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EVIDENCE: RECENT DEVELOPMENTS IN THE SEVENTH CIRCUIT

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During the 1980-81 term, the United States Court of Appeals for the Seventh Circuit was called upon to answer a number of questions concerning the Federal Rules of Evidence. The opinions relating to the Federal Rules of Evidence resolved various issues of relevancy, privilege, cross-examination and, in one interesting case, the scope of rule 407 with regard to strict liability actions.

In discussing the parameters of rule 401, the Seventh Circuit took note of Professor McCormick's statement that " '[a] brick is not a wall.' "[1] But, while undoubtedly building towards a comprehensive treatment of the Federal Rules of Evidence, the Seventh Circuit was not called upon to build a "wall." Instead, the court's task was to provide a few "bricks" for practitioners to use in their efforts to comply with the Federal Rules of Evidence. This article will discuss the most significant evidence rulings of the Seventh Circuit during the 1980-81 term and will highlight opinions from other circuits where similar issues were addressed.

RELEVANCY: RULES 401, 402 AND 403

The Federal Rules of Evidence define relevant evidence as "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."[2] All relevant evidence is admissible unless otherwise provided by law.[3] However, rule 403 states that even 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

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1. United States v. Greschner, 647 F.2d 740, 741 (7th Cir. 1981). Professor McCormick's statement refers to the fact that several individual pieces of evidence often may have to be presented in order to prove the existence of a fact that is in issue. *See* note 9 *infra*.

2. FED. R. EVID. 401.

3. FED. R. EVID. 402.

undue delay, waste of time, or needless presentation of cumulative evidence."[4] The need for the evidence and its reliability are two factors used to ascertain its probative value.[5] Under the Seventh Circuit's interpretations of the Federal Rules of Evidence, a trial judge *must* conduct a balancing of these factors in deciding whether to admit evidence.[6]

The most interesting opinion on the issue of relevancy under rule 401 was that in *United States v. Greschner*.[7] Greschner was an inmate of the federal penitentiary at Marion, Illinois. While receiving a haircut from a fellow inmate named Logan, Greschner stabbed him with a homemade knife. At trial, Greschner represented himself and defended on a theory of self-defense. In presenting this defense, Greschner attempted to prove that Logan had a character trait for violence and that Logan had a motive to attack him. To prove these points, Greschner sought to introduce evidence showing that Logan had previously stabbed another inmate and that Logan's motive for wanting to attack Greschner was that Logan thought Greschner had called him an informer. In a jury trial, the district court excluded evidence on each issue. Greschner was convicted of assault and of conveying a weapon within the prison.

On appeal, the Seventh Circuit held that the excluded evidence was relevant under rule 401 and that its exclusion was "seriously prejudicial" to the defendant's theory of self-defense on the assault charge.[8] Accordingly, the court reversed Greschner's conviction and remanded the case for a new trial. In addressing the exclusion of evidence relating to Logan's character for violence, the Seventh Circuit gave an expansive, though literal, reading to rule 401, requiring only, as stated in the rule, that the proferred evidence have "any tendency" to make a fact of consequence more or less probable.[9] The excluded evidence re-

4. FED. R. EVID. 403.

5. The court should also consider the importance of the fact which the evidence is being offered to prove in the context of the litigation as a whole, the length of the chain of inferences necessary for the evidence to prove the fact it is being offered to prove, the availability of alternative means of proof, whether the fact which the evidence is being offered to prove is actually in dispute, and, in appropriate cases, the potential effectiveness of a limiting instruction to the jury under rule 105. *See* United States v. Dolliole, 597 F.2d 102 (7th Cir.), *cert. denied*, 442 U.S. 946 (1979); United States v. Ostrowski, 501 F.2d 318 (7th Cir. 1974).

6. *See* United States v. Price, 610 F.2d 819 (7th Cir. 1979); United States v. Dolliole, 597 F.2d 102 (7th Cir.), *cert. denied*, 442 U.S. 946 (1979).

7. 647 F.2d 740 (7th Cir. 1981).

8. *Id.* at 743.

9. *Id.* at 741. In its review of rule 401, the court looked to the Advisory Committee's Note on the rule. That note makes clear, as the court found, that the standard of probability is not stringent in considering whether evidence is relevant under rule 401:

lating to Logan's possible motive for attacking Greschner was a " 'brick in his wall' "[10] according to the court and thus met the requirements for admissibility under rule 401. Looking to rule 404,[11] the court found no bar to the admission of character evidence of the victim.

Greschner exemplifies the Seventh Circuit's generally consistent application of the principles of relevancy during its 1980-81 term and indicates the likelihood that the court will continue to follow a steady and predictable course in this area of the law of evidence.

In *United States v. Thomas*,[12] the court approved the admission of certain photographs offered by the Government. Among the photographs were pictures of some of the defendants near a warehouse where an alleged stolen automobile "chop shop" was being operated. Other photos showed auto parts in the warehouse at the time the FBI executed a search warrant. In a straightforward analysis, the Seventh Circuit rejected the defendant's relevancy argument and found that the photographs were not unfairly prejudicial so as to warrant exclusion under rule 403.[13]

> Problems of relevancy call for an answer to the question whether an item of evidence, when tested by the processes of legal reasoning, possesses sufficient probative value to justify receiving it in evidence. Thus, assessment of the probative value of evidence that a person purchased a revolver shortly prior to a fatal shooting with which he is charged is a matter of analysis and reasoning.
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> . . . .
>
> Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Does the item of evidence tend to prove the matter sought to be proved? Whether the relationship exists depends upon principles evolved by experience or science, applied logically to the situation at hand. . . . [Rule 401] summarizes this relationship as a "tendency to make the existence" of the fact to be proved "more probable or less probable." . . .
>
> The standard of probability under the rule is "more . . . probable than it would be without the evidence." Any more stringent requirement is unworkable and unrealistic. As McCormick § 152, p. 317, says, "A brick is not a wall," or, as Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L. Rev. 574, 576 (1956), quotes Professor McBaine, ". . . [I]t is not to be supposed that every witness can make a home run."

FED. R. EVID. 401, Advisory Committee's Note.

10. 647 F.2d at 743. Motive is the cause or reason that moves the will and induces action, BLACK'S LAW DICTIONARY 914 (5th ed. 1979), while intent is the mental state existing at the time of the action, *id.* at 727. Evidence of motive is always admissible, dependent, of course, upon the trial court's broad discretion. *Pointer v. United States*, 151 U.S. 396, 414 (1894). Generally, defendants may offer proof of good motive to contradict suggestions that motivation was bad. United States v. Brown, 411 F.2d 1134 (10th Cir. 1969); May v. United States, 175 F.2d 994 (D.C. Cir.), *cert. denied*, 338 U.S. 830 (1949). Since there was no deviation from the general rule regarding the admissibility of motive and since facts regarding Logan's belief that Greschner had called him an informer were crucial to Greschner's defense, the Seventh Circuit was clearly correct in reversing on this ground alone.

11. FED. R. EVID. 404(a)(2) provides that evidence of a crime victim's character is admissible in certain limited circumstances.

12. No. 79-1465 (7th Cir. July 24, 1980) (unreported).

13. As the court stated:

> The defendants fail[ed] to show how these photographs were *unfairly* prejudicial. The photographs were not likely to inflame the emotions of the jury. *See, e.g., United States*

In *Thomas*, the Seventh Circuit also approved admission of lay opinion testimony by an FBI agent that the condition of the warehouse at the time the search warrant was executed indicated that the defendants "did not appear to have been operating an auto repair shop."[14] The court concluded that the agent, who had financed part of his college education by working at an auto repair shop and who had rebuilt several cars as a hobby, was qualified under rules 602[15] and 701[16] to render such an opinion.[17]

Relevancy questions were also addressed in *United States v. Lampson*.[18] Lampson and his nephew, Qualls, were charged with forcible entry into a post office and theft of mail. Lampson testified on his own behalf that he was present at the post office not to participate in the crime but to dissuade his nephew from committing the offense. To buttress this defense, Lampson attempted to call an attorney for whom he had previously worked and with whom he had discussed his concern that his nephew stay out of trouble. The district court refused to admit the attorney's testimony on relevancy grounds. And, although the Seventh Circuit stated that it might "have been inclined to rule differently on the question of relevance,"[19] it refused to substitute its opinion for

> *v. Cartano*, 420 F.2d 363 (1st Cir.), *cert. denied*, 397 U.S. 1054 (1970) (vivid pictures of murder victim's wounds admissible). Nor did the photos improperly imply the defendants' guilt to the jury. *See, e.g., United States v. Weir*, 575 F.2d 668 (8th Cir. 1978) (evidence of an attempt by the defendant to kill a suspected informant was considered improper). The defendants overlook[ed] the fact that all evidence is "inherently prejudicial" and that only "unfair prejudice, *substantially* outweighing probative value . . . permits exclusion of relevant matter under Rule 403." *United States v. McRae*, 593 F.2d 700, 707 (5th Cir.), *cert. denied*, 100 S. Ct. 128 (1979) (emphasis in original). These photos were relevant evidence properly admitted by the district court.

United States v. Thomas, No. 79-1465, slip op. at 7-8.

14. *Id.* at 9. The agent noted that the only equipment in the warehouse was for the taking apart of cars and that there was no equipment for the assembling, repairing or painting of cars. *Id.*

15. FED. R. EVID. 602 provides:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

16. FED. R. EVID. 701 provides:

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

17. Slip op. at 9. The Seventh Circuit also noted that none of the defendants' attorneys objected at the time this evidence was elicited from the agent at trial. Rule 103 requires such a contemporaneous objection.

18. 627 F.2d 62 (7th Cir. 1980).

19. *Id.* at 66.

that of the trial court absent a "clear showing of abuse of discretion."[20]

Analyzing the relevance of the attorney's testimony, the Seventh Circuit reasoned:

> A question of relevancy must be raised in relation to the particular crime charged. Here, Lampson was indicted with two counts but convicted on only one, the second count. Thus, questions of relevancy of evidence based on count I (breaking and entering) are here mooted by the acquittal on that count, and we need only address the excluded testimony as it relates to count II (theft of mail).
>
> Theft of mail under 18 U.S.C. § 1708 does include the element of intent to steal at the time the mail is taken. . . . However, the attorney's testimony was offered to corroborate Lampson's testimony about his state of mind upon entering the post office—his motivation for entering. The question here is narrow: whether it would have been error for the Court to exclude the attorney's testimony based upon its relevancy only to count II of the indictment.
>
> Motivation or intent for entering the post office is separate and distinct from the intent associated with the taking of the mail. Lampson's purported concern for his nephew's behavior does not bear on his act of removing mail from a post office. . . .[21]

In *United States v. Payne*,[22] the defendant was charged with conspiracy to transport stolen motor vehicles from Kentucky to Indiana in violation of 18 U.S.C. § 2312 and to conceal and sell such vehicles in violation of 18 U.S.C. § 2313. The trial court excluded evidence offered by the defendant to show that he had previously purchased automobiles in Detroit at less than "redbook" value. The defendant argued that the excluded evidence would have tended to negate the inference that he knew he was buying stolen cars because the price he paid was less than the "redbook" value. The Seventh Circuit found the evidence irrelevant and said that even if the evidence was of some remote relevance, it was still properly excluded under rule 403 as tending to cause confusion or undue delay and waste of time at trial.

It is difficult to square this conclusion with the court's statements concerning the "abundant evidence" in the record from which the jury could draw a "more solid inference of the defendant's guilty knowledge."[23] The court went on to catalogue the bases of this solid

20. *Id.* It is difficult to reconcile the conclusion the court reached in *Greschner* with its conclusion in *Lampson*. In both instances, evidence which tended to exculpate the defendant was sought. In both instances, the evidence related to an essential fact at issue and no reasonable alternative of proof was available. In *Lampson*, the court refused to substitute its judgment for that of the trial court. In *Greschner*, however, the court found that the failure to admit the offered evidence was reversible error and an abuse of discretion.

21. 627 F.2d at 66.

22. 635 F.2d 643 (7th Cir. 1980), *cert. denied*, 101 S. Ct. 2050 (1981).

23. *Id.* at 647.

inference of guilt and, in doing so, seemed implicitly to support a conclusion that the proferred evidence was indeed relevant under the broad parameters of rule 401. The final conclusion actually seems to be grounded on a notion that the exclusion was harmless in light of the abundant evidence of the defendant's guilt.

Relevancy and rule 403 were again the topic in *United States v. Koger*[24] in which the Seventh Circuit reversed a conviction for possession of three checks that had been stolen from the mail. At his trial, Koger testified in his own behalf that he worked at the post office but had not taken the checks and did not know they were stolen. He said he had obtained the checks from a long-time friend named Stephanie Green. Koger had rented an apartment to Green, and he said she gave him one of the checks to pay her rent. He cashed the check and, after deducting the rental payment, gave her the balance. He deposited a second check she gave him into his account and gave her cash. Koger said Green had finally given him a check for more than $100,000, saying they could use the money to go into business together. He said he had asked her to deposit the check in his account since he was on his way to work at the time. He later withdrew $6,000 of this money. He never saw Green again.

On cross-examination, Koger said he did not know if Green had ever been convicted of a crime. The Government then introduced evidence showing that Green had previously been convicted for embezzling mail while employed by the postal service and that she had been incarcerated in July and August of 1978. The Government stated that this evidence was offered to impeach Koger, and the district court admitted it into evidence over Koger's objections that its introduction violated rules 403 and 803(22). The evidence was shown to the jury, and no limiting instruction was given until the next day when the court devoted a single paragraph of its eleven page jury charge to a statement that the evidence of Green's criminal acts was to be considered only on the issue of the credibility of Koger's testimony.

On appeal, the Seventh Circuit held that the evidence regarding Green "did not and could not impeach Koger, because he testified he did not know Green had been convicted."[25] Therefore, the court stated, "[T]he exhibits regarding the conviction and jail term of a third party (Green) for an offense not shown to have anything to do with the charges against Koger were completely irrelevant and violated Rules

24. 646 F.2d 1194 (7th Cir. 1981).
25. *Id.* at 1198.

401 and 402 of the Federal Rules of Evidence, and, therefore, were inadmissible."[26] Even if the evidence had been relevant, said the court, its

> probative value (if any) is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury. In other words, the exhibits were before the jury for all purposes and without any limiting instructions for almost 24 hours. They could have speculated during that period of time, as well as afterward, that Green stole the checks and gave them to Koger, and that because Green was convicted and served time for stealing the checks, Koger knew they were stolen because of Green's conviction for that offense, which he was bound to know about because of her absence from her apartment during the period of incarceration. Such procedure is highly speculative and theoretical at best and without proof and should not be allowed in a criminal trial. It violates Rule 403 and other Rules of Evidence and is highly prejudicial, and violates the rule of presumption of innocence.[27]

Turning from the issue of relevancy, the court rejected the Government's argument—and the holding of the trial judge—that the exhibits were not rendered inadmissible by rule 803(22)[28] because they were " 'not offered to prove any fact essential to sustain the prior judgment of [Green's] conviction.' "[29] The court stated that, notwithstanding the offering statements of the prosecutor, the exhibits regarding Green's conviction *were* offered to prove that Green had previously been convicted of theft from the mail and that she had been incarcerated during part of the time she lived in Koger's building.[30]

Quoting the Supreme Court's opinion in *Kirby v. United States*,[31] the Seventh Circuit held that the introduction into evidence of the exhibits deprived Koger of the right of confrontation of witnesses in violation of the sixth amendment to the Constitution.[32] In conclusion, the court declared:

26. *Id.* (footnote omitted).
27. *Id.* (footnote omitted).
28. FED. R. EVID. 803(22) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
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> . . . .
>
> **(22) Judgment of previous conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

29. 646 F.2d at 1199.
30. *Id.*
31. 174 U.S. 49 (1899).
32. 646 F.2d at 1200.

> We are convinced that the introduction of the exhibits into evidence subjected Koger to devastating and unfair prejudice, confused the issues and perhaps misled the jury. It could be argued that this phase of the case was presented and tried, as stated by the late Chief Judge Hutcheson of the Fifth Circuit Court of Appeals in *Olinger v. Commissioner of Internal Revenue*, 234 F.2d 823, 824 (1956), too much on the theory of "Give a dog an ill name and hang him."[33]

IMPEACHMENT: RULES 608(b) AND 609

In addition to discussing the relevancy of evidence purportedly offered for impeachment in *Koger*,[34] the Seventh Circuit addressed the collateral impeachment by extrinsic evidence prohibition of rule 608(b)[35] in *United States v. Payne*.[36] In *Payne* a defense witness denied knowing a police detective seated at counsel table. In fact, the witness had been stopped earlier that year by the officer for a traffic offense and had been arrested when the officer discovered the witness was carrying a pistol without a permit. The witness had subsequently been convicted. After the witness denied knowing the officer, the prosecution was permitted to follow up that answer by asking the witness if he had been convicted in the preceding 12-month period.

Without discussion or citation of authority, the Seventh Circuit found that the trial court was correct in permitting such "proper" questions. However, the court failed to specify what it meant by "proper" questions. The first question, concerning the witness' recognition of the officer, arguably addresses the issue of the witness' ability to recollect. The witness' failure to remember an individual involved in a significant, recent event would perhaps suggest a general inability to recollect accurately. The second question asked of the witness presents a much more difficult problem regarding the propriety of permitting the prose-

33. *Id.* (footnote omitted).

34. *See* notes 24-33 and accompanying text *supra*.

35. FED. R. EVID. 608(b) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
>
> The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

36. 635 F.2d 643 (7th Cir. 1980), *cert. denied*, 101 S. Ct. 2050 (1981). *See* notes 22-23 and accompanying text *supra*.

cutor to "follow up" his inquiry into the witness' ability to recall the officer by asking him about his previous criminal convictions.

The question about the prior convictions seems to demand a two stage scrutiny in this case. First, since the question was directed at a collateral matter—the witness' ability to recognize a particular police officer—it must be determined whether rule 608(b) would permit impeachment of his statement that he failed to recognize the officer by evidence of his previous conviction on a charge lodged against him by that officer. Second, if rule 608(b) would bar such evidence, it must be determined whether the evidence could nevertheless come in as an impeaching prior conviction under rule 609. If evidence of the prior conviction could not be admitted under either of these theories to perfect the prosecution's attempted impeachment, it is difficult to see how the prosecution could argue in good faith that it had a basis in fact for asking the impeaching question once the witness denied knowing the officer.[37]

Under rule 608(b), the follow up question was plainly inappropriate. The rule provides that specific instances of the conduct of a witness, for the purpose of attacking his credibility, may not be proved by extrinsic evidence.[38] Thus, if the witness had stood his ground and denied any previous convictions when the prosecutor inquired about such convictions in an attempt to impeach the witness' recollection, the prosecutor would have been required to "take [the witness'] answer."[39] The prosecutor would not have been permitted to call other witnesses or produce records to perfect the impeachment by proving that the witness did have prior convictions.[40]

37. *See* Davis v. Freels, 583 F.2d 337 (7th Cir. 1978); T. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 281-84 (1980).

38. *See* note 35 *supra*.

39. *See* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 84 (2d ed. 1972).

40. *See id.*; Davis v. Freels, 583 F.2d 337 (7th Cir. 1978). *Davis* was a civil action under 42 U.S.C. § 1983 in which a police officer was being sued for shooting a suspect. The jury found for the police officer and the plaintiff appealed. In discussing one of the plaintiff/appellant's allegations of error, the Seventh Circuit made the following observations:

> On direct examination, appellant testified that he owned two auto repair shops and Wallaces Rib Shop and that he was going to one of the auto repair shops at the time he was shot by Freels. On cross-examination he was asked whether he had filed income tax returns for 1973, 1974, and 1975. Appellant's objection was overruled, and he contends that this was error. Appellee argues that the questioning about income tax returns was for the purpose of casting doubt on appellant's credibility regarding his ownership of the three businesses, and that failure to report any income from those businesses would be inconsistent with such claimed ownership. This theory of admissibility was not the one relied on at trial, where defendant's counsel justified the question as going to the plaintiff's general credibility as a witness. We offer the following observations because, as concluded *infra*, the case must be retried. Whether appellant owned the three businesses was an issue injected into the case by appellant himself in an effort, apparently, to bolster

Only if the witness' prior conviction had been admissible under rule 609 would it have been subject to proof by extrinsic evidence, thus justifying the impeaching question about prior convictions.[41] However, the facts of the case do not indicate that the previous conviction would have been admissible under rule 609. There is nothing to show that the crime of which the witness had been convicted was punishable by imprisonment in excess of one year. This is a threshold for admissibility of a conviction under rule 609. Therefore, it is possible that the prosecutor attempted to link the witness' knowledge of the police officer to an inquiry regarding the conviction in order to argue that by failing to recognize the detective the witness had opened the door to proof of a conviction which was punishable by less than one year. If the witness honestly did not recall, however, it is difficult to accept a finding that his prior conviction would be impeaching of his failure to recognize the detective at trial. In any event, the court failed to establish that the conviction was for a crime punishable by more than one year.[42] Equally as troubling, the Seventh Circuit failed to establish whether the trial court balanced the risk of unfair prejudice to the defendant against the evidence's probative value as required by rule 609(a)(1).[43]

The value of impeachment by proof of a prior conviction where

> his own credibility and to blunt the possible inference that he lacked any good reason to be where he was at the place and time of the incident. The issue being collateral, 3A *J. Wigmore Evidence* § 1003 (Chadbourne ed. 1970), it cannot be the subject of independent evidence, *id.*, § 1001. *The question and answer are all the jury will hear.* For this reason, the trial judge, in exercising his discretion to allow cross-examination bearing on such an issue, ought to satisfy himself that there is a basis in fact for the ultimate inference the cross-examiner would have the trier of fact draw, in this case that appellant did not own the businesses. At the new trial, which we conclude *infra* must be granted, the judge will be guided by what we have said.

Id. at 341-42 (emphasis added).

While the additional witness bar is the often used standard for determining whether extrinsic evidence is involved, *see, e.g.*, United States v. Cohen, 631 F.2d 1223 (5th Cir. 1980), a more difficult question arises when the examiner attempts to pursue "extrinsic" matters with the same witness. In United States v. Pisari, 636 F.2d 851 (1st Cir. 1981), the court reversed a conviction and held that calling a witness to rebut testimony given by the defendant as to his non-involvement in a prior robbery was improper. The court stated that the examiner must "take the answer" of the witness.

41. FED. R. EVID. 609 provides:

> (a) **General rule.** For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

42. Indeed, under the law of Indiana, the jurisdiction where the witness had been convicted, a conviction for a first offense of illegally carrying a gun is *not* punishable by a sentence of more than one year. IND. CODE ANN. §§ 35-23-4.1-3, -18, -50-3.2 (Burns 1979).

43. *See* note 41 *supra*.

the crime does not relate to dishonesty or false statement is questionable.[44] It is thus important to adhere strenuously to certain safeguards when such an inquiry is pursued. First, where possible, the parties should consider use of a motion in limine in which to raise the issue.[45] The use of such motions insures fundamental fairness and can aid counsel in making tactical decisions regarding the litigation. Second, it is essential where such evidence is offered that the court determine that its probative value outweighs the possibility of unfair prejudice to the defendant. The Seventh Circuit has "urge[d] trial judges to make such determinations after a hearing on the record . . . and to explicitly find that the prejudicial effect of the evidence to the defendant will be outweighed by its probative value."[46] Third, the trial court should, where possible, give a limiting instruction regarding the use of such testimony immediately after the witness' testimony. And even where the court gives such an instruction, counsel would be well advised to request another such instruction to the jury on the same point at the conclusion of the case.

The issue of whether the attempted impeachment is collateral or noncollateral is a frequently recurring problem under rule 608 for both courts and litigants. Within this general dilemma is the question of which party created the basis of the collateral/noncollateral issue: was the question which prompted the attempted impeachment asked by the tendering party or his adversary? In a different but somewhat related context, the Supreme Court recently addressed the question of whether the use of illegally obtained evidence for impeachment is permitted when the questioning which "opens the door" to impeachment by such evidence occurs during cross-examination. The traditional view had been that only testimony elicited by questioning during direct examination could be impeached by use of illegally seized evidence.[47] That view has now been repudiated by the Supreme Court.[48]

44. *See, e.g.*, Gertz v. Fitchburg R.R., 137 Mass. 77 (1884) in which Judge Holmes observed:

> [W]hen it is proved that a witness has been convicted of a crime, the only ground for disbelieving him which such proof affords is the general readiness to do evil which the conviction may be supposed to show. It is from that general disposition alone that the jury is asked to infer a readiness to lie in the particular case, and thence that he has lied in fact. The evidence has no tendency to prove that he was mistaken, but only that he has perjured himself, and it reaches the conclusion solely through the general proposition that he is a bad character and unworthy of credit.

Id. at 78.

45. *See* 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 609[03a] at 607-79 (1977).

46. United States v. Mahone, 537 F.2d 922, 929 (7th Cir. 1976).

47. *See* Walder v. United States, 347 U.S. 62 (1954); Agnello v. United States, 269 U.S. 20 (1925).

48. *See* United States v. Havens, 446 U.S. 620 (1980). In *Havens*, the Supreme Court under-

SIMILAR ACTS: RULE 404(b)

In *United States v. DeJohn*,[49] the Seventh Circuit examined the use of similar acts evidence offered by the Government under rule 404(b).[50]

cut the traditional understanding that the Government may use illegally obtained evidence only to impeach statements made by a defendant on direct examination. Havens and a companion had flown from Lima, Peru to Miami, Florida. During a customs search in Miami, Havens' companion was discovered to be carrying cocaine sewed into makeshift pockets on a T-shirt he was wearing. He implicated Havens, who had already cleared customs, and Havens was arrested. Havens' luggage was illegally seized and searched. Inside was a T-shirt from which had been cut pieces of material matching the pieces used to make the cocaine pouches in his companion's T-shirt. This evidence was suppressed prior to Havens' trial on various drug related charges. At his trial, Havens took the witness stand in his own defense and denied any knowledge of involvement in the cocaine smuggling, despite the assertions of his former companion, who had testified for the Government. On direct examination, Havens gave the following testimony:

> Q. And you heard Mr. McLeroth testify earlier as to something to the effect that this material was taped or draped around his body and so on, you heard that testimony?
>
> A. Yes, I did.
>
> Q. Did you ever engage in that kind of activity with Mr. McLeroth and Augusto or Mr. McLeroth and anyone else on that fourth visit to Lima, Peru?
>
> A. I did not.

446 U.S. at 622. On cross-examination Havens testified as follows:

> Q. Now, on direct examination, sir, you testified that on the fourth trip you had absolutely nothing to do with the wrapping of any bandages or tee shirts or anything involving Mr. McLeroth; is that correct?
>
> A. I don't—I said I had nothing to do with any wrapping or bandages or anything, yes. I had nothing to do with anything with McLeroth in connection with this cocaine matter.
>
> . . . .
>
> Q. And your testimony is that you had nothing to do with the sewing of the cotton swatches to make pockets on that tee shirt?
>
> A. Absolutely not.
>
> Q. Sir, when you came through Customs, the Miami International Airport, on October 2, 1977, did you have in your suitcase Size 38-40 medium tee shirts?

An objection to the latter question was overruled and questioning continued:

> Q. On that day, sir, did you have in your luggage a Size 38-40 medium man's tee shirt with swatches of clothing missing from the tail of that tee shirt?
>
> A. Not to my knowledge.
>
> . . . .
>
> Q. Mr. Havens, I'm going to hand you what is Government's Exhibit 9 for identification and ask you if this tee shirt was in your luggage on October 2nd, 1975 [*sic*]?
>
> A. Not to my knowledge. No.

Id. at 622-23. Havens also denied having told a Government agent that the T-shirts found in his luggage belonged to his companion, McLeroth. On rebuttal, a Government agent testified that the T-shirt with the pieces cut out (Exhibit 9) had been found in Havens' suitcase and that Havens had said the T-shirts in his bag, including Exhibit 9, belonged to McLeroth. Exhibit 9 was then admitted into evidence, with an instruction to the jury that the rebuttal evidence should be considered only for impeaching Havens' credibility. *Id.* at 623.

The Fifth Circuit reversed Havens' conviction, holding that illegally seized evidence may be used for impeachment only if the evidence contradicts a particular statement made by a defendant in the course of his direct examination. The Supreme Court then reversed the Fifth Circuit. The Court held that a defendant's statements made during proper cross-examination "reasonably suggested by the defendant's direct examination" were subject to impeachment by illegally seized evidence which was inadmissible during the Government's direct case. *Id.* at 627-28.

49. 638 F.2d 1048 (7th Cir. 1981).

50. 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

In *DeJohn*, the court affirmed a conviction on a charge of uttering and publishing two United States Treasury checks in violation of 18 U.S.C. § 495. The defendant challenged his conviction on the ground that the trial court had impermissibly allowed testimony of his activities on other occasions.

Specifically, the Seventh Circuit approved the trial judge's admission of testimony by a security guard that, on another occasion, he had arrested the defendant when he had found him near the same mail box from which the stolen checks were taken in this case. Similarly, the court approved the trial judge's admission of a police officer's testimony that, on an earlier occasion, unrelated to the charge for which the defendant was on trial, the officer had found a treasury check on the defendant while searching him at the police station.

Holding that this testimony was properly admitted under rule 404(b), the court discussed the "opportunity" portion of that rule. Distinguishing cases which the defendant relied on in arguing that the similar acts evidence was improperly admitted, the court pointed out that there is less danger of prejudice in using such evidence to show opportunity than to show intent or malice. In this connection the court stated:

> [The cases cited by the defendant] deal with the admissibility of similar crimes evidence directed to the issues of intent and motive, and this particularly is pertinent for the last of the four points that defendant contends governs admissibility. *See United States v. Fierson*, 419 F.2d 1020 (7th Cir. 1969). Here the testimony was directed to defendant's *opportunity* to obtain the checks. It is important to avoid unnecessary use of similar acts evidence on the issues of intent and motive because the evidence may be unduly prejudicial on subjective issues of a defendant's conduct. "Opportunity" is not a subjective issue: either defendant had access to the checks or he did not. Defendant's theory of the case as a practical matter brought into prominence the issue of opportunity even though he did not "dispute" it in the common use of that term. In this context, actual dispute of the issue is not required. *Compare United States v. Weidman*, 572 F.2d 1199 (7th Cir.), *cert. denied*, 439 U.S. 821, 99 S. Ct. 87, 58 L. Ed. 2d 113 (1978) (defendant need not dispute element of specific intent in order to permit into evidence similar bad acts bearing on intent since prosecution must prove that element to make its case).[51]

admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

51. 638 F.2d at 1052 n.4. The defendant had argued that in order for the similar acts evidence in this case to be admissible, the acts must be:

The court then addressed the defendant's contention that the trial judge should have balanced the probative value of the testimony against its prejudicial effect and stated in writing his reasons for admitting it. The Seventh Circuit declared that it would be preferable for judges to set down their rule 403 analysis in writing. But, where that was not done and the balance clearly favored admission of the testimony, the court said that it would "not presume that the evidence was admitted for the wrong reason."[52]

SUBSEQUENT REMEDIAL MEASURES: RULE 407

For the trial practitioner, *Oberst v. International Harvester Co.*[53] provides a significant discussion of rule 407[54] in the context of strict liability cases. Oberst was injured in a 1975 accident while riding in the sleeping compartment of a truck manufactured by International Harvester. At the time of the accident, the sleeping compartment was designed with two vertical restraining straps approximately thirty-six inches apart in the front of the compartment. As a result of the acci-

1) similar enough and close enough in time to the offense to be relevant; 2) shown by clear and convincing evidence to have occurred; 3) of not so prejudicial a nature as to outweigh their probative value; 4) relevant to an issue disputed by defendant.

Id.

In his concurring opinion, Judge Cudahy highlighted the difficult problems involved in using this sort of evidence:

> The most troublesome aspect of this case involves the liberal admission of testimony about other "bad acts", ostensibly to show that the defendant had the "opportunity to gain access to the mailboxes and obtain the checks" . . . . Although the evidence was relevant only to establish this simple objective fact, it also revealed the extraneous spectacles of the defendant's "arrest" by a security guard (who testified that he "held [the defendant] for the police and called the City police") and of a subsequent (and unrelated) search of the defendant by a police officer at police headquarters.
>
> Perhaps if these events were probative of something as relatively complex and elusive as "consciousness of guilt" . . . these embellishments, as conveyed by live testimony, would have been appropriate. But simply to show the plain fact of opportunity to gain access to the checks, a straightforward stipulation would seem to have been equally probative and considerably less prejudicial.

Id. at 1060 (Cudahy, J., concurring) (citations omitted).

See also United States v. Pisari, 636 F.2d 855 (1st Cir. 1981) (in which the court held improper the admission of evidence of the defendant's use of a knife in a prior robbery to show identity); United States v. Bramble, 641 F.2d 681 (9th Cir. 1981) (in which the court held improper the admission of evidence of a previous conviction for possession of marijuana to show a predisposition to sell cocaine).

52. 638 F.2d at 1053.

53. 640 F.2d 863 (7th Cir. 1980).

54. FED. R. EVID. 407 provides:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

dent, Oberst was ejected from the sleeping compartment into the front seat and partially through the windshield.

Part of the evidence Oberst attempted to introduce at trial demonstrated a post-accident change made by International Harvester in the types of bunk restraints installed in its trucks. The district court refused to admit this evidence, apparently on the basis of rule 407.[55] On appeal to the Seventh Circuit, Oberst argued that rule 407 was inapplicable to actions such as his where strict liability was asserted. His argument was that the first sentence of the rule applies only to actions involving negligence or culpable conduct, which obviously do not include strict liability actions, and that the second sentence merely creates an exception to the first sentence. Under this theory, evidence of subsequent repair would be admissible for any purpose in a strict liability action.

Discussing admissibility under both Illinois law and federal rule 407, the majority found that the weight of authority in Illinois rejected a theory such as that propounded by Oberst. The court stated that, while evidence of a post-accident change could be admitted under rule 407 to show feasibility of an alternative design, that was so only where feasibility was controverted. The majority found that there was no such controversy in *Oberst* and upheld the exclusion, saying that, even if it had been error, it was only harmless error as to Oberst's claims.[56]

In dissent, Judge Swygert began with an interesting discussion in a footnote of whether admissibility of post-accident design changes should be governed in diversity actions by state law or the Federal Rules of Evidence. The judge concluded that the question need not be decided in *Oberst* because there was no conflict between rule 407 and its Illinois counterpart.[57]

55. 640 F.2d at 865.

56. *Id.* at 866.

57. Judge Swygert's discussion on this point is set forth in full:

The question whether the admissibility of the disputed evidence is governed by state or federal law is a difficult one. *See generally* O.G. Wellborn III, *The Federal Rules of Evidence and the Application of State Law in the Federal Courts*, 55 Tex. L. Rev. 371 (1977). This action was commenced after the effective date of the Federal Rules of Evidence. *See* P.L. 93-595, § 1, 88 Stat. 1926 (January 2, 1975). Generally, even in a diversity case such as this, the Federal Rules of Evidence govern all evidentiary questions, except where they specifically refer to state law. *Pollard v. Metropolitan Life Ins. Co.*, 598 F.2d 1284, 1286 (3d Cir.), *cert. denied*, — U.S. —, 100 S. Ct. 232 (1979) (admission of documents); *accord, Johnson v. William C. Ellis & Sons Iron Works*, 604 F.2d 950, 957 (5th Cir. 1979); *Gibbs v. State Farm Mutual Ins. Co.*, 544 F.2d 423, 428, n.2 (9th Cir. 1976); *see, e.g.*, Fed. R. Evid. 302, 501. Unlike most of the other Federal Rules of Evidence, however, Rule 407 is based primarily upon policy considerations and not upon relevancy or concern for truth finding. *Advisory Committee Notes*, Fed. R. Evid. 407. *See also* Fed. R. Evid. 408 (compromise and offers to compromise). For this reason, it is

Turning to the applicability of rule 407, Judge Swygert found that the majority's conclusion that feasibility was not controverted was refuted by the record.[58] Furthermore, he stated that rule 407 permitted the use of evidence of subsequent remedial measures for impeachment purposes and that in this case the excluded evidence was part of Oberst's effort to impeach certain key testimony of the defendant's primary witness.

Beyond this, Judge Swygert agreed with Oberst that rule 407 probably does not apply at all in strict liability actions.[59] This was supported by a literal interpretation of the rule, said the judge, because "where strict liability is asserted, neither negligence nor culpable conduct need be shown. In such cases, liability depends upon the character of the product and not upon that of the defendant."[60] The judge also pointed out that, although many federal courts have assumed that rule 407 applies in strict liability actions, several have stated that it does

debatable whether Rule 407 or a conflicting state rule should govern in a diversity case. *See* 2 *Weinstein's Evidence* ¶ 407 [objections of Prof. Schwartz to Rule 407 at Hearings Before the Subcommittee on Criminal Justice, House Committee on the Judiciary, 93rd Cong., 1st Sess., Rules of Evidence (Supp.), Ser. No. 2, p. 303 (1973)]; *Wellborn*, *supra*; *see generally* McCormick, *Evidence* § 275 (2d ed. 1972). This question apparently has not been addressed directly by any federal court, but the Fifth Circuit's analysis in *Conway v. Chemical Leaman Tank Lines, Inc.*, 540 F.2d 837 (5th Cir. 1976) (on rehearing) is of assistance. There, the court was faced with a Texas rule of evidence which permitted the impeachment of a widow suing for the wrongful death of her husband with proof of the fact of her subsequent ceremonial marriage. Apparently using a balancing analysis under Fed. R. Evid. 403, the district court refused to permit such impeachment. The Fifth Circuit reversed, saying that the Texas rule was a rare state rule of evidence which was so intimately related to state substantive law that it should be applied in a diversity action to prevent forum shopping. Another example of such a rule might be the parol evidence rule which is widely considered to be a part of the law of contracts, although it is couched in terms of the law of evidence. *See* Wigmore, *Evidence* § 2400 (3d ed. 1940).

The Supreme Court recently has reaffirmed the analysis of problems such as the one presented here, which was set forth in *Hanna v. Plummer*, 380 U.S. 460 (1965). *See Walker v. Armco Steel Corp.*, — U.S. —, 100 S. Ct. 1978 (1980). Pursuant to that analysis, where, as here, a federal and state rule both govern the issue in dispute and are in conflict, the federal rule is applied in a diversity case if it is arguably procedural. But, where there is no pertinent federal rule, usually a specific state rule will be applied. *See, e.g.*, *Walker*, *supra* (method of commencing action for purposes of statute of limitations controlled by state law rather than by Fed. R. Civ. P. 3). In *Conway*, application of the *Hanna* analysis was relatively simple because the federal rules were silent on the issue at hand. Therefore, the state rule applied. In this case, application of the analysis is more difficult than in Conway because the state and federal rules both govern the evidentiary problem presented. Although Rule 407 is based primarily upon policy grounds, it is arguably evidentiary (i.e., procedural). Therefore, it, and not a conflicting state rule, probably applies in a diversity case. As discussed in the text, we need not decide this question in this case because there is no conflict between Rule 407 and its Illinois counterpart.

Id. at 867-68 n.2 (Swygert, J., dissenting).

58. *Id.* at 868.

59. *Id.* at 869.

60. *Id.* (citing Sutkowski v. Universal Marion Corp., 5 Ill. App. 3d 313, 281 N.E.2d 749 (1972)).

not.[61]

Examining the background of rule 407 and its underlying policies, the dissent found support for the conclusion that rule 407 is inapplicable in strict liability actions.[62] First, finding rule 407 comparable to section 1151 of the California Evidence Code, Judge Swygert analyzed the "seminal" case of *Ault v. International Harvester Co.*[63] *Ault* had held that whatever tendency a rule excluding evidence of post-accident design changes had toward achieving its policy goals in other types of cases, it was not sufficiently effective in achieving those goals to justify its application in strict liability actions. The judge said that this conclusion has been widely accepted by legislatures, courts, and commentators.[64] Judge Swygert then stated:

> In strict liability cases, an exclusionary rule is unlikely to achieve its ostensible objective, primarily because the exceptions to the rule make exclusion uncertain, if not unlikely. Ultimately, admissibility depends upon the effectiveness of the plaintiff's trial tactics in getting the defendant to "controvert" feasibility or opening itself to impeachment. Many defendants may be unaware of the rule. It is illogical to assume that such defendants will alter their behavior because of it. Of the defendants who are aware of the rule, most will be insured. Their insurers are likely to encourage or require them to mitigate losses by taking remedial measures, regardless of the existence of an exclusionary rule. Some remedial measures may be required by regulatory authorities. Potential defendants are not likely to violate regulatory mandates because of the lack of an exclusionary rule. *See generally Ault; Note*, 44 Cin. L. Rev. 637 (1975). With respect to the federal rule, in particular, because most products liability cases are litigated in state court, the only basis for federal jurisdiction being diversity, the coercive effect of an exclusionary rule is negligi-

61. *Id.* (citing Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978) (dictum); Robbins v. Farmer's Union Grain Terminal Assoc., 552 F.2d 788, 792 (8th Cir. 1977); Farner v. Paccar, Inc., 562 F.2d 518 (8th Cir. 1977) (dictum)).

62. *Id.* at 870. For other discussions of the applicability of rule 407, see Arceneaux v. Texaco, 623 F.2d 924 (5th Cir. 1980); Werner v. Upjohn Co., 628 F.2d 848 (4th Cir. 1980).

63. 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1974). The language of rule 407 was derived from that of CAL. EVID. CODE § 1151. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 275 (2d ed. Supp. 1978).

64. 640 F.2d at 870. The following authorities were cited as examples of those which had accepted the *Ault* court's policy analysis:

> Me. R. Evid. 407 (evidence of subsequent remedial measures admissible for any legitimate purpose even in negligence cases); Wyo. R. Evid. 407 (specifically allowing such evidence in strict liability cases); Okla. R. Evid. 407 (same as Wyoming) (discussed in Kutner, *A Comparative Outline of the Oklahoma Evidence Code and the Federal Rules of Evidence*, 32 Okla. L. Rev. 355, 376 (1979)); Barry v. Manglass, 55 A.D.2d 1, 389 N.Y.S.2d 870 (2d Dept. 1976); Note, *Post-Accident Repairs and Offers of Compromise: Shaping Exclusionary Rules to Public Policy*, 10 Loy. Chi. L.J. 487, 491 (1979); Lampert & Saltzburg, *A Modern Approach to Evidence*, 189 & n.21 (1977); 2 *Weinstein's Evidence* ¶ 407[02]; McCormick, Evidence § 77 (1st ed. 1954).

Id. n.7.

ble. Consequently, safeguards other than Rule 407 should be used.[65]

Finally, the judge concluded, "[E]ven if Rule 407 does apply to strict liability actions, the factors weighing against its efficacy suggest a more generous application of the rule than either the trial court or the majority have given it in this case."[66]

On the question of admissibility of the evidence under Illinois law, the judge disputed the majority's conclusion that an Illinois case supporting admissibility, *Burke v. Illinois Power Co.*,[67] had been wrongly decided.[68] Judge Swygert also pointed out that recent Illinois cases clearly demonstrate that Illinois has adopted the *Ault* position.[69]

PRIVILEGE: RULE 501

The scope of privilege under rule 501[70] was discussed in several opinions this past term. One such case was *In re Special September 1978 Grand Jury (II)*.[71] After the initial panel decision in this case on April 30, 1980, the Seventh Circuit denied a petition for rehearing but modified its initial opinion. On December 19, 1980, the court issued its modified opinion. The case involved a grand jury investigation of a currency exchange association. The grand jury had subpoenaed records held by two law firms which had represented the association. Addressing a claim that the records were protected by the attorney-client privilege, the court noted that the attorney-client privilege belongs to the client alone. Therefore, the second time around in *In re Special September 1978 Grand Jury (II)*, the court persisted in its holding that ongoing fraud by the client negates the attorney-client privilege. Turning to the question of whether the client's fraud foreclosed protection of the records under the work product rule, the court held that lawyers representing the client could assert the work product doc-

65. *Id.*
66. *Id.* at 870-71.
67. 57 Ill. App. 3d 498, 373 N.E.2d 1354 (1978).
68. 640 F.2d at 871.
69. *Id.* (citing Smith v. Verson Allsteel Press Co., 74 Ill. App. 3d 818, 393 N.E.2d 598 (1979); Christopherson v. Hyster Co., 58 Ill. App. 3d 791, 374 N.E.2d 858 (1978)).
70. FED. R. EVID. 501 provides:

> Except as otherwise required 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. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

71. 640 F.2d 49 (7th Cir. 1980).

trine, even where the client engaged in fraud, but only to prevent disclosure of "the attorney's mental impressions, conclusions, opinions and legal theories about the case."[72]

In *FTC v. Shaffner*,[73] the Seventh Circuit rejected a "blanket claim" of attorney-client privilege and required the party claiming the privilege to "present the underlying facts demonstrating the existence of the privilege."[74] Citing *Radiant Burners, Inc. v. American Gas Association*,[75] the Seventh Circuit stated:

> This is not to say that the party must detail the contents of each communication, for that would indeed violate the privilege. But the party must supply the court with sufficient information from which it could reasonably conclude that the communication: (1) concerned the seeking of legal advice; (2) was between a client and an attorney acting in his professional capacity; (3) was related to legal matters; and (4) is at the client's instance permanently protected.[76]

In *Martin-Trigona v. Gouletas*,[77] the Seventh Circuit reviewed an order of the district court finding Trigona, a judgment debtor, to be a recalcitrant witness. Trigona's recalcitrance, for which he was incarcerated pursuant to 28 U.S.C. § 1826(a), arose out of supplementary proceedings to discover his assets. Trigona had failed to respond to the initial citation to discover assets. In an apparent attempt to purge himself of the contempt order resulting from that initial failure, Trigona represented that he was willing to respond to the citation. In a hearing before a magistrate, Trigona refused to answer 169 questions, invoking his fifth amendment privilege against self-incrimination. In his report to Judge Decker, the magistrate found certain invocations of the fifth amendment privilege by Trigona to be well taken as to certain questions, but found others to be inapplicable or waived.

The inquiry continued before Judge Decker who conducted a re-

72. *Id.* at 63. For another discussion of this case, see Crowley, *Modernizing and Liberalizing the Law of Evidence*, 57 CHI. KENT L. REV. 191, 204-05 (1981). Similar issues were addressed by several other courts during the past term. *See, e.g.*, United States v. Winner, 641 F.2d 825 (9th Cir. 1981) (law enforcement investigation privilege); In re Grand Jury Proceeding Involving Berkley & Co., 629 F.2d 548 (8th Cir. 1980) (fraud voiding attorney-client privilege); United States v. Entrekin, 624 F.2d 597 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 2049 (1981) (interspousal privilege); Champion Int'l Corp. v. International Paper Co., 486 F. Supp. 1328 (N.D. Ga. 1980) (inadvertent disclosure of "slight" amount of privileged material not worthy of attorney-client privilege protection). *See also* Trammel v. United States, 445 U.S. 40 (1980); United States v. Burton, 629 F.2d 975 (4th Cir. 1980), *cert. denied*, 101 S. Ct. 1487 (1981).

73. 626 F.2d 32 (7th Cir. 1980).

74. *Id.* at 37.

75. 320 F.2d 314 (7th Cir. 1963). In *Radiant*, the court stated, "The limitation surrounding any information sought must be determined for each document separately considered on a case-by-case basis." *Id.* at 324.

76. 626 F.2d at 37.

77. 634 F.2d 354 (7th Cir. 1980) (per curiam).

newed hearing to allow Trigona to explain why "seemingly innocuous" questions might elicit incriminating information. As a result of the hearing, Judge Decker held that Trigona could not rely on the fifth amendment as to some questions and that his assertions of lack of memory and absence of knowledge were made in bad faith. Judge Decker found Trigona in contempt and ordered him confined until he answered the questions.

Addressing the self-incrimination aspect of Trigona's "three-pronged"[78] attack on the district court's order, the Seventh Circuit agreed with the district court that Trigona's fears of criminal prosecution were "well-founded." That fear alone, however, did not justify Trigona's refusal to answer questions on fifth amendment grounds since "the pendency of criminal proceedings does not by itself excuse a witness of his obligation to give testimony in civil proceedings. Some nexus between the risk of criminal conviction and the information requested must exist."[79]

Finding that Trigona had offered "little explanation" to the trial court in support of his fifth amendment claim, the Seventh Circuit said

78. The three "prong[s]" of Trigona's "attack" were described by the Seventh Circuit as follows:

> First, Trigona maintains that several of the questions asked were irrelevant, *i.e.*, the information they sought to elicit could not aid in discovering his current assets. Second, Trigona declares that the district court erred in finding that his claims of lack of memory or knowledge were made in bad faith. Finally, Trigona argues that the district court improperly held that the Fifth Amendment did not shield Trigona from answering most of the remaining questions put to him.

Id. at 356.

The "attack" became a rout as the Seventh Circuit dispatched each of Trigona's contentions in turn, stating, "Trigona has proved to be an extremely uncooperative litigant." *Id.* at 357. An examination of those portions of the record of the district court hearing quoted by the Seventh Circuit supports the court's characterization of Trigona as "extremely uncooperative." In affirming the district court's finding that Trigona had engaged in a bad faith refusal to answer questions, the Seventh Circuit set out the following excerpt from the record:

> The Court: [W]hat is your usual business, profession or occupation at this time?
> The Witness: I don't know.
> The Court: Do you have any business?
> The Witness: I don't know how to answer that question. I am not sure.
> The Court: Are you engaged in any profession?
> The Witness: I am not sure I can answer that question.
> The Court: Do you have any occupation at all?
> The Witness: My time at this time—
> The Court: And this relates to seventy—
> The Witness: —is involved in the defense of this litigation and criminal prosecution. So if you are talking about occupation by devotion of assets, I would say—
> The Court: No, I am talking about—
> The Witness: —then I would say about 95 percent of my time is being devoted to responding to the Gouletases and to the federal government and to the state government.

Id. at 357-58 (citations to transcript omitted).

79. *Id.* at 360.

the trial court was not bound to accept that explanation at face value.[80] The court stated:

> "It is clear that the trial court has the discretion to assess the facts which underlie an asserted claim of Fifth Amendment privilege." *In re Folding Carton Antitrust Litigation*, 609 F.2d 867, 871 n.5 (7th Cir. 1979). "The trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.' " *Hoffman v. United States*, 341 U.S. at 487, 71 S. Ct. at 818. . . . The trial court reasonably concluded that Trigona's claim of commingling was speculative and overbroad and that the privilege was claimed in bad faith in order to hinder the appellees from collecting upon their judgment. There is ample reason to believe that Trigona's claimed fear of self-incrimination is fanciful. The tendency of this witness to exaggerate, to believe himself the victim of conspiracies where none exist, and to suspect without any reasonable basis that others are persecuting him is evident from many of his filings in this record. The evasiveness of this witness, his discredited claims of lack of memory, his failure to offer any credible explanation as to how answers to seemingly innocuous questions might be incriminating, his personal interest in frustrating the efforts of the appellees to collect upon their judgment are "peculiarities of the case" which the trial court could properly consider in directing the appellant to answer. The failure of Trigona to obey those directions was properly found to constitute contempt of court.[81]

Affirming the contempt finding of the trial court, the Seventh Circuit reaffirmed the principle that a witness seeking to invoke the fifth amendment privilege against self-incrimination in a civil proceeding need not establish that an answer *will* indeed incriminate him but must at least tender some "credible reason" why an answer would pose a real danger of incrimination.[82]

CONCLUSION

During the 1980-81 term, the Seventh Circuit rendered a number of decisions which aided the continuing process of refining the Federal Rules of Evidence. These opinions of the court must be reviewed as "bricks" in the larger "wall" of evidence rules, the remainder of which will be built over time, on a case-by-case basis, with logic and a just result as the binding mortar.

80. *Id.* at 361.

81. *Id.* at 361-62 (footnote omitted).

82. *Trigona* may only be of value to the practitioner as a clear example of behavior which will *not* justify invocation of the privilege against self-incrimination. A much clearer guide to when the privilege may be asserted can be found in last term's decision of *In re Folding Carton Antitrust Litigation*, 609 F.2d 876 (7th Cir. 1979).