 F.2d 613, 618 (5th Cir. 1977), *cert. denied*, 435 U.S. 996 (1978).

27. *Gutman*, 725 F.2d at 421. Direct testimony from a witness with first hand knowledge always satisfies the clear and convincing test. *See* United States v. Moschiano, 695 F.2d 236, 245 n.14 (7th Cir. 1982), *cert. denied*, 104 S. Ct. 110 (1983); United States v. O'Brien, 618 F.2d 1234, 1239 (7th Cir.), *cert. denied*, 449 U.S. 858 (1980).

of the prior $40,000 payment outweighed its prejudicial impact.[28]

The holding in *Gutman* relied exclusively on the Seventh Circuit's previous decision in *United States v. Dolliole*,[29] where the court discussed in detail the role of the balancing test in the admission of prior crimes evidence. *Dolliole* provides that evidence of prior crimes is admissible under the balancing test of Rule 403 where the evidence is clear and convincing and is reasonably necessary in proving an essential element of the crime.[30] Further, substantial deference is given to the evidentiary ruling of the trial judge who is in a better position to determine the prejudicial impact of the disputed evidence on the jury.[31]

RULE 404: CHARACTER EVIDENCE

While the admissibility of evidence of other crimes or acts is probably the most frequently litigated issue under Rule 403,[32] evidence of other crimes or acts presents issues under Rule 404(b)[33] as well. Rule 404(b) codifies the long standing common law principle[34] that evidence of other crimes, wrongs, or acts is not admissible to establish the character of a person as circumstantial proof of the person's conduct on a particular occasion.[35] Thus, evidence that a person charged with burglary has previously been convicted of shoplifting is inadmissible to prove that

28. *Gutman*, 725 F.2d at 421.

29. 597 F.2d 102 (7th Cir.), *cert. denied*, 442 U.S. 946 (1979). In *Dolliole*, evidence that the defendant had participated in two prior bank robberies was admitted in his trial on charges of being an accomplice in the robbery of a savings and loan association. *Id.* at 106. For an excellent discussion of this case, see Cole, *Evidence: Developments in Character Evidence, Cross-Examination Rules, and Prior Consistent Statements*, 56 CHI-KENT L. REV. 279, 281-85 (1980).

30. 597 F.2d at 106-07.

31. *Id.* at 107.

32. 22 WRIGHT & GRAHAM, *supra* note 12, § 5215, at 281.

33. FED. R. EVID. 404(b) provides:

> 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.

34. The Supreme Court succinctly stated this principle in 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 overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.

See also MCCORMICK, EVIDENCE § 189, at 445-46 (Cleary ed. 1972).

35. FED. R. EVID. 404(b). In United States v. Phillips, 599 F.2d 134, 136 (6th Cir. 1979), the court notes that the first sentence of Rule 404(b) expresses two concerns:

> (1) that the jury may convict a "bad man" who deserves to be punished—not because he is guilty of the crime charged but because of his prior or subsequent misdeeds; and (2) that the jury will infer that because the accused committed other crimes, he probably committed the crime charged.

the person is by nature dishonest and therefore likely to have committed the burglary. However, the second sentence of Rule 404(b) provides that evidence of other crimes, wrongs, or acts may be admissible "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[36] This list is not meant to be all-inclusive, and Rule 404(b) is generally understood to mean that such evidence is admissible, if relevant, *for any purpose* other than to prove mere propensity to commit the crime.[37] Of course, the probative value of the other crimes evidence must always outweigh its prejudicial impact as required by Rule 403.[38] Therefore, evidence of other crimes or prior bad acts often requires consideration under both Rule 403 and Rule 404(b) to determine its admissibility.

During the last term, several cases were decided by the Seventh Circuit dealing with evidence of prior crimes or bad acts. This section will discuss the more important cases involving intent, background, and knowledge.

Intent

Three of the cases in which evidence of prior acts was admitted to prove intent presented similar issues and were analyzed similarly by the court. In the first case, *United States v. Wormick*,[39] the defendant, a police officer, was convicted on five counts of mail fraud in a scheme designed to defraud an insurance company by submission of false automobile accident and theft claims. Wormick's part in the scheme consisted of writing false police reports. Wormick admitted writing the reports, but insisted he was an unwilling dupe of the other participants and merely recorded information given to him during his official duties. On appeal, he challenged the admission of evidence of an unrelated incident which resulted in his demotion from sergeant to patrolman for falsifying a police report involving a shooting.

The second case, *United States v. Stump*,[40] involved a physician who was convicted of illegally prescribing controlled substances. On appeal, the defendant challenged the admission of evidence of illegal prescrip-

36. FED. R. EVID. 404(b).

37. United States v. Nolan, 551 F.2d 266, 271 (10th Cir.), *cert. denied*, 434 U.S. 904 (1977).

38. *See, e.g.*, United States v. Dolliole, 597 F.2d 102, 106-07 (7th Cir.), *cert. denied*, 442 U.S. 946 (1979); United States v. Beechum, 582 F.2d 898, 914-15 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979).

39. 709 F.2d 454 (7th Cir. 1983).

40. 735 F.2d 273 (7th Cir.), *cert. denied*, 105 S. Ct. 203 (1984).

tions which he wrote prior to the date of the charged crime and which were not included in the indictment.

In the third case, *United States v. Kane*,[41] the defendant was convicted of conspiring to possess cocaine with the intent to distribute. The charges against the defendant arose from a drug sale to undercover officers in which he did not actually take part. The trial court admitted testimony of an undercover agent concerning a conversation with the defendant nineteen months previously wherein the defendant openly discussed his extensive cocaine business. The defendant objected to this evidence as a violation of Rule 404.

In analyzing the admissibility of the prior acts evidence in each of these cases, the Seventh Circuit utilized the four part test set out in *United States v. Feinberg*.[42] The first element of this test requires the prior bad acts to be similar in kind and close enough in time to be relevant.[43] In *Wormick*, both the charged crime and the prior act involved falsifying police reports, and the prior act occurred during the same time period as the charged crime.[44] In *Stump*, the prior act was also the same as the charged crime (writing illegal prescriptions), and the time between the incidents was less than a year.[45] Likewise, in *Kane*, the similarity in acts (drug dealing) was indisputable, and the nineteen months between the incidents was not considered to be too remote to be relevant.[46] The Seventh Circuit has held previously that five years between the prior act and the charged crime did not disqualify the evidence.[47]

The second element of the *Feinberg* test is that the evidence must be clear and convincing. The clear and convincing standard is designed to prevent the admission of circumstantial evidence or the mere inference of the defendant's participation in a prior crime.[48] In all three of the cases, the clear and convincing standard was satisfied by testimony of witnesses

41. 726 F.2d 344 (7th Cir. 1984).

42. 535 F.2d 1004 (7th Cir.), *cert. denied*, 429 U.S. 929 (1976). This guide indicates that evidence of prior bad acts is admissible to prove specific intent when:

> (1) the prior act is similar enough and close enough in time to be relevant, (2) the evidence of the prior act is clear and convincing, (3) the probative value of the evidence outweighs the risk of prejudice, and (4) the issue to which the evidence is aimed is disputed by the defendant.

Id. at 1009.

43. The similarity is relevant only to the degree that the acts are sufficiently alike to support an inference of criminal intent. United States v. O'Brien, 618 F.2d 1234, 1238 (7th Cir.), *cert. denied*, 449 U.S. 858 (1980).

44. *Wormick*, 709 F.2d at 459.

45. *Stump*, 735 F.2d at 275.

46. *Kane*, 726 F.2d at 348.

47. *See* United States v. Berkwitt, 619 F.2d 649, 655 (7th Cir. 1980); United States v. Zeidman, 540 F.2d 314, 319 (7th Cir. 1976).

48. *Dolliole*, 597 F.2d at 106-07.

with direct knowledge of the prior acts.[49]

The third element is that the issue to which the evidence will be applied must be disputed by the defendant. Generally, intent is considered to be in dispute whenever a plea of not guilty is entered.[50] This criterion was clearly met in all three cases inasmuch as Wormick vigorously disputed intentionally falsifying the accident reports,[51] Dr. Stump denied intentionally writing unlawful prescriptions,[52] and Kane denied any intentional involvement with drug dealing.[53]

The fourth element is that the probative value of the evidence must outweigh the risk of unfair prejudice. This is, of course, the balancing test of Rule 403. The court sidestepped this issue in *Wormick* by stating that the application of the balancing test is left to the discretion of the trial judge.[54] Since the record disclosed that the judge considered the competing interests, there was no abuse of discretion in admitting the prior acts evidence. In *Stump*, the court found the probative value of the prior acts evidence to be very high because "it tended to prove that the defendant was engaged in a pattern of continuing unlawful conduct outside the scope of a legitimate medical practice" which outweighed "any conceivable prejudice to the defendant."[55] The court was forced to examine the probative value of the prior acts evidence in *Kane* in more detail. According to the court, the facts of the charged crime revealed evidence of Kane's involvement in the cocaine sale, but there was a distinct lack of evidence that he was the actual supplier.[56] Since there was no accomplice testimony or other evidence of Kane's knowledge or intent, the disputed evidence was needed by the prosecution to sustain its burden of proof. Consequently, the court held that the probative value of the evidence outweighed the danger of unfair prejudice because of the

49. *See supra* text accompanying note 27. The evidence of the falsified shooting report in *Wormick* was provided by the testimony of the veteran police lieutenant who investigated the incident. 709 F.2d at 459. In *Stump*, the direct testimony came from one of the recipients of the prescriptions as well as the prescription slips themselves. 735 F.2d at 275. Finally, the evidence in *Kane* was provided by the testimony of the government agent to whom the defendant made his admissions. 726 F.2d at 348.

50. *See, e.g.*, United States v. Buchanan, 633 F.2d 423, 426 (5th Cir. 1980), *cert. denied*, 451 U.S. 912 (1981) ("Faced with a plea of not guilty, the prosecution is under no obligation to wait and see whether the defendant argues the non-existence of an element of crime before the prosecution presents evidence establishing that element."); United States v. Roberts, 619 F.2d 379, 383 (5th Cir. 1980) ("Evidence of such extrinsic offenses as may be probative of a defendant's state of mind is admissible unless he 'affirmatively takes the issue of intent out of the case' " (citation omitted)).

51. *Wormick*, 709 F.2d at 459.

52. *Stump*, 735 F.2d at 275.

53. *Kane*, 726 F.2d at 348.

54. *Wormick*, 709 F.2d at 459.

55. *Stump*, 735 F.2d at 275.

56. *Kane*, 726 F.2d at 348.

lack of any other evidence necessary to prove an essential element of the crime.[57]

Explanation and Background

The Seventh Circuit's decision in *United States v. Jordan*[58] illustrates a situation where evidence of a prior bad act was admitted to explain or provide background for the charged crime. In this case, the defendant was charged and convicted of aggravated battery and resisting a peace officer arising out of his efforts to avoid arrest by security officers at an Air Force base. In an incident a month earlier, the defendant had been barred from the base for threatening security officers. On appeal, the defendant argued that direct and indirect references to the debarment incident violated rule 404(b) and denied him a fair trial.

The indirect references consisted of vague and unspecific comments by the prosecutor concerning the prior debarment and were made to explain Jordan's presence on the base at the time of the charged crime.[59] The court observed that in balancing the probative value against the prejudicial impact, other circuits have admitted evidence of prior bad acts in cases where the acts either explained the circumstances of the crime charged,[60] provided background of the crime charged,[61] or completed the story of the crime charged.[62] Since the comments about the earlier incident merely provided background information on the charged crime, the court held that the trial judge did not abuse his discretion in denying Jordan's motion for a mistrial.[63]

The direct references came on direct examination of a witness where the prosecutor attempted to elicit detailed information about the prior debarment over the defendant's consistent objections. The trial judge sustained the objections but would not grant defendant's motion for a

57. *Id.* (*citing Dolliole*, 597 F.2d at 106, where the court said:

> Cases in this and other circuits, . . . indicate the usefulness of assessing the government's need for the evidence. (citation omitted). When the government has ample evidence to establish an element of the crime, the [incremental] probative value of the prior crime evidence is greatly reduced, and the risk of prejudice which accompanies the admission of such evidence will not be justified.

For a discussion of the dangers of the "necessity test" see Comment, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763, 771-73 (1961).

58. 722 F.2d 353 (7th Cir. 1983).

59. The base Commander had given permission for Jordan to return to the base to attend a meeting on lifting his debarment. *Id.* at 356 n.1.

60. *Id.* at 356. *See, e.g.*, Buatte v. United States, 350 F.2d 389, 395 (9th Cir. 1965), *cert. denied*, 385 U.S. 856 (1966).

61. *See, e.g.*, United States v. Magnano, 543 F.2d 431, 435 (2d Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977).

62. *See, e.g.*, United States v. Wilson, 578 F.2d 67, 72 (5th Cir. 1978).

63. *Jordan*, 722 F.2d at 357.

mistrial. He chose instead to promptly instruct the jury to disregard the testimony about the prior incident. The Seventh Circuit held that although the direct references to Jordan's prior bad acts were improper under Rule 404(b), there was no reversible error considering the trial court's prompt cautionary instruction and the overwhelming evidence of guilt.[64]

Knowledge

The most important case involving Rule 404(b) to be decided by the Seventh Circuit last year was *United States v. Falco*.[65] In this case, the defendant was charged with possession of stolen goods shipped in interstate commerce. Knowledge that the goods were stolen is an essential element of the crime and was the only issue in dispute at trial. The defendant presented evidence tending to prove that he came into possession of the goods through the ordinary course of his employment without any knowledge that they were stolen. The district court allowed the government to enter evidence of the defendant's four prior interstate theft convictions, two of which occurred in 1952, one in 1962, and the other in 1978. On appeal, the defendant challenged the admission of the prior convictions as violations of Rules 404(b) and 403.

The defendant's first argument was that the mere fact that he had previously been convicted of crimes requiring knowledge of stolen goods was not relevant to knowledge in this case unless the underlying facts of the prior convictions were similar to the facts in the charged crime. In rejecting this argument, the court deftly sidestepped precedent cases requiring similarity of prior acts as a necessary element of relevancy[66] by distinguishing *Falco* on the basis that only the bare convictions were admitted, not the underlying facts.[67] This made the case one of first im-

64. *Id.* The court's instructions were "[a]s to specific incidents, [Jordan] is only on trial for resisting these particular military policemen and for the charge of aggravated battery. . . . The jury understands it is only the charges against Mr. Jordan that he is being tried for, not for something else that happened." *Id.* Such cautionary or limiting instructions have long been considered important in lessening the prejudicial impact of prior crimes evidence. *See, e.g.*, United States v. Dennis, 625 F.2d 782, 801 (8th Cir. 1980); United States v. Masters, 622 F.2d 83, 88 (4th Cir. 1980); United States v. Lutz, 621 F.2d 940, 944 (9th Cir.), *cert. denied*, 449 U.S. 859 (1980). However, blind reliance on limiting instructions has come under increasing criticism, and it may be more realistic to believe that the jury will be incapable of considering the evidence solely for the purpose offered. *See* United States v. Figueroa, 618 F.2d 934, 943 (2d Cir. 1980); United States v. Bettencourt, 614 F.2d 214, 218 (9th Cir. 1980); United States v. Bell, 500 F.2d 1287, 1289-90 (2d Cir. 1974). *See also* Comment, *Rule 404(b) Other Crimes Evidence: The Need for a Two-Step Analysis*, 71 NW. U.L. REV. 634, 643 (1976).

65. 727 F.2d 659 (7th Cir. 1984).

66. *See, e.g.*, United States v. Wormick, 709 F.2d 454, 459 (7th Cir. 1983); United States v. Feinberg, 535 F.2d 1004, 1009 (7th Cir.), *cert. denied*, 429 U.S. 929 (1976).

67. *Falco*, 727 F.2d at 663.

pression in the circuit. In the court's opinion, the prior convictions for crimes which all required knowledge as an element tended to show that Falco was familiar with transactions in stolen merchandise. The prior convictions were therefore probative to the extent that they suggested Falco would recognize the characteristics of a shipment of stolen goods and know that the goods in the charged crime were stolen. Other criminal transactions are relevant if they have "a tendency to make the existence of an element of the crime more probable than it would be without such evidence."[68] Consequently, the court found that the evidence met the minimal requirement of relevancy.[69]

The court similarly rejected the argument that the age of the prior convictions made them too stale to be of any probative value. Again agreeing with the reasoning of the district court, the Seventh Circuit stated that it was the pattern of the convictions over several years that was important in this case, not the age of any one of the convictions. It was the pattern of conduct which, according to the court, tended to establish the defendant's familiarity with transactions in stolen goods and provided the probative value to the evidence.[70]

In analyzing whether the trial judge abused her discretion in admitting the evidence of the prior convictions under rule 403, the Seventh Circuit relied on familiar theories. First, proof of knowledge was an essential element of the crime, and the government had very little other evidence to present on this issue. The amount of available corroborative evidence is a proper consideration in the balancing exercise.[71] Second, an attempt was made by the trial court to minimize the potential prejudicial impact of the prior convictions by the use of a cautionary instruction to the effect that the prior convictions should only be considered on the issue of the defendant's knowledge.[72] Finally, the court noted that the trial judge has wide discretion in undertaking the balancing required by Rule 403 which should not be disturbed unless clearly abused. Thus, the appellate court held that the admission of the prior convictions was not an abuse of the trial court's discretion.[73]

Falco is a case which apparently could have gone either way. The court pointed out that the trial judge would also have been justified in

68. *Id.* at 663-64 (*quoting* United States v. Fairchild, 526 F.2d 185, 188-89 (7th Cir. 1975), *cert. denied*, 425 U.S. 942 (1976)).

69. *Id.*

70. *Id.* at 665.

71. *Id.* (*citing Dolliole*, 597 F.2d at 106). *See supra* note 57.

72. 727 F.2d at 666. *See supra* text accompanying note 64.

73. *Id.* at 666-67.

excluding the evidence of the prior convictions.[74] This decision thus exemplifies the usual reluctance of appellate courts to interfere with the discretion of the trial judge in determining whether to admit or exclude evidence of prior crimes.[75]

Although the Seventh Circuit can certainly point to many precedent cases where the admissible prior crimes evidence had just as little connection to the charged crime,[76] there are also recent decisions to the contrary which just as easily could have been followed.[77] Judge Cudahy noted in his thoughtful dissent that the tendency for over-reliance on legal precedent may have resulted in a failure to logically analyze the prior crimes evidence.[78] In his opinion, the underlying factual circumstances in the four prior convictions were crucial in determining whether the evidence was relevant to proving knowledge in the charged crime. Considering the numerous different factual circumstances which could arise in any episode of transporting stolen goods, unless the facts of the prior convictions are similar to the facts in the charged crime, knowledge of stolen goods may not necessarily be inferred from the bare conviction records.[79] Moreover, the danger in using the four prior convictions to establish a pattern of conduct is the potential for inferential error by the jury.[80] Although the trial court's cautionary instruction to the jury was intended to minimize this danger, these instructions are not always effective.[81] In view of the obvious risk of unfair prejudice due to the repeti-

74. *Id.*

75. To the Seventh Circuit's credit, it went to considerable length in this case to analyze the district court's reasoning. This has not always been the case with appellate courts which seem to be all too willing to accept the trial court's judgment in these cases with little or no comment. *See, e.g.*, United States v. Longoria, 624 F.2d 66, 68 (9th Cir.), *cert. denied*, 449 U.S. 858 (1980) (admission of prior crimes evidence affirmed without discussion based on deference to trial court's discretion); United States v. D'Alora, 585 F.2d 16, 21 (1st Cir. 1978) (appellate court only mentions balancing test, then relies on trial court's discretion); United States v. Jackson, 576 F.2d 46, 49 (5th Cir. 1978) (appellate court assumes trial court determined that probative value outweighed unfair prejudice).

76. *See, e.g.*, United States v. Mehrmanesh, 689 F.2d 822, 831 (9th Cir. 1982) (prior charge of hashish possession five years earlier was admissible to prove knowledge that a suitcase contained heroin); United States v. Alessi, 638 F.2d 466, 476 (2d Cir. 1980) (prior conviction in 1972 of purchasing airline tickets with fraudulent credit cards was admissible to prove knowledge that tickets sold by defendant in this case were purchased with stolen credit cards).

77. *See, e.g.*, United States v. Foskey, 636 F.2d 517, 524 (D.C. Cir. 1980) (the mere fact that defendant was in the company of one who possessed drugs was inadmissible to prove knowledge in drug possession charge two and one half years later); United States v. Burkhart, 458 F.2d 201, 203-04 (10th Cir. 1972) (en banc) (two prior convictions for the interstate transportation of stolen vehicles were not admissible to prove defendant's knowledge that the vehicle he was charged with transporting was stolen).

78. *Falco*, 727 F.2d at 668.

79. *Id.* at 667. (Cudahy, J., dissenting).

80. "The danger is that once the jury is told of the defendant's other crimes, the jury will impermissibly infer that he is a bad man likely to have committed the crime for which he is being tried." United States v. Benedetto, 571 F.2d 1246, 1248-49 (2d Cir. 1978).

81. "Giving the instruction may lessen but does not invariably eliminate the risk of prejudice

tion of similar conduct, it is certainly questionable whether there was a proper balancing of Rule 403 considerations in *Falco*.

Summary

The cases decided by the Seventh Circuit during the last term clearly indicate that the court still considers Rules 403 and 404 to be rules of inclusion. As is seen in the cases of *Gutman*, *Kane*, *Jordan*, and *Falco*, wide latitude is given to the discretion of the trial court in weighing the probative value of the evidence against the danger of unfair prejudice. The decisions in *Kane* and *Falco* are also good examples of the inferential lengths to which the Seventh Circuit is willing to go in accepting the admission of prior crimes evidence, particularly where the government has little else with which to prove an essential element of the crime. If there is a danger of inferential error by the jury which might lead them to convict because the defendant is a "bad person," it appears this danger can be satisfactorily ameliorated by the proper cautionary instruction. In sum, the Seventh Circuit has continued its trend of liberally allowing the admission of prior bad acts in criminal cases, with the decision in *Falco* perhaps going farther in this direction than any previous decision.

RULE 501: PRIVILEGE

It now is generally accepted that in rejecting the nine specific rules on privilege originally submitted by the Judicial Conference Advisory Committee, "Congress manifested an affirmative intention not to freeze the law of privilege."[82] By enacting the general language of Rule 501,[83] Congress left the door open to change and provided the courts with "the flexibility to develop the rules of privilege on a case by case basis".[84] During the 1983-84 term, the Seventh Circuit took advantage of this flexibility to decide three cases dealing with privilege. Their decisions in two of these cases modified existing privileges, and the decision in the third case created a new privilege not previously recognized in the circuit.

notwithstanding the instruction. Rule 403 balancing must therefore take into account the likelihood that the limiting instruction will be observed." United States v. Figueroa, 618 F.2d 934, 943 (2d Cir. 1980).

82. Trammel v. United States, 445 U.S. 40, 47 (1980).

83. FED. R. EVID. 501 provides in pertinent part:

> Except as otherwise provided by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

84. *Trammel*, 445 U.S. at 47.

Husband-Wife

The court, in *United States v. Clark*,[85] reaffirmed the joint participation exception to the common law spousal privilege. In *Clark*, the defendant and his wife were indicted for stealing money from a savings and loan association where he was employed. Clark was tried first and convicted in a bench trial. After the jury failed to reach a verdict in the wife's first trial, the prosecution subpoenaed Clark to testify as a hostile witness, believing that the incredibility of his testimony would sway the second jury. Invoking the right of a witness-spouse not to testify adversely against his accused spouse,[86] Clark refused to testify. The district court found that the privilege did not apply and held Clark in criminal contempt.

On appeal, the Seventh Circuit upheld the district court for two reasons. First, the court held that the spousal privilege was limited to only those situations where a spouse was neither a victim nor a participant.[87] If this were not so, a criminal would be assured that the aid of a spouse could be enlisted for a criminal purpose without fear of creating a potential witness. The public interest in discouraging such activity outweighs the interest in protecting the marriage. Furthermore, two other circuits have adopted similar exceptions to the marital privilege against one spouse testifying as to the confidential communications of the other.[88] Second, the court held that the privilege did not apply because the crime took place prior to the marriage.[89] Although this exception was created to discourage sham and collusive marriages entered into for the purpose of suppressing testimony, it is not limited to this purpose. Application of the exception generally to all cases makes it unnecessary for courts to hold mini-trials to determine the true reasons for a marriage.[90]

The decision in *Clark* is consistent with the general principle that

85. 712 F.2d 299 (7th Cir. 1983).

86. *See Trammel*, 445 U.S. at 53, where the Supreme Court modified the spousal privilege rule "so that the witness spouse alone has a privilege to refuse to testify adversely" against the accused spouse.

87. *Clark*, 712 F.2d at 301 (*citing* United States v. Van Drunen, 501 F.2d 1393, 1397 (7th Cir.), *cert. denied*, 419 U.S. 1091 (1974), where the court created the joint participants exception to spousal privilege).

88. *See* United States v. Mendoza, 574 F.2d 1373, 1379-81 (5th Cir.), *cert. denied*, 439 U.S. 906 (1976); United States v. Cotroni, 527 F.2d 708, 712-13 (2d Cir. 1975), *cert. denied*, 426 U.S. 906 (1976); *But see* Appeal of Malfitano, 633 F.2d 276, 278-79 (3d Cir. 1980).

89. *Clark*, 712 F.2d at 302. Again, the court relied on *Van Drunen* where it had previously created the premarriage acts exception to spousal privilege. 501 F.2d at 397. Two other circuits also have recognized the premarriage acts exception for the related marital privilege of confidential communications. United States v. Pensinger, 549 F.2d 1150, 1151 (8th Cir. 1977); Voliantis v. Immigration and Naturalization Servs., 352 F.2d 766, 768 (9th Cir. 1965).

90. *Clark*, 712 F.2d at 302.

privileges are obstructions to truth and should be narrowly construed.[91] The spousal privilege in particular has come under increasing criticism in recent years since the original reasons for its existence are largely outmoded in today's society.[92] In this regard, the Seventh Circuit has always been in the judicial vanguard of those limiting the scope of the spousal privilege.[93]

Attorney-Client

In *Commodity Futures Trading Commission v. Weintraub*,[94] the Seventh Circuit held that the trustee in bankruptcy of a corporate debtor does not have the power to waive the corporation's attorney-client privilege as to any communications occurring prior to the date the petition was filed.[95] In this case, the Chicago Discount Commodity Brokers, Inc. (CDCB) came under investigation of the Commodity Futures Trading Commission (Commission) for alleged violations of the Commodity Exchange Act. At the same time, CDCB also filed a petition for bankruptcy, and a trustee was appointed. In furtherance of its investigation, the Commission served an administrative subpoena *duces tecum* upon the respondent who had formerly represented CDCB as one of its attorneys. Weintraub appeared for his deposition but refused to answer certain questions, asserting the attorney-client privilege. The trustee in bankruptcy then waived the attorney-client privilege, but Weintraub still refused to answer the questions. An order by the Magistrate compelling Weintraub to answer was upheld by the district court. The only question on appeal was whether the trustee in bankruptcy had the power to waive the corporate attorney-client privilege.[96]

Although this question had not previously been considered by the Seventh Circuit, the Second and Eighth Circuits have recently addressed the issue. Both of these courts held that the trustee in bankruptcy had

91. United States v. Nixon, 418 U.S. 683, 710 (1974); *See also* 8 WIGMORE, EVIDENCE § 2228, at 221 (McNaughton rev. 1961); MCCORMICK, EVIDENCE § 79, at 165 (Cleary ed. 1972).

92. The roots of this privilege sprang from medieval jurisprudence where the wife and husband were considered to be one person but finds little support in modern marriages characterized by independence and complete political and legal equality of the spouses. *See, e.g., Trammel*, 445 U.S. at 43-45; MCCORMICK, *supra* note 91, § 66, at 145-46.

93. *See* United States v. Van Drunen, 501 F.2d 1393, 1396-97 (7th Cir.), *cert. denied*, 419 U.S. 1091 (1974); United States v. Kahn, 471 F.2d 191, 194-95 (7th Cir. 1972), *cert. denied*, 411 U.S. 986 (1973) (cross petition raising marital privilege issue), *rev'd on other grounds*, 415 U.S. 143 (1974); United States v. Doughty, 460 F.2d 1360, 1363-64 (7th Cir. 1972).

94. 722 F.2d 338 (7th Cir. 1983), *cert. granted*, 105 S. Ct. 321 (1984).

95. *Id.* at 342.

96. *Id.* at 340. There is little question that the corporate attorney-client privilege survives the corporation's entry into bankruptcy. *See* People's Bank of Buffalo v. Brown, 112 F. 652, 654 (3rd Cir. 1902).

the power to waive the attorney-client privilege. In *In re O.P.M. Leasing Services, Inc.*,[97] soon after a computer leasing company filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Reform Act of 1978, it was charged with fraud by several creditors, and the officers and directors resigned. During the ensuing investigation by the U.S. Attorney, the trustee in bankruptcy waived the attorney-client privilege in regards to a subpoena *ducus tecum* served on a former corporate attorney. The court upheld the waiver in these circumstances because the power to make such a decision adheres to the trustee by virtue of the nonexistence of any other entity (corporate officer or director) authorized to so act.[98] The Seventh Circuit was able to distinguish the facts in *O.P.M. Leasing* because some of CDCB's officers and directors remained in office and thus were able to exercise the right to invoke or waive the attorney-client privilege on behalf of the corporation.[99]

In *Citibank, N.A. v. Andros*,[100] the principal secured creditor of three bankrupt corporations attempted to obtain an order compelling production of certain documents from a former corporate legal advisor. Officers of the bankrupt corporation successfully opposed the order by invoking the attorney-client privilege, but the trustee in bankruptcy claimed the right to waive the privilege and appealed. The Eighth Circuit reasoned that the attorney-client privilege belonged to the corporation, and the power to assert or waive it thus rested with management, not the individual officers. Under the Bankruptcy Act, the trustee assumed broad management powers. Because the power to assert or waive the privilege belonged to management, the court held that it passed to the trustee with the property of the corporate debtor.[101] The Seventh Circuit admitted the factual similarity between the two cases but criticized the Eighth Circuit for not discussing the policy of full disclosure underlying the attorney-client privilege or explaining why the attorney-client privilege for a corporation should be treated differently in bankruptcy than the attorney-client privilege of an individual. Ultimately, the Seventh Circuit simply rejected the Eighth Circuit's conclusion that the attorney-client privilege was a form of property that passed automatically to the trustee upon bankruptcy.[102] Furthermore, the court did not find that the CDCB specifically relinquished control of the attorney-cli-

97. 670 F.2d 383 (2d Cir. 1982).
98. *Id.* at 386-87.
99. *Commodity Futures*, 722 F.2d at 341.
100. 666 F.2d 1192 (8th Cir. 1981).
101. *Id.* at 1195.
102. *Commodity Futures*, 722 F.2d at 342. The court also criticized the Eighth Circuit for relying on an unpublished slip opinion from a district court in another circuit (In re Continental Mort-

ent privilege in the documents transferring corporate assets to the trustees.[103]

The Seventh Circuit articulated four reasons for its holding in this case. First, even in bankruptcy the corporation continues to exist until dissolved by its shareholders or by the state. Although the trustee has broad powers to manage the corporation's property and assets, he does not acquire absolute authority over all corporate functions and legal rights.[104] Second, an individual in bankruptcy is also subject to public examination by the trustee, but the trustee cannot waive the attorney-client privilege for the individual.[105] There is no reason for a debtor corporation to have less protection. Third, allowing the trustee to waive the attorney-client privilege discriminates against the corporation solely on the basis of economic status.[106] Fourth, allowing the trustee to waive the attorney-client privilege would have a "chilling effect" on communications between attorneys and their corporate clients which would inhibit the free exchange of ideas so necessary to effective legal representation.[107] Thus, the Seventh Circuit reached the opposite conclusion of every other court which has considered the issue.[108]

Academic Freedom

The Seventh Circuit recognized for the first time in *Equal Employment Opportunity Commission v. University of Notre Dame Du Lac*[109] a qualified academic freedom privilege to protect from disclosure the identities of academicians participating in the faculty peer review process.[110] In this case, a black professor alleged that the University had unlawfully discriminated against him on the basis of race in denying him a tenured

gage Investors, No. 79-593-S *slip op.* at 2 (D. Mass. July 31, 1979)) as the only authority for its conclusion.

103. 722 F.2d at 341.

104. *Id.* at 342.

105. *Id.* (*citing* In re Blier Cedar Co., 10 B.R. 993 (Bankr. D. Me. 1981); 2 COLLIER ON BANKRUPTCY, ¶ 343.12 (15th ed. 1982)).

106. 722 F.2d at 343.

107. *Id.*

108. *See* In re O.P.M. Leasing Servs. Inc., 670 F.2d 383, 387 (2d Cir. 1982) (power to waive attorney-client privilege vests with trustee in absence of corporate officers or directors); Citibank, N.A. v. Andros, 666 F.2d 1192, 1195 (8th Cir. 1981) (power to waive attorney-client privilege passes with corporate property to the trustee in bankruptcy); In re Blier Cedar Co., 10 B.R. 993 (Bankr. D. Me. 1981) (power to waive attorney-client privilege passes to the trustee in bankruptcy); In re Amjoe, Inc., 11 Collier Bankr. Cas. 2d (MB) 45 (M.D. Fla. 1976) (order of bankruptcy adjudication divests officers of the power to invoke the attorney-client privilege and vests it in the trustee by operation of law); Weck v. District Court, 161 Colo. 384, 422 P.2d 46 (1967) (trustee in bankruptcy has power to waive statutory accountant-client privilege).

109. 715 F.2d 331 (7th Cir. 1983).

110. *Id.* at 337.

position in the Economics Department. He filed a complaint with the EEOC, and as part of its investigation the EEOC demanded that the University furnish copies of the personnel records of the professor. The University offered to allow an investigator to view the personnel file, but refused to permit the EEOC to make copies because the file contained so much confidential material. In response, the EEOC demanded the personnel records of the entire Economics Department. The University offered to produce the records if the EEOC would sign an agreement requiring them to protect the confidentiality of the material. The EEOC refused and issued an administrative subpoena *duces tecum* for the records. When the University refused to comply, the EEOC applied to the district court for an order to show cause why the subpoena should not be enforced. The district court ruled for the EEOC, and the University appealed.

The University contended that the personnel files contained peer review evaluations which were protected by a qualified academic privilege since the evaluations were made with the assurance and expectation of confidentiality. It asked to be permitted to delete the names and other identifying information of the faculty members participating in the peer review process.[111] The University also argued that the EEOC should be required to sign a non-disclosure agreement as a condition precedent to obtaining the files.[112]

The Seventh Circuit was faced with significant and substantial competing interests in this case. On the one hand, the importance of maintaining academic freedom as a special concern of the first amendment has been ardently expressed by the Supreme Court.[113] The peer review process has evolved as a reliable method of making tenure decisions based on an objective and frank critique of the candidate's academic qualifications. Confidentiality is essential to the peer review process, and disclosure of secret tenure ballots and evaluations could have a "chilling effect" on the participants' willingness to be candid.[114]

On the other hand, even first amendment interests are not absolute and may be overcome by compelling countervailing interests.[115] A com-

111. *Id.* at 334.

112. *Id.*

113. Regents of the Univ. of California v. Bakke, 438 U.S. 265, 312 (1978). *See also* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

114. Keyes v. Lenoir Rhyne College, 552 F.2d 579, 581 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977); McKillop v. Regents of Univ. of California, 386 F. Supp. 1270, 1276 (N.D. Cal. 1975); *cf.* United States v. Nixon, 418 U.S. 683, 705 (1974) (a denial of confidentiality among high government officials would temper their candor).

115. *See, e.g.*, Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 841-42 (1978); Wooley v. Maynard, 430 U.S. 705, 715-17 (1977).

plete academic freedom privilege could be used as a shield to overcome charges of discrimination and frustrate the national goal of ending discrimination.[116] Thus, a claim of academic freedom should yield when necessary for the vindication of a person's constitutional rights.[117]

The court weighed these competing interests and found the balance tipped in favor of academic freedom.[118] Consequently, the University was allowed to delete names and identifying information from the records before producing them. The district court was ordered to review both the edited records and the unedited records *in camera* to determine whether the deletions were reasonably necessary to conceal the identity of the evaluating academicians. If so, the edited files would be given to the EEOC. However, the privilege was only qualified and would give way upon a showing that the tenure decision was not made for legitimate, nondiscriminatory reasons.[119] For disclosure of the deleted portions of the records, the EEOC would be required to show a "particularized need"[120] for the additional material, and the district court would be obliged to conduct a balancing test to determine whether the need for disclosure outweighed the adverse effects. "Exploratory" searches would not be condoned, and the court foresaw very few circumstances in which it would be necessary to release the identities of the peer reviewers. The court also held that the EEOC did not have to sign a non-disclosure agreement to obtain the records but instructed the district court to issue a protective order insuring the confidentiality of the edited records.[121] In the court's view, these procedures struck the proper balance between the competing interests.

The Seventh Circuit thus joins the Second Circuit as the only two federal circuits to recognize a qualified academic freedom privilege. The privilege outlined by the Seventh Circuit however is broader than the privilege established by the Second Circuit in *Gray v. Board of Higher Education, City of New York*.[122] According to that case, the qualified

116. *Notre Dame*, 715 F.2d at 337.

117. *See, e.g.*, Gray v. Board of Higher Educ., City of New York, 692 F.2d 901, 908 (2d Cir. 1982) (the plaintiff's need for information to prove racial discrimination was greater than the college's need for confidentiality); Kunda v. Muhlenberg College, 621 F.2d 532 (3rd Cir. 1980) (production of confidential information allowed faculty member to prove sex discrimination in promotion practices).

118. *Notre Dame*, 715 F.2d at 337.

119. *Id.* at 338.

120. The "particularized need" standard varies in proportion to the degree of access to other sources of information; thorough and exhaustive discovery to fully exploit all other information must be conducted; and a compelling necessity for the specific information must be demonstrated. *Id.*

121. *Id.* at 339.

122. 697 F.2d 901 (2d Cir. 1982).

privilege should be recognized only if the faculty member is first provided with a detailed statement of the reasons for an adverse decision.[123] The Fourth Circuit fell short of recognizing the privilege in *Keyes v. Lenoir Rhyne College*,[124] where it held that a district court order protecting the confidentiality of faculty evaluations was valid under Rule 26(c) of the Federal Rules of Civil Procedure. The Fifth Circuit rejected an academic freedom privilege in *In re Dinnan*,[125] stating that such a privilege would simply encourage discrimination of all types at institutions of higher learning.[126]

RULE 801(d)(2)(E): CO-CONSPIRATOR STATEMENTS

Rule 801(d)(2)(E)[127] provides that a statement[128] of one co-conspirator is admissible against any other co-conspirator as a non-hearsay[129] admission if made during the course and in furtherance of the conspiracy. Although the co-conspirator exception is stated simply enough in its codified form, the language of the rule conspicuously leaves open a number of issues which have complicated its administration. For example, Rule 801(d)(2)(E) is silent on the respective roles of the judge and jury in determining whether a conspiracy exists and the exception applies.[130] Rule 801(d)(2)(E) similarly fails to delineate the standard of proof necessary to satisfy its foundational requirements or indicate whether the proponent must adduce evidence independent of the proffered statement to discharge the appropriate standard of proof.[131]

123. *Id.* at 908.

124. 552 F.2d 579, 581 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977).

125. 661 F.2d 426 (5th Cir. 1981), *cert. denied*, 457 U.S. 1106 (1982).

126. *Id.* at 431.

127. FED. R. EVID. 801(d)(2)(E) provides: "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a coconspirator of a party during the course of and in furtherance of the conspiracy."

128. FED. R. EVID. 801(a) defines a "statement" as (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion."

129. FED. R. EVID. 802 reads: "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." *See infra* note 177. Prior to the enactment of the Federal Rules, co-conspirator statements were admitted as an exception to the hearsay rule. Anderson v. United States, 417 U.S. 211 (1974). Although Rule 801(d)(2)(E) now classifies evidence of an admissible co-conspirator statement as non-hearsay rather than as an exception to the hearsay rule, this is a distinction with only a semantic difference. United States v. Smith, 578 F.2d 1227, 1231 n.6 (8th Cir. 1978).

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

131. *Id.* For an excellent discussion of the administrative and procedural issues surrounding the co-conspirator exception, see Mueller, *The Federal Co-conspirator Exception: Action, Assertion, and Hearsay*, 12 HOFSTRA L. REV. 323, 363-87 (1984). *See also* Note, *Inconsistencies in the Federal Circuit Courts' Application of the Co-conspirator Exception*, 39 WASH. & LEE L. REV. 125 (1982); Note, *Co-Conspirator Declarations: Procedure and Standard of Proof for Admission Under the Federal Rules of Evidence*, 55 CHI.-KENT L. REV. 577 (1979).

In 1978, in *United States v. Santiago*,[132] the Seventh Circuit carefully considered these issues and set forth the circuit's standard for the admission of co-conspirator statements under Rule 801(d)(2)(E). Under the *Santiago* standard, a statement is admissible as a co-conspirator declaration when the trial judge[133] is satisfied that the proponent of the statement has proven by a preponderance of the evidence,[134] independent of the statement itself:[135] (1) that a conspiracy existed,[136] (2) that the

132. 582 F.2d 1128 (7th Cir. 1978).

133. In *Santiago*, the Seventh Circuit held that Rule 104(a) requires the trial judge alone to determine the admissibility of co-conspirator statements. *Id.* at 1133. The Seventh Circuit's position is consistent with the current consensus among the other circuits that the trial judge is solely responsible for deciding whether to admit the co-conspirator statements. *See* United States v. Jackson, 627 F.2d 1198, 1217-18 (D.C. Cir. 1980); United States v. James, 590 F.2d 575, 579 (5th Cir.) (en banc), *cert. denied*, 442 U.S. 917 (1979); United States v. Andrews, 585 F.2d 961, 966 (10th Cir. 1978); United States v. Enright, 579 F.2d 980, 984-85 (6th Cir. 1978); United States v. Bell, 573 F.2d 1040, 1043 (8th Cir. 1978); United States v. Stanchich, 550 F.2d 1294, 1298 (2d Cir. 1977); United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977); United States v. Trowery, 542 F.2d 623, 627 (3d Cir. 1976) (per curiam), *cert. denied*, 429 U.S. 1104 (1977); United States v. Jones, 542 F.2d 186, 203 (4th Cir.), *cert. denied*, 426 U.S. 922 (1976); Carbo v. United States, 314 F.2d 718, 736-37 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964).

134. 582 F.2d at 1134. Eight other circuits apply the preponderance of evidence standard of proof. *See* United States v. Petersen, 611 F.2d 1313, 1327 (10th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980); United States v. James, 590 F.2d 575, 582 (5th Cir.) (en banc), *cert. denied*, 442 U.S. 917 (1979); United States v. Enright, 579 F.2d 980, 986 (6th Cir. 1978); United States v. Bell, 573 F.2d 1040, 1044 (8th Cir. 1978); United States v. Stanchich, 550 F.2d 1294, 1299 n.4 (2d Cir. 1977); United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977); United States v. Trowery, 542 F.2d 623, 626-27 (3d Cir. 1976) (per curiam), *cert. denied*, 429 U.S. 1104 (1977); United States v. Jones, 542 F.2d 186, 202-03 (4th Cir.), *cert. denied*, 426 U.S. 922 (1976). Only the Ninth Circuit applies the less burdensome prima facie standard of proof. United States v. Batimana, 623 F.2d 1366, 1368 (9th Cir.) *cert. denied*, 443 U.S. 1038 (1980), ("substantial evidence apart from the statements which establishes a prima facie case of conspiracy and the defendant's slight connection to the conspiracy.") The prima facie standard has been criticized by one commentator on the ground that it affords the criminal defendant little protection. Saltzberg, *Standards of Proof and Preliminary Questions of Fact*, 27 STAN. L. REV. 271, 303-04 (1975).

Although none of the circuits have adopted a beyond a reasonable doubt standard of proof for the admission of co-conspirator statements, one commentator asserts that the more onerous standard of proof is necessary to protect alleged criminal co-conspirators. 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE, ¶ 104[05] at 104-44 (1982). *But see* S. SALTZBERG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 466-67 (2d ed. 1977) (reasonable doubt standard would allow the possibility of bootstrapping). In *Santiago*, the Seventh Circuit found that there was "no reason to require that [the existence of a] conspiracy be proved beyond a reasonable doubt. That is the standard the jury will apply to the evidence as a whole. The judge is ruling on admissibility, not guilt or innocence; the government's burden need not be so great." 582 F.2d at 1134 (quoting United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977)).

135. 582 F.2d at 1133. *See also* United States v. Jefferson, 714 F.2d 689, 696 (7th Cir. 1983) (evidence used "to establish the conspiracy must be non-hearsay and independent of the statements the government wishes to have admitted"); United States v. West, 670 F.2d 675, 684 (7th Cir.), *cert. denied*, 457 U.S. 1124 (1982); United States v. McPartlin, 595 F.2d 1321, 1357 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979).

The requirement that a conspiracy be shown by independent, non-hearsay evidence finds its origin in the pre-Rules decision of Glasser v. United States, 315 U.S. 60 (1942). In *Glasser*, the Supreme Court held that the independent evidence requirement was necessary, "[o]therwise, hearsay would lift itself by its bootstraps to the level of competent evidence." *Id.* at 74-75. A majority of circuits, including the Seventh Circuit, continue to adhere to the *Glasser* independent evidence re-

defendants and the declarant were members of the conspiracy,[137] and (3) that the statement was made during the course and in furtherance of the conspiracy.[138]

The great value and utility of the co-conspirator exception in federal practice is perhaps best reflected by the fact that, judging from reported cases, Rule 801(d)(2)(E) is easily the single most cited provision of Article VIII of the Federal Rules of Evidence.[139] This observation remained true for the Seventh Circuit during its 1983-84 term.[140] The court's most comprehensive decision of this last term involving Rule 801(d)(2)(E) was *United States v. Coe*.[141] In *Coe*, as part of a plea arrangement, an admitted drug dealer named Klinefelter had agreed to help law enforcement officials in narcotics investigations. In the first of a series of nineteen taped telephone conversations, Klinefelter contacted defendant Coe and offered to sell him a large amount of marijuana. In the last taped conversation on April 15, 1982, Coe told Klinefelter that he had finally found

quirement. *See, e.g.*, United States v. Macklin, 573 F.2d 1046, 1048 n.2 (8th Cir.), *cert. denied*, 439 U.S. 852 (1978). The First and Sixth Circuits have relied upon Rule 104(a), which provides that a trial judge "is not bound by the rules of evidence except those with respect to privileges" when deciding preliminary questions of admissibility, to hold that the trial judge may consider the co-conspirator statement itself in determining its admissibility. FED. R. EVID. 104(a); United States v. Guerro, 693 F.2d 10, 12 (1st Cir. 1982); United States v. Vinson, 606 F.2d 149, 153 (6th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

136. Although Rule 801(d)(2)(E) does not expressly require proof that a conspiracy existed, "the existence of a conspiracy is an obvious precondition before the Rule comes into play." United States v. Gil, 604 F.2d 546, 547 (7th Cir. 1979).

137. Circumstantial evidence may be sufficient to establish membership in a conspiracy. Hamling v. United States, 418 U.S. 87, 124 (1974); United States v. Coe, 718 F.2d 830, 837 (7th Cir. 1983).

138. FED. R. EVID. 801(d)(2)(E). The "during the course" and "in furtherance" requirements are closely linked. The purpose of the "in futherance" requirement is "to protect the accused against idle chatter of criminal partners as well as inadvertantly misreported and deliberately fabricated evidence." 4 J. WEINSTEIN & M. BERGER, WEINTEIN'S EVIDENCE ¶ 801(d)(2)(E)[01], 801-235 (1982).

139. 4 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 427 at 331 (1980).

140. In addition to the cases discussed *infra*, the following cases may be of interest to the Seventh Circuit practitioner: United States v. Radseck, 718 F.2d 233 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 1291 (1984) (despite an isolated reference to the prima facie standard, trial judge properly applied the preponderance of the evidence standard in determining that a conspiracy existed as required under *Santiago*); United States v. Jefferson, 714 F.2d 689, 697 (7th Cir. 1983) (trial court's conditional admission of co-conspirators' statements before a conspiracy had been established was proper; co-conspirator statements may be admitted conditionally subject to the trial judge later declaring a mistrial or giving a cautionary instruction if conspiracy showing is not made); United States v. Ras, 713 F.2d 311, 317 (7th Cir. 1983) (co-conspirator's testimony in great detail about his dealings with defendant in furtherance of the conspiracy was not hearsay and provided ample basis for admission as a co-conspirator statement under the *Santiago* standard); United States v. Samples, 713 F.2d 298, 303 (7th Cir. 1983) (in a prosecution for aiding and abetting the receipt, sale, and disposition of stolen goods and property, existence of a conspiracy had been shown by a preponderance of the evidence where coconspirator testified that a third party had given him defendant's name and telephone number).

141. 718 F.2d 830 (7th Cir. 1983).

someone with the necessary $12,000 in cash and was now ready to make the deal.[142] They agreed to meet in the parking lot of a Denny's restaurant in Springfield, Illinois, at 5:00 p.m. that evening, Coe indicating that his party would arrive in a white Chevelle.

When Coe and defendants Korenak and Joseph arrived at the parking lot in a white Chevelle as planned, they were arrested by the police. After being advised of his rights, Joseph, an auto mechanic once in the employ of Korenak, made a statement to the effect that the three men had driven from Kansas City, Missouri to Springfield for the purpose of buying used cars to fix and sell for profit.[143] Several firearms and a bag containing $12,000 in cash were discovered in the car. At a jury trial, all of the defendants were found guilty of conspiring to possess marijuana with the intent to distribute and various firearms offenses.[144]

On appeal, Joseph and Korenak contended that the trial court erred in admitting tapes of the phone conversations between Coe and Klinefelter under Rule 801(d)(2)(E) as evidence against them. Specifically, they argued that the government had failed to establish by a preponderance of independent evidence all of the predicate facts for admission of a co-conspirator statement under the *Santiago* standard. At the threshold of its analysis, the Seventh Circuit posited that the co-conspirator exception is based upon the theory that members of a conspiracy are partners in crime and thus each other's agents.[145] The court high-

142. Klinefelter had sold Coe 350 pounds of marijuana in July of 1981. The transcripts of the telephone calls made before April 15, 1982, revealed that Coe was attempting, with little success, to find persons to finance the drug deal. 718 F.2d at 833.

143. Joseph stated that he had brought the $12,000 in cash for this purpose and a loaded firearm for security. He maintained that he did not know the person who was selling the cars, but that if they had found any cars to buy he would have had to return to Kansas City to get a trailer to pick them up. At trial, Coe and Korenak testified, corroborating Joseph's statement. Korenak testified that Coe had telephoned to tell him about the cars for sale in Springfield, and that he in turn telephoned Joseph and relayed the information. Coe testified that he had made up the whole used car story to convince Joseph and Korenak to come to Springfield with the money. Coe testified that his purpose in arranging this scheme was so that he could meet Klinefelter, show him the cash, and then go with him alone to the place where he kept his supply of drugs, his money and other valuables. There, Coe would try to collect on a debt owed to him by Klinefelter's brother-in-law, for which he thought Klinefelter should be held partly responsible, or at least obtain information on the whereabouts of the brother-in-law. Coe would then tell Joseph and Korenak, who were waiting at a motel with the cash, that there were no cars to buy. He denied having bought marijuana from Klinefelter on any prior occasion, and claimed that he had learned the drug slang that he used in his conversations with Klinefelter from some acquaintances who were involved with drugs. *Id.* at 833-34.

144. *Id.* at 834.

145. *Id.* at 835 (citing Anderson v. United States, 417 U.S. 211 (1974)). In *Anderson*, the Court explained that the rationale of the coconspirator exception was based upon concepts of agency law:

> The rationale for both the hearsay-conspiracy exception and its limitations is the notion that conspirators are partners in crime. As such, the law deems them agents of one another. And just as the declarations of an agent bind the principal only when the agent acts within the scope of his authority, so the declaration of a conspirator must be made in furtherance of the conspiracy charged in order to be admissible against his partner.

lighted the important distinction between the evidentiary concept of conspiracy, and the substantive crime of conspiracy, which requires much more than a mere joint venture or concerted action.[146] Because the evidentiary and criminal concepts of conspiracy are not coterminous,[147] a criminal conspiracy charge is not a prerequisite for invocation of the co-conspirator exception.[148] The exception may be invoked in both civil and criminal cases.[149]

After laying this groundwork, the Seventh Circuit turned to the merits of the case at hand. The court first addressed the defendants' contention that the government had failed to prove by a preponderance of independent evidence that a conspiracy existed. The Seventh Circuit noted that the trial court had based its decision to admit the telephone conversations largely on the fact that a white Chevelle carrying the defendants and $12,000 in cash had arrived at the restaurant parking lot exactly as predicted. Inasmuch as Coe's statements were themselves the source of this prediction, the Seventh Circuit found that the trial court had improperly considered the telephone conversations in determining that the government had met its burden of proving that the defendants had engaged in a joint venture.[150] However, the Seventh Circuit concluded that the trial court's error in considering the telephone conversa-

417 U.S. at 218 n.6 (citations omitted). *See also* Van Riper v. United States, 13 F.2d 961, 967 (2d Cir. 1926) ("When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made 'a partnership in crime.' "), *cert. denied sub nom.*, Ackerson v. United States, 273 U.S. 702 (1926).

It has been candidly suggested, however, that the real reason for the co-conspirator exception is simply that there is a great need for it in criminal conspiracy prosecutions, which are inherently difficult to prove. Note, *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 989 (1959); Levie, *Hearsay and Conspiracy—A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule*, 52 MICH. L. REV. 1159, 1163-65, 1169 (1954). The Advisory Committee to the Federal Rules of Evidence implicitly adopted this view when it stated, "The agency theory of conspiracy is at best a fiction". Advisory Committee's Note, FED. R. EVID. 801(d)(2)(E) (1976). Despite the foregoing, the Seventh Circuit readily asserted in *Coe* that the rationale for the co-conspirator exception is explained by principles of agency law. 718 F.2d at 835. The Seventh Circuit's revelation in *Coe* is a bit perplexing when viewed in light of its recent recognition that the co-conspirator exception is in fact "largely a result of necessity, since it is most often invoked in criminal conspiracy cases in which the proof would otherwise be very difficult and the evidence largely circumstantial." United States v. Gil, 604 F.2d 546, 549 (7th Cir. 1979).

146. 718 F.2d at 835. The substantive crime of conspiracy generally requires a meeting of the minds, intent, and, where mandated by statute, an overt act. *Gil*, 604 F.2d at 549.

147. United States v. Kendall, 665 F.2d 126, 130 (7th Cir.), *cert. denied*, 455 U.S. 1021 (1982).

148. *Gil*, 604 F.2d at 549. To help distinguish between the criminal and evidentiary concepts of conspiracy, courts sometimes drop the term conspiracy and refer to the evidentiary concept as the "joint venture" exception, *e.g.*, United States v. Swainson, 548 F.2d 657, 661 (6th Cir. 1977), *cert. denied*, 431 U.S. 937 (1978), or the "concert of action" exception, *e.g.*, United States v. Trowery, 542 F.2d 623, 626 (3d Cir. 1976) (per curiam), *cert. denied*, 429 U.S. 1104 (1977).

149. *See, e.g.*, Spray-Rite Service Corp. v. Monsanto Co., 684 F.2d 1126, 1245 (7th Cir. 1982) (civil antitrust suit). Thus, as the Seventh Circuit pointed out in *Coe*, it is not even necessary that the joint venture itself be unlawful. 718 F.2d at 836 n.3.

150. 718 F.2d at 836.

tions was harmless in light of the trial record which disclosed sufficient independent evidence to establish these foundational facts[151] and show that Coe's statements, at least in part,[152] were made in the course and furtherance of a joint venture to buy marijuana.

On appeal, Korenak also challenged the admission of Coe's statements in the telephone calls made prior to the day of the arrest on the grounds that: (1) there was no evidence that either he or Joseph were members of a conspiracy before that point; and (2) the conspiracy itself was not yet in existence. In rejecting the first claim, the Seventh Circuit relied upon the "well-established principle that statements of co-conspirators before a defendant joins the conspiracy are nonetheless admissible against him."[153] Turning to the second claim, the court found that insofar as "[t]he requirement that the statement be made 'during the course of' the conspiracy seems itself to contemplate that the conspiracy be in existence at the time the statement is made,"[154] Coe's statements to Klinefelter before the day of the arrest should not have been admitted under the co-conspirator exception because they also were made before the formation of the conspiracy. The court noted that transcripts of the telephone calls before that date revealed that Coe had not yet found anyone to finance the drug buy. Furthermore, Coe and Klinefelter were not engaged in a joint venture; they were working at cross purposes, even though Coe was unaware of this at the time.

Nevertheless, the Seventh Circuit concluded that the substance of these statements was merely cumulative, adding nothing prejudicial to Coe's statements to Klinefelter on the date of the defendants' arrest, which were admissible under the conconspirator exception.[155] Therefore, any error in their admission was harmless beyond a reasonable

151. The Seventh Circuit found that there was sufficient evidence of a joint venture to purchase marijuana in Springfield because, among other things, Klinefelter testified that he had contacted Coe for the purpose of luring him to Springfield for the drug buy; the events surrounding another recent drug deal between Klinefelter and Coe were similar to those leading up to the defendants' arrest; the trip to Springfield was made immediately after the last of nineteen telephone calls; and the defendants were in possession of a large amount of cash and three loaded firearms when they were arrested. *Id.* at 837-38.

152. *See infra* text accompanying notes 154-55.

153. 718 F.2d at 838. *See* United States v. United States Gypsum Co., 333 U.S. 364, 393 (1948) ("With the conspiracy thus fully established, the declarations and acts of the various members, even though made or done prior to the adherence of some to the conspiracy, become admissible against all as declarations or acts of co-conspirators in aid of the conspiracy."). *See also* United States v. Cassity, 631 F.2d 461, 464 (6th Cir. 1980); United States v. Anderson, 532 F.2d 1218, 1230 (9th Cir.), *cert. denied*, 429 U.S. 839 (1976); United States v. Santos, 385 F.2d 43, 44-5 (7th Cir.), *cert. denied*, 390 U.S. 954 (1968).

154. 718 F.2d at 840.

155. *Id.*

doubt.[156] Although no new trails were blazed in *Coe*, the decision reflects a tension between loosening the strictures of the *Santiago* standard to allow wider admissibility of co-conspirator statements and the concern with protecting the criminal defendant against the unfair prejudice of an improperly admitted co-conspirator statement.

The Seventh Circuit decided two other cases during this last term which indicate that the court favors a flexible application of the foundational requirements for admission of a co-conspirator statement under the *Santiago* standard. In *United States v. Xheka*,[157] the defendants were convicted of conspiracy to destroy their downtown restaurant as part of a scheme to collect the proceeds from an insurance policy taken out on the restaurant. The evidence presented at trial showed that in July of 1976 Chris Callas had told Wadie Howard, a known arsonist, that the defendants had a problem which Howard could probably solve. Although Callas, a mutual acquaintance of the defendants and Howard, did not tell Howard what the nature of this problem was, he did ask Howard to pass along some money if he was remunerated for his services. Two days later, Howard met with the defendants and agreed to burn down the restaurant for $5,000 in cash plus expenses. Three more weeks passed, and after receiving the money in advance as promised, Howard set a fire that destroyed the restaurant. The scheme backfired, however, because two eyewitnesses at the scene of the crime saw Howard leave the restaurant just moments before it was leveled by an explosion.

After his arrest, Howard decided to cooperate with the government's investigation of the fire. A suit which the defendants had filed against their insurance company, seeking payment of the insurance proceeds, was pending at the time of the trial. At trial, the government was allowed to introduce a tape recording of a conversation that took place in July of 1979 between Callas and Howard, who was now a government informant. The crux of the conversation, which was admitted as substantive evidence under the co-conspirator exception, was that Callas thought that the defendants should work with Howard so that they could collect the insurance proceeds.[158]

On appeal, the defendants argued that the trial court erred in admitting the tape because (1) the conspiracy had ended as soon as the fire was

156. *Cf.* United States v. Miller, 725 F.2d 462, 467 (8th Cir. 1981) (trial court's error in admission of a statement under the co-conspirator exception which was not made during the course or in furtherance of the conspiracy was harmless where the statement was cumulative in nature and not essential to the government's case).

157. 704 F.2d 974 (7th Cir.), *cert. denied*, 104 S. Ct. 486 (1983).

158. The Seventh Circuit set out the following excerpt from the taped conversation:

set, and (2) Callas was not a member of any conspiracy at the time of the conversation. Recognizing that "an agreement to conceal a completed crime does not extend the life of a conspiracy,"[159] the Seventh Circuit indicated that it will follow the teachings of *United States v. Grunewald*,[160] where the Supreme Court found that "a vital distinction must be made between acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been obtained."[161] Citing the analogous situation where kidnappers conceal their crime and their victim while waiting for a ransom payment, the court reasoned that the conspiracy did not end once the restaurant was destroyed because the defendants were still actively pursuing the unrealized main object of the conspiracy—obtaining the insurance payment.[162]

In rejecting the defendants' claim that there was insufficient evidence to establish that Callas was a member of the conspiracy at the time of the taped conversation, the Seventh Circuit underscored the fact that Callas had sent Howard to the defendants and expected some money in return. Furthermore, one of the defendants had made a brief telephone call when Howard introduced himself at the restaurant. According to the court, it was "a fair inference" that the call was to Callas to confirm Howard's credentials.[163] The court concluded:

> Once a member of the conspiracy Callas remained a conspirator until he took affirmative steps to withdraw from the agreement. Even if

> Howard: Have you got a quick minute where we can talk right quick? The Government come back. I been trying to get in touch with Sonny [one of the defendants]. Have you heard anything from him?
>
> Callas: I heard he had a restaurant somewhere, I hear. Like I say, if you really want to know, I can find out, I can find out for you.
>
> * * * *
>
> Callas: . . . You know the worst thing that you ever did in life to me is introduce me to this guy. This son-of-a-bitch.
>
> Howard: What now? . . . They welch? . . . They should cooperate with you if they want to get their money. They should cooperate with you. Then leave me your number and I'm going to try to, for sure, I'm going to try to hard. I got this girl that's coming back in a few weeks. She knows them.
>
> * * * *
>
> Howard: Yes. I want to talk to 'em.
>
> Callas: Do they get that money?
>
> Howard: Yes, ah no. I don't, I don't think so yet. It's still pending.
>
> Callas: Can they get the money without you?
>
> Howard: I don't think so.
>
> Callas: All right. I think, I think I'm gonna talk to this girl for sure.

704 F.2d at 984-85.

159. *Id.* at 985 (citing Grunewald v. United States, 353 U.S. 391, 405 (1957)).

160. 353 U.S. 391 (1957).

161. *Id.* at 405.

162. 704 F.2d at 985-86.

163. *Id.* at 986.

> Callas did nothing to further the purpose of the conspiracy after he sent Howard to see the defendants, and even if Callas had, understandably, given up any hope of receiving money from Howard, he remained a conspirator. "Mere cessation of activity in furtherance of the conspiracy does not constitute withdrawal."[164]

The Seventh Circuit also found that Callas's statements were in furtherance of the conspiracy because they showed that he was trying to keep Howard in the conspiracy to aid the defendants' efforts in collecting the insurance proceeds.[165] The court's finding is significant for two reasons. First, it clarifies an ambiguous point about the "in furtherance" requirement which the court had recently made in *United States v. Mackey*.[166] In *Mackey*, the Seventh Circuit stated that the government must demonstrate that "some reasonable basis exists for concluding that the statements furthered the conspiracy."[167] The court's statement would seem to suggest that a co-conspirator's statement must effectively advance conspiratorial goals to satisfy the 'in furtherance' requirement. However, this reading of *Mackey* was implicitly rejected by the Seventh Circuit in *Xheka*. In *Xheka*, Callas's statements to Howard could not have *actually* furthered the conspiracy because Howard was a government informant at the time of their conversation. *Xheka* thus stands for the proposition that, for purposes of the "in furtherance" requirement, it is not necessary that a co-conspirator statement actually further the conspiracy; it is enough if the statement is uttered with the *intent* of furthering the conspiracy.[168]

The *Xheka* decision is also important because it marks the first time that the Seventh Circuit, or any other circuit court of appeals, has acknowledged that the determination of whether a co-conspirator statement is made in furtherance of the conspiracy "must of necessity take into account the contents of the [proffered] statement."[169] This practice, applicable only to the "in furtherance" prong of the *Santiago* standard after all of the other predicate facts for admission are established by in-

164. *Id.* (quoting United States v. Phillips, 664 F.2d 971, 1018 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136 (1982)). *See also* United States v. Diaz, 662 F.2d 713 (11th Cir. 1981); United States v. Bastone, 526 F.2d 971, 988 (7th Cir.), *cert. denied*, 425 U.S. 973 (1976).

165. *See supra* note 158.

166. 571 F.2d 376 (7th Cir. 1978). *See also* United States v. Kendall, 665 F.2d 126 (7th Cir.), *cert. denied*, 455 U.S. 1021 (1982).

167. 571 F.2d at 388.

168. *Cf.* United States v. Hamilton, 689 F.2d 1262, 1270 (6th Cir.) (trial court properly admitted under the coconspirator exception statements made to a coconspirator who was cooperating with the government because such statements need not actually further the conspiracy; "[i]t is enough that they be intended to promote the conspiratorial objectives"), *cert. denied*, 103 S. Ct. 753, 754 (1983).

169. 704 F.2d at 986.

dependent evidence,[170] makes a good deal of sense. The court's ruling is both logical and practical because the contents of the statement in issue will, by their very nature, be important in determining whether the declarant made it with the intent to further the conspiracy.[171] For example, the contents of the conversation in question in *Xheka* revealed that although Callas had not communicated with the defendants recently, he was nonetheless aware that Howard's cooperation was vital in obtaining the insurance proceeds, and, to this end, had told Howard that he was going to get in touch with the defendants.[172] The Seventh Circuit concluded that this sufficed to establish that the conversation was made in furtherance of the conspiracy.[173]

This same theme found further expression in *United States v. De Gudino*,[174] where the defendants were convicted of conspiracy to transport illegal aliens. On appeal, the principal issue in *De Gudino* was whether certain lists containing evidence of the smuggling operation were made during the course and in furtherance of the conspiracy, and were thus admissible under the co-conspirator exception. The Seventh Circuit noted that the contents of the lists consisted of names of smuggled aliens and their sponsors, along with dates, telephone numbers, dollar figures, and records of payment. From the contents of the lists, it was clear that their author was familiar with the intricacies of the smuggling operation.

The Seventh Circuit found that the fact that the lists contained dates and records of payment was sufficient evidence to establish that they were written during the course of the conspiracy. The "in furtherance" prong of the *Santiago* standard was also satisfied because the names, telephone numbers, and dollar amounts were evidence that the lists were used to preserve information which the defendants needed to continue their smuggling activities. The Seventh Circuit concluded that "[s]ince this evidence was not countered by any evidence that the lists were made at any time other than during the conspiracy or that the lists were not made to further the conspiracy, . . . the lists were admissible as co-conspirators' statements."[175]

During the 1983-84 term, the Seventh Circuit devoted considerable attention to the co-conspirator exception. Commendably, the court's de-

170. *See supra* note 135.

171. *Cf.* United States v. Mangan, 575 F.2d 32, 43 (2d Cir.) (an examination of the context in which the statement is made is necessary to determine if it was made in furtherance of the conspiracy), *cert. denied*, 439 U.S. 931 (1978).

172. *See supra* note 158.

173. 704 F.2d at 986-87.

174. 722 F.2d 1351 (7th Cir. 1984).

175. *Id.* at 1356.

cisions appear to have struck an appropriate balance between the legitimate competing policy interests that arise in cases in which the co-conspirator exception is invoked. On the one hand, the *Coe* decision exemplifies the court's rigorous application of the *Santiago* standard to ensure the exclusion of unreliable co-conspirator statements. On the other hand, the court's decisions of this last term indicate that the *Santiago* standard should not be so overly stringent that reliable evidence, needed to secure conspiracy convictions, is also excluded. In *Xheka* and *De Gudino*, the court demonstrated a willingness to allow greater admissibility of co-conspirator statements under the *Santiago* standard by recognizing that the trial judge may consider the contents of the statement in issue in determining whether the declarant made it with an intent to further the conspiracy or joint venture.

RULE 803(8): PUBLIC RECORDS AND REPORTS

Rule 803(8)[176] sets forth a hearsay exception[177] for public records and reports. The public records exception is based in part upon the presumption that public officials will perform their duties; that they lack any motive to suppress or distort the truth; and, to a lesser extent, upon the notion that public examination of records, when available, will reveal any inaccuracies.[178] Two other more realistic justifications for the exception are that it is necessary because of the disruptive effect and inconvenience to a public official called into court to testify to a matter which was accurately reported and recorded, and the great likelihood that a public official will have little or no recollection independent of a record or report comprised of a multitude of trivial or mechanical entries.[179]

The public records exception does not, however, sanction blanket admission for all public records or reports; instead, the exception in-

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

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, in criminal cases matters observed by police officers or other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings made pursuant to authority granted by law, unless the sources of information or other circumstances indicate a lack of trustworthiness.

177. FED. R. EVID. 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

178. *See* 5 WIGMORE, EVIDENCE § 1632 at 618-21 (Chadbourn rev. 1974).

179. Wong Wing Foo v. McGrath, 196 F.2d 120, 123 (9th Cir. 1952) ("[T]here is a great likelihood that a public official would have no memory at all respecting his actions in hundreds of entries that are little more than mechanical. A further necessity lies in the inconvenience of calling to the witness stand all over the country government officials who have made in the course of their duties thousands of similar written hearsay statements concerning events coming within their jurisdictions.").

cludes important use restrictions to preserve the confrontation rights of criminal defendants.[180] For example, although subsection (B) of Rule 803(8) provides an exception to the hearsay rule for "matters observed pursuant to duty imposed by law as to which there was a duty to report," it also renders inadmissible "in criminal cases matters observed by police officers and other law enforcement personnel."[181] In *United States v. Oates*,[182] the Second Circuit set forth an exhaustive canvass of the legislative history underlying Rule 803(8)(B) and (C), and concluded that in addition to the explicit law enforcement use restriction of subsection (B), there is clear congressional intent that law enforcement reports or records are to be absolutely inadmissible against an accused under Rule 803(8)(B) or (C) or any other hearsay exception.[183]

Only one case in the Seventh Circuit's last term involved the public records exception. In perhaps the most controversial evidentiary decision of the 1983-84 term, *United States v. Hardin*,[184] the Seventh Circuit reached a result hopelessly at odds with the *Oates* doctrine. In *Hardin*, the defendant was charged with possessing, with intent to distribute, approximately 344 grams of cocaine. At the jury trial, the government was allowed to introduce a graph from a Drug Enforcement Administration (DEA) statistical report which purported to show the average price and purity of illicit cocaine in the United States. The price and quality data from the statistical report were derived from DEA purchases and seizures of illicit cocaine between 1977 and 1980. Over the defendant's hearsay objection, the graph was used to show that the 344 grams of 87% pure cocaine, when diluted to average retail purity, had an approximate "street" value of $212,680. The government relied upon this evidence as circumstantial proof of the defendant's intent to distribute. A conviction followed.

On appeal, the defendant argued that the graph fell within the law enforcement use restriction of Rule 803(8)(B) and was thus inadmissible under any exception to the hearsay rule. The government contended that the graph was admissible under Rule 803(8)(A) as a data compilation setting forth the activities of the DEA or under Rule 803(8)(B) as a rec-

180. 120 CONG. REC. 2387-88 (1974) (statements of Reps. Dennis and Holtzman).

181. Subsection (C) of Rule 803(8) also sets forth a use restriction for "evaluative" reports by providing that "factual findings resulting from an investigation made pursuant to authority granted by law" are only admissible in civil actions and against the government in criminal cases "in view of the almost certain collision with confrontation rights which would result from their use against the accused in a criminal case." Advisory Committee's Note, FED. R. EVID. 803(8)(C).

182. 560 F.2d 45 (2d Cir. 1977).

183. *Id.* at 72. *Accord* United States v. Cain, 615 F.2d 380, 381-82 (5th Cir. 1980); United States v. Ruffin, 575 F.2d 346, 356 (2d Cir. 1978).

184. 710 F.2d 1231 (7th Cir.), *cert. denied*, 104 S. Ct. 286 (1983).

ord of routine police observations. Without citation to any legal authority supporting its decision, the Seventh Circuit held that the graph was admissible as a data compilation within the meaning of Rule 803(8)(A).[185] The court based its conclusion on this reasoning:

> The conversion into statistical form of the average price and purity of illicit cocaine purchased by DEA agents over a period of years not only reflects the agency's activity but is important to its understanding of the market it polices and the efficient performance of its regulatory duties. That the observations of DEA agents in the field are the ultimate source of the data does not affect admissibility. The compilation of such information for the non-litigative purpose of identifying national trends in the illicit drug market provides little incentive for misrepresentation by these agents. Moreover, the government's need and obligation to define its regulatory mission with accuracy clothe the report with inherent reliability, while its preparation for congressional review subjects it to public scrutiny for veracity.[186]

The result reached by the Seventh Circuit in *Hardin* is unsound and finds no support in either the Federal Rules or case law. The court's conclusion that the graph was admissible under Rule 803(8)(A) as a data compilation of DEA's *own* activities is clearly in error because the graph, which charted the average price and purity of illicit cocaine, was used at trial to compute the "street value" of the cocaine seized from the defendant, and did not purport to set forth, explain, or describe any activities of the DEA itself. Query whether the graph might nevertheless have been received, as the government alternatively argued, under Rule 803(8)(B) as a record of routine police observations. Although a few courts have held that the law enforcement use restriction of Rule 803(8)(B) will not bar admission of routine and non-adversarial reports,[187] the observations of DEA field agents during the course of a seizure or purchase of illicit cocaine can hardly be characterized as routine or non-adversarial. Furthermore, it should be of no moment that these observations were not specifically directed at the defendant in *Hardin*, for they were nonetheless tainted by the adversarial nature present in the investigation and apprehension of other suspected law breakers.

The Seventh Circuit's finding of "inherent reliability" in the DEA graph is also suspect. The court's opinion conspicuously fails to discuss whether the person(s) responsible for compiling the DEA statistics had the qualifications to make the report reliable in the first instance. In light of the fact that many of the procedural safeguards employed by govern-

185. *Id.* at 1237.

186. *Id.*

187. *See, e.g.*, United States v. Hernandez-Rojas, 617 F.2d 533, 535 (9th Cir.), *cert. denied*, 449 U.S. 864 (1980); United States v. Grady, 544 F.2d 598, 604 (2d Cir. 1976).

ment agencies are inadequate to ensure "inherent reliability",[188] the court's analytical oversight cannot be dismissed lightly. Furthermore, because the DEA, like any other government agency, has a reputation to maintain and protect, it does not necessarily follow that the agency's reports are somehow free from bias and distortion.[189]

More problematic is the Seventh Circuit's uncritical acceptance of the DEA graph since its reliability was further attenuated by multiple hearsay.[190] The court's statement that "the observations of DEA agents in the field are the ultimate source of the data does not affect admissibility"[191] flies in the face of Rule 805,[192] which proscribes the admission of evidence containing multiple hearsay absent an individual hearsay exception for each separate level of hearsay. Finally, the Seventh Circuit also did not address the question whether the government's imprimatur on the graph might have caused the *Hardin* jury to accord the evidence more weight than it deserved.[193]

In sum, the *Hardin* decision rests upon an analysis that bristles with analytical deficiencies. The court's holding represents an unwarranted extension of Rule 803(8)(A) which, if followed in future cases, will emasculate the law enforcement use restriction of Rule 803(8)(B). Although the Seventh Circuit may narrowly read *Hardin* to avoid this result by limiting its holding to the particular facts and circumstances of the case, such a decision must unfortunately wait until further reflection and consideration by the court.

CONCLUSION

The Seventh Circuit's evidentiary jurisprudence in the 1983-84 term continued a trend of liberal admissibility through a flexible construction and application of the Federal Rules of Evidence. An abiding sensitivity

188. *See, e.g.*, Denny v. Hutchinson Sales Corp., 649 F.2d 816, 821 (10th Cir. 1981) (in a housing discrimination suit, probable cause determination of Colorado Civil Rights Commission based upon ex parte investigation lacking procedural safeguards such as cross-examination was properly excluded as untrustworthy).

189. *See, e.g.*, Wetherwill v. University of Chicago, 518 F. Supp. 1384, 1390-91 (N.D. Ill. 1981).

190. The DEA graph arguably contained three separate levels of hearsay. The first hearsay level was the observations of illicit drug activities by the DEA field agents. The second hearsay level was the conversion of the DEA field agents' observations into data compiled in the statistical report. Finally, the third level of hearsay was the DEA graph itself which purported to show in visual form the summarized findings of the statistical report.

191. 710 F.2d at 1237.

192. FED. R. EVID. 805 provides: "Hearsay within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."

193. *See* City of New York v. Pullman Inc., 662 F.2d 910, 915 (2d Cir. 1981) (government records and reports have an "aura of special reliability"), *cert. denied*, 454 U.S. 1164 (1982).

and deference to the broad discretionary powers vested in the trial judge by the Federal Rules was a theme common to many of the court's decisions. Perhaps only with the notable exception of the court's decision in the area of public records, the Seventh Circuit commendably looked to the policy and logic underlying the rules in deciding upon their proper application. With almost a decade's experience under the Federal Rules, the Seventh Circuit has demonstrated that it will, whenever reasonable, interpret the rules creatively to promote the growth of the law of evidence in the interests of justice.