Mercer Law Review

Volume 42
Number 4 *Eleventh Circuit Survey*

Article 10

7-1991

Evidence

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by Marc T. Treadwell*

I. Introduction

The Georgia lawyers among the readers of this Article likely are somewhat familiar with efforts over the past several years to adopt a new Georgia Evidence Code based upon the Federal Rules of Evidence (the "Rules").[1] The Georgia Evidence Code is sorely in need of revision. It can be argued that there is no Georgia Evidence Code as such. Indeed, Georgia lawyers must grapple with an amorphous amalgam of disjointed statutes and thousands of judicial decisions that constitute our body of evidence law.

If Georgia evidence law needs a concise and understandable framework, then logically this framework should be based upon the Rules. This is the position of the State Bar of Georgia, which has spearheaded the drive to adopt the proposed Georgia Rules of Evidence (the "proposed Rules").

In each of its last three sessions, the Georgia General Assembly has considered the proposed Rules. Although no organized opposition has arisen, the general assembly has yet to adopt the proposed Rules. In the 1991 session, as in the 1990 session, the proposed Rules were approved by the senate, but bogged down in the House Judiciary Committee. The proposed Rules will carry over to the 1992 session.

II. Article I: General Provisions

Every lawyer knows that the failure to object in a timely manner to an erroneous evidentiary ruling precludes his raising that error on appeal. Equally well known, but for some reason more frequently ignored, is the

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1. *See* Treadwell, *An Analysis of Georgia's Proposed Rules of Evidence*, 26 Ga. St. B.J. 173 (1990) for a detailed discussion of the significant differences between existing law and the proposed Georgia Rules of Evidence.

offer of proof requirement of rule 103(a)(2).[2] The Eleventh Circuit's opinion in *United States v. West*[3] is useful as a reminder of the danger of failing to inform the court of the substance of excluded evidence. In *West* defendant contended that evidence excluded by the trial court was admissible as an exception to the hearsay rule. The Eleventh Circuit agreed.[4] Defendant, however, did not inform the district court of the substance of the excluded evidence, and the Eleventh Circuit could not determine whether the trial court's error affected a substantial right of defendant. Therefore, the Eleventh Circuit affirmed defendant's conviction.[5]

If a party requests it, rule 105[6] requires a district court to give a limiting instruction to the jury when evidence is admitted for one purpose, but is inadmissible for other purposes. In *Sherman v. Burke Contracting, Inc.*,[7] the Eleventh Circuit addressed the issue of whether, in a civil case, a district court must give a limiting instruction in the absence of a request. In *Sherman* the district court admitted hearsay evidence for the purpose of impeaching a witness. The district court, however, did not instruct the jury that the evidence was being offered only for impeachment and could not be considered for any substantive purpose.[8] On appeal the Eleventh Circuit rejected defendant's contention that the district court, on its own initiative, had a duty to give such an instruction. Rather, as in the case of a failure to object, the appellate court will reverse only upon a finding of plain error. Noting that strategic considerations often militate against requesting a limiting instruction, the Eleventh Circuit concluded that plain error could be found only if the strategic choice "resulted in a manifest miscarriage of justice."[9] Under this standard, the Eleventh Circuit found no plain error.

III. Rule 201: Judicial Notice of Adjudicated Facts

Cases involving judicial notice are rare. When a lawyer encounters the doctrine, he should be aware that rule 201[10] contains strict procedural requirements that may trap the unwary. In *Nationalist Movement v. City of Cumming*,[11] plaintiff alleged the district court improperly took judicial notice that plaintiff's rallies and marches were loud and precipitated po-

2. Fed. R. Evid. 103(a)(2).
3. 898 F.2d 1493 (11th Cir. 1990).
4. *Id.* at 1497.
5. *Id.* at 1505.
6. Fed. R. Evid. 105.
7. 891 F.2d 1527 (11th Cir. 1990).
8. *Id.* at 1533-34.
9. *Id.* at 1534 (citations omitted).
10. Fed. R. Evid. 201.
11. 913 F.2d 885 (11th Cir. 1990).

tentially violent counter-demonstrations. The court also took judicial notice of plaintiff's attorney's involvement in these demonstrations.[12] The Eleventh Circuit concluded that the nature of plaintiff's demonstrations was well known in the Cumming and Atlanta areas and thus was a proper subject of judicial notice. The court did not reach the question whether the district court properly took judicial notice of plaintiff's attorney's role because plaintiff did not request a hearing on the propriety of that action as required by rule 201(e). The court held that the failure to request such a hearing precludes a party from contesting the judicially noticed fact on appeal.[13]

IV. RULE 401: DEFINITION OF "RELEVANT EVIDENCE"

Under the Rules, evidence is relevant if it has a tendency to make the existence of a fact more or less probable.[14] On appeal, most relevancy issues arise under rule 403,[15] which prohibits the admission of evidence if its potential prejudice outweighs its probative value, and rule 404,[16] which provides for the admissibility of extrinsic act evidence. Nevertheless, district courts constantly determine whether evidence meets the threshold test of relevancy and, on occasion, these determinations are the subject of appeal.

In *United States v. Lattimore*,[17] defendant, who was convicted of misapplication of bank funds, contended that the district court erroneously admitted evidence that her husband paid a delinquent loan with a cash payment.[18] The Eleventh Circuit affirmed, noting that the government may adduce evidence of a defendant's sudden monetary acquisition even though it cannot prove the source of that money.[19] In *Lattimore* the evidence revealed that defendant and her husband were experiencing severe financial difficulties when her husband suddenly paid the loan with $1,200 in cash. Under these circumstances, the Eleventh Circuit concluded that the district court properly admitted this evidence.[20]

In *United States v. Delgado*,[21] defendant contended that the district court erred in refusing to admit evidence of the circumstances surrounding an alleged coconspirator's plea agreement. In this agreement, the

12. *Id.* at 893 n.13.
13. *Id.* at 893.
14. FED. R. EVID. 401.
15. FED. R. EVID. 403.
16. FED. R. EVID. 404.
17. 902 F.2d 902 (11th Cir. 1990).
18. *Id.* at 903.
19. *Id.*
20. *Id.*
21. 903 F.2d 1495 (11th Cir. 1990).

coconspirator pled guilty to other offenses, and the government dismissed charges arising from the alleged conspiracy with defendant. Defendant contended that the evidence constituted an admission by the government that the coconspirator did not conspire with defendant.[22] The Eleventh Circuit, for several reasons, disagreed. The court concluded that a decision not to prosecute did not necessarily equate to an admission of innocence. Rather, many considerations, including the government's desire to elicit the coconspirator's cooperation, may have influenced the government's decision.[23] Moreover, the decision not to prosecute, at best, merely reflected the government's opinion of innocence, and this opinion had no more evidentiary value than the opinion of defendant's attorney that defendant was innocent. Thus, the evidence was simply not relevant to prove that defendant was innocent. In addition, the Eleventh Circuit reasoned that even if the evidence was "technically relevant," it nevertheless should have been excluded under rule 403. The admission of the evidence would have required the government to explain the reasons why the charges were dropped and thus would have opened the door to collateral evidence that would have confused the jury.[24]

In products liability actions, the relevancy of evidence of product recall campaigns is often an issue. The Eleventh Circuit's decision in *Hessen v. Jaguar Cars*[25] is particularly instructive on this issue. In *Hessen* the district court admitted evidence of recall campaigns that did not specifically include plaintiff's vehicle. Defendant contended that the recall evidence was not relevant because plaintiff's vehicle was not the subject of the recalls. The Eleventh Circuit agreed that recall evidence is not admissible unless the alleged defect is the same as the defect that is the subject of the recall campaign. The Eleventh Circuit, however, noted that plaintiff had adduced evidence that the alleged defect in his car was the same as that mentioned in the recall campaigns. Accordingly, the district court properly admitted evidence of defendant's recall campaigns.[26]

V. Rule 403: Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Rule 403 allows a trial court to exclude evidence, even though relevant, under certain circumstances, most notably when the danger of unfair prejudice substantially outweighs the probative value of the evidence. Because the application of rule 403 results in the exclusion of relevant evi-

22. *Id.* at 1499.
23. *Id.*
24. *Id.*
25. 915 F.2d 641 (11th Cir. 1990).
26. *Id.* at 649.

dence, it is an extraordinary remedy and is used only sparingly.[27] Although at one time rule 403 was the frequent subject of appeals, it has received scant attention from the Eleventh Circuit in the past two years. Whether this is by chance or design is unknown. The Eleventh Circuit's decision in *United States v. Terzado-Madruga*,[28] however, illustrates the difficulty of successfully relying upon rule 403 to exclude relevant evidence and perhaps suggests that the Eleventh Circuit is attempting to limit the scope and application of rule 403.

In *Terzado-Madruga* the trial court admitted, at defendant's trial for conspiracy to distribute cocaine, copious evidence which suggested that defendant had attempted to murder a coconspirator. On appeal defendant contended that the prejudicial effect of this evidence far outweighed its probative value and should have been excluded under rule 403.[29] The Eleventh Circuit began its consideration of this contention by pointedly noting that a district court's discretion to exclude evidence under rule 403 is limited, and "the balance under the Rule, therefore, should be struck in favor of admissibility."[30] Examining the questioned evidence, the Eleventh Circuit concluded that defendant's alleged attempt to murder his coconspirator constituted an act in furtherance of the conspiracy and thus was relevant evidence.[31] In addition, the Eleventh Circuit found that this evidence was relevant to establish the existence of the conspiracy, to explain the relationship of the conspirators, and to demonstrate the conspiracy's methods of operation. Conceding that the substantial prejudice of this evidence made this "a relatively close case," the Eleventh Circuit nevertheless concluded that rule 403 did not prohibit the admission of evidence that a defendant in a drug trial had attempted to murder a coconspirator.[32]

VI. Rule 404: Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

As in past survey years, rule 404 proved to be the most fecund source of evidentiary issues for the Eleventh Circuit. In particular, rule 404(b)'s proscription against the use of evidence of extrinsic acts to prove that a person, on the occasion in question, acted in conformity with his conduct on other occasions spawned many appeals. Before discussing particular

27. *See* United States v. Betancourt, 734 F.2d 750, 757 (11th Cir.), *cert. denied*, 469 U.S. 1021 (1984).

28. 897 F.2d 1099 (11th Cir. 1990).

29. *Id.* at 1117.

30. *Id.*

31. *Id.* at 1119 (citations omitted).

32. *Id.*

decisions, a brief discussion of the general principles governing the application of rule 404(b) is appropriate.

Extrinsic act evidence is not admissible to prove, for example, that a person was negligent on another occasion.[33] Similarly, evidence of "bad acts" is not admissible to show that a person is of bad character and thus more likely to have committed the charged offense.[34] Rule 404(b), however, permits the use of extrinsic act evidence "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[35]

To determine whether extrinsic act evidence is admissible, the Eleventh Circuit uses the test established by the old Fifth Circuit in *United States v. Beechum*.[36] "First, it must be determined that the extrinsic evidence is relevant to an issue other than the defendant's character. Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of rule 403."[37] Prior to the Supreme Court's decision in *Huddleston v. United States*,[38] the circuit courts were split on whether the government, as a prerequisite to admissibility, had to prove that a defendant committed the extrinsic act by clear and convincing evidence or only by a preponderance of the evidence.[39] In a footnote, the Supreme Court held that the preponderance of evidence standard governed this preliminary determination.[40] In last year's survey article the author suggested that *Huddleston* demanded a much more relaxed scrutiny of proffered extrinsic act evidence, even more relaxed than the relatively liberal *Beechum* standard.[41] Nevertheless, the cases discussed in last year's survey certainly did not signal a radical change in practice, and in some instances, it appeared that the court applied an even more stringent analysis.[42]

Although it is certainly too soon to report any post *Huddleston* trend in the Eleventh Circuit's rule 404(b) analysis, it may be significant to note that, during this survey period, no judgment was reversed on the grounds that extrinsic act evidence had been erroneously admitted under rule 404(b).

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33. McCormick on Evidence § 189 (E. Cleary 3d ed. 1984).
34. *See id.* at § 190.
35. Fed. R. Evid. 404(b).
36. 582 F.2d 898 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979).
37. 582 F.2d at 911 (citations omitted).
38. 485 U.S. 681 (1988).
39. *Id.* at 685 n.2 (presenting a lineup of the circuits on this issue).
40. *Id.* at 687 n.5.
41. Treadwell, *Evidence*, 41 Mercer L. Rev. 1357, 1360 (1990).
42. *Id.*

The Eleventh Circuit's decision in *United States v. Cardenas*[43] provides a good general discussion of rule 404(b) analysis. In *Cardenas* the district court admitted evidence that defendant, who was on trial for drug charges, used and sold drugs on other occasions. The district court admitted this evidence after concluding that the extrinsic acts were relevant to prove defendant's intent and knowledge. On appeal defendant argued that intent and knowledge were not at issue and that the only issue at trial was the identity of the culprit. When extrinsic act evidence is offered to prove identity, the extrinsic act must be "so similar to the charged offense as to mark it as the handiwork of the accused."[44] When offered for other purposes, such as to prove intent, knowledge, or motive, a lesser degree of similarity is required. Therefore, defendant argued that while the extrinsic acts may have been sufficiently similar to the charged offense to be admissible to prove intent or knowledge, they were not sufficiently similar to prove identity.[45] The Eleventh Circuit, however, rejected defendant's contention that the only issue at trial was the identity of the culprit.[46] The mere entry of a not guilty plea to a conspiracy charge requires the government to prove that a defendant possessed the requisite intent. Thus, extrinsic act evidence is admissible to prove a defendant's state of mind unless he takes affirmative steps to remove the issue of intent from the case.[47]

Because defendant in *Cardenas* did not concede his intent to participate in the charged offense when the government proved his involvement, the Eleventh Circuit examined the extrinsic acts under the less stringent standard of similarity for intent and knowledge.[48] Applying the *Beechum* test, the court concluded that the extrinsic acts required the same intent as the charged offense and that the government adduced sufficient evidence for the jury to find that defendant committed the extrinsic acts.[49] Turning to the second prong of the *Beechum* test—whether the danger of unfair prejudice substantially outweighed the probative value of the extrinsic act evidence—the Eleventh Circuit noted that the government's proof of defendant's intent was weak and therefore the need for, and thus the probative value of, the extrinsic act evidence was great. Under these

43. 895 F.2d 1338 (11th Cir. 1990).

44. *Id.* at 1342 (citing United States v. Myers, 550 F.2d 1036, 1045-46 (5th Cir. 1977), *cert. denied*, 439 U.S. 847 (1978)).

45. *Id.* at 1341.

46. *Id.* at 1342.

47. In two other cases decided during the survey period, the Eleventh Circuit held that a plea of not guilty makes intent an issue and thereby opens the door for the admission of extrinsic act evidence. United States v. Hernandez, 896 F.2d 513 (11th Cir. 1990); United States v. Jones, 913 F.2d 1552 (11th Cir. 1990).

48. 895 F.2d at 1343.

49. *Id.*

circumstances, the Eleventh Circuit concluded that the district court did not err in admitting the extrinsic act evidence.[50]

On its face, rule 404(b) operates to exclude evidence of extrinsic acts by anyone, regardless of whether they are defendants, plaintiffs, or third-party witnesses. Nevertheless, in the 1983 decision of *United States v. Morano*,[51] the Eleventh Circuit held that rule 404(b) does not "specifically apply to exclude . . . evidence . . . involv[ing] an extraneous offense committed by someone other than [a criminal] defendant."[52] This holding is suspect, and as discussed in last year's survey, the Eleventh Circuit has applied rule 404(b) to evidence of extrinsic acts committed by individuals other than criminal defendants.[53] During the survey year, the Eleventh Circuit openly questioned *Morano*.[54]

In *United States v. Sellars*,[55] the government introduced evidence of the violent propensities of a coconspirator who was not being tried with defendant. On appeal defendant contended that rule 404(b) precluded the admission of this extrinsic act evidence.[56] Applying the *Beechum* 404(b) test, notwithstanding the fact that the extrinsic acts were not those of a defendant, the Eleventh Circuit affirmed.[57]

In a footnote, the Eleventh Circuit conceded that it was bound by *Morano*, but criticized its reasoning.[58] The court noted that rule 404, by its plain language, applied to "persons" and not "defendants." Moreover, when extrinsic act evidence is being offered to prove a defendant's guilt, it should be subject to rule 404(b) analysis.[59] Recognizing *Morano*, the Eleventh Circuit nevertheless applied the *Beechum* standard, explaining that no harm would be done because the *Beechum* standard is functionally the same as the analysis required by rule 403, which applies to all evidence.[60]

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50. *Id.*

51. 697 F.2d 923 (11th Cir. 1983).

52. *Id.* at 926.

53. Treadwell, *supra* note 41, at 1363-64 (discussing United States v. Cohen, 888 F.2d 770 (11th Cir. 1989), which applied rule 404(b) to a criminal defendant's efforts to introduce evidence of extrinsic acts committed by a government witness and, for the contrary proposition, United States v. Norton, 867 F.2d 1354 (11th Cir. 1989), which held that rule 404(b) did not apply to extrinsic acts committed by a coconspirator not being tried with a defendant).

54. *See infra* text accompanying notes 55-60.

55. 906 F.2d 597 (11th Cir. 1990).

56. *Id.* at 604.

57. *Id.* at 606.

58. *Id.* at 604 n.11.

59. *Id.* at 605.

60. *Sellars* is also noteworthy because the Eleventh Circuit held that character evidence admitted under rule 404(a) must also be judged by the *Beechum* standard.

The Eleventh Circuit took a similar approach in a civil case, *Glados, Inc. v. Reliance Insurance Co.*[61] In *Glados*, a fire loss case, the insured introduced extrinsic act evidence to demonstrate that a third-party had a plan or motive to set the fire. Noting that the extrinsic act evidence concerned a third-party and that *Morano* held that rule 404(b) does not apply to extrinsic acts committed by someone other than a criminal defendant, the court nevertheless concluded that *Morano* did not prevent the application of a rule 404(b) analysis.[62] The court quoted language from *Morano* to the effect that the exceptions listed in rule 404(b) (allowing the use of extrinsic act evidence to demonstrate motive, opportunity, intent, etc.) could be considered in the context of a rule 403 analysis. Thus, as in *Sellars*, the court found no functional difference between the analysis of extrinsic acts committed by nondefendants and defendants.

Therefore, it would seem that although rule 404(b), pursuant to *Morano*, applies only to criminal defendants, all extrinsic act evidence is judged by the same standard. Arguably, it would be easier simply to overrule *Morano*.

Glados, being a civil case, is also noteworthy for the fact that it even mentions rule 404(b). Perhaps because of *Morano*, the Eleventh Circuit rarely, if ever, explicitly applies rule 404(b) to civil cases. For example, in *Hessen v. Jaguar Cars*,[63] a products liability action, defendant contended that the trial court erroneously admitted evidence of complaints by other Jaguar owners.[64] The Eleventh Circuit noted that evidence of similar occurrences may be relevant to demonstrate a defendant's notice of a defect, the magnitude of the defect, the defendant's ability to correct a defect, the lack of safety for intended uses, the strength of a product, the standard of care, and causation.[65] To be admissible, however, the extrinsic occurrences must be sufficiently similar and must not be too remote in time. These factors (relevancy to a legitimate issue, similarity, and time proximity) are factors found in the *Beechum* analysis and thus, even in civil cases, the Eleventh Circuit seems to apply a rule 404(b) standard without explicitly acknowledging rule 404(b).[66]

One of the more difficult issues that may arise in extrinsic act evidence appeals is whether a defendant's acquittal of an extrinsic offense bars the admission of evidence of that offense at a subsequent trial. The Eleventh Circuit has not been faced with this situation. The Georgia appellate

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61. 888 F.2d 1309 (11th Cir. 1987). Although *Glados* was decided September 29, 1987, it was not published until early 1990.

62. *Id.* at 1312.

63. 915 F.2d 641 (11th Cir. 1990).

64. *Id.* at 642.

65. *Id.* at 650.

66. *Id.*

courts, however, have dealt with this situation and have held that the doctrine of collateral estoppel prevents the admission of evidence of an extrinsic offense if the purpose for which the evidence is being offered concerns an issue that was resolved in defendant's favor at the prior trial.[67]

During the survey period, the United States Supreme Court faced this issue, and its decision addresses the constitutional implications of the use of extrinsic act evidence in these circumstances.[68] Although the Court recognized that the double jeopardy clause incorporates the doctrine of collateral estoppel, it refused to hold that an acquittal prohibited the subsequent use of evidence of that offense. The Court cited its decision in *Huddleston v. United States*,[69] discussed above,[70] in which it held that extrinsic act evidence was to be judged by the standard of whether a jury could reasonably conclude that the act occurred and that the defendant was the actor, rather than by the clear and convincing evidence standard. The Court reasoned that an acquittal meant only that a jury had a reasonable doubt that a defendant committed the crime and did not amount to a finding of innocence.[71] Because of the difference in the burden of proof--beyond a reasonable doubt to convict and preponderance of the evidence to admit extrinsic act evidence—the doctrine of collateral estoppel did not preclude the subsequent use of extrinsic act evidence.[72] Alternatively, the Court held that even if the double jeopardy clause did apply it would not benefit defendant because he did not demonstrate that his acquittal of the extrinsic act represented a jury determination that he was not present at the time of the extrinsic defense.[73] Thus, the United States Supreme Court, in an alternative rationale similar to that employed by the Georgia Supreme Court, concluded that collateral estoppel would not prohibit the admission of evidence of the extrinsic act unless the purpose for which it was being offered concerned an issue that was resolved in defendant's favor at the first trial.[74]

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67. Salcedo v. State, 258 Ga. 870, 376 S.E.2d 360 (1989), *rev'g* 188 Ga. App. 3, 372 S.E.2d 238 (1988); Mims v. State, 191 Ga. App. 628, 382 S.E.2d 414 (1989). For a discussion of these cases, *see* Treadwell, *Evidence*, 41 MERCER L. REV. 175, 181-83 (1989); *see also* Treadwell, *Evidence*, 42 MERCER L. REV. 223, 229-30 (1990).

68. Dowling v. United States, 110 S. Ct. 668 (1990).

69. 485 U.S. 681 (1988).

70. *See supra* text accompanying notes 38-42.

71. 493 U.S. at 672.

72. *Id.* at 673.

73. *Id.* at 673-74.

74. *Id.* at 672-74.

Finally, the Eleventh Circuit once again acknowledged that evidence of extrinsic acts is not extrinsic for purposes of rule 404(b) if the extrinsic acts are "inextricably intertwined" with the charged offense.[75]

VII. Rule 406: Habit; Routine Practice

In *McWhorter v. City of Birmingham*,[76] plaintiff sought to prove his 42 U.S.C. § 1983[77] claim through the testimony of former employees who allegedly were discharged for exercising their first amendment rights. Plaintiff contended that this evidence was admissible to show a habit on the part of defendant.[78] The Eleventh Circuit held that this testimony did not establish that defendant had a habit of harassing employees who exercised their first amendment rights. Rule 406, the Eleventh Circuit noted, contemplates a " 'person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or giving the hand signal for a left turn . . . .' "[79] Relying on its decision in *Loughan v. Firestone Tire & Rubber Co.*,[80] the Eleventh Circuit suggested that the admissibility of habit evidence depends upon "adequacy of sampling and uniformity of response."[81]

VIII. Rule 408: Compromise and Offers to Compromise

Rule 408[82] generally prohibits the admission of evidence of settlement and settlement negotiations. In *Blu-J, Inc. v. Kemper C.P.A. Group*,[83] an investor in a failed company brought suit against the company's accountants. Plaintiff alleged that, before investing in the company, it relied upon the erroneous and fraudulent financial statements prepared by the accountants. Prior to trial, the parties agreed to allow an independent accounting firm to review the facts and issue an opinion as to whether "plaintiff had a case or not."[84] This evaluation proved favorable to plain-

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75. United States v. Foster, 889 F.2d 1049, 1055 (11th Cir. 1989).

76. 906 F.2d 674 (11th Cir. 1990).

77. 42 U.S.C. § 1983 (1988).

78. Plaintiff also contended that this evidence was admissible under rule 404(b) to show that defendant had a policy, custom or practice of violating employee's rights. The Eleventh Circuit held that the district court did not abuse its discretion in excluding the evidence under rule 404(b).

79. 906 F.2d at 679 (quoting Loughan v. Firestone Tire & Rubber Co., 749 F.2d 1519, 1524 (11th Cir. 1985)).

80. 749 F.2d 1519, 1524 (11th Cir. 1985).

81. *Id.* at 1529.

82. Fed. R. Evid. 408.

83. 916 F.2d 637 (11th Cir. 1990).

84. *Id.* at 642.

tiff and, at trial, plaintiff sought to admit evidence of this evaluation. Defendant objected, arguing that the evaluation was conducted in connection with settlement discussions and thus was admissible pursuant to rule 408. Plaintiff agreed that the evaluation was performed by mutual agreement and for the purpose of promoting settlement, but argued that no settlement discussions ever took place.[85] The district court sided with defendant and excluded evidence of the evaluation.[86]

Relying on *Ramada Development Corp. v. Rauch*,[87] the Eleventh Circuit affirmed. According to *Ramada*, the test for the admissibility of statements allegedly made in connection with settlement discussions is "whether the statements or conduct were intended to be part of the negotiations toward compromise."[88] The court in *Ramada* held that an architect's report prepared to facilitate settlement negotiations fell within the purview of rule 408 and thus was not admissible.[89] The Eleventh Circuit concluded that the accountant's evaluation in *Blu-J* fell "squarely within the *Ramada Development Corp.* holding and the proscription of Rule 408."[90]

IX. RULE 501: PRIVILEGES

The Rules, rather than undertaking the daunting task of formulating rules recognizing and defining various evidentiary privileges, yield to the courts and allow the federal judiciary, in nondiversity cases, to formulate such rules. In diversity cases, state law determines the existence of the privilege.[91]

During the survey period, the Eleventh Circuit twice grappled with the amorphous *last link* exception to the attorney-client privilege. Arguably these two decisions signal the eventual demise of the last link exception and thus merit discussion in detail.

In *In re Grand Jury Proceedings (Rabin)*,[92] a grand jury issued a subpoena requiring an attorney to produce "records pertaining to fees paid by" a former client.[93] Relying upon the last link exception, the district court quashed the subpoenas.[94] In a lengthy opinion, the Eleventh Circuit reversed. The Eleventh Circuit examined carefully the Ninth Circuit's

85. *Id.* at 641-42.
86. *Id.* at 639.
87. 644 F.2d 1097 (5th Cir. 1981).
88. 916 F.2d at 642 (quoting *Ramada*, 644 F.2d at 1106).
89. 644 F.2d at 1106-07.
90. 916 F.2d at 642.
91. FED. R. EVID. 501.
92. 896 F.2d 1267 (11th Cir. 1990).
93. *Id.* at 1269.
94. *Id.*

opinion in *Baird v. Koerner*,[95] the genesis of the last link exception, and the Fifth Circuit's adoption of the last link exception in *In re Grand Jury Proceedings (Jones)*.[96] *Baird*, according to the Eleventh Circuit, held that an attorney could not be required to disclose the identities of his clients because such disclosure would necessarily reveal the potentially incriminating motive of the clients in retaining an attorney.[97] Similarly, *Jones* held that attorneys cannot be compelled to disclose their clients' identities "when such protection is necessary in order to preserve the privileged motive"[98] for seeking legal advice. In *Rabin* the Eleventh Circuit felt that the district court "failed to grasp" the "crucial point" of *Jones* and *Baird*.[99] The issue, according to the Eleventh Circuit, was not whether the client's identities could be an incriminating last link,[100] but whether the clients' motive for retaining the attorney's services could constitute an incriminating last link. In *Baird* and *Jones*, disclosure of the client's identities would necessarily result in the disclosure of their motives and therefore their attorneys could not be compelled to reveal the clients' identities.[101] In sum, a client's identity is protected from disclosure only if such disclosure would necessarily require the disclosure of other privileged information (*e.g.*, the client's motive for hiring an attorney).

In *Rabin* the identity of the client was known, and the issue was whether fee information could be discovered. The Eleventh Circuit concluded that the test was the same—whether disclosure of the fee information would reveal privileged information. The district court, however, had simply concluded that the information could not be discovered because it might be incriminating. The Eleventh Circuit emphatically stated that the potential for incrimination is of no consequence and held that the district court erred in quashing the grand jury subpoenas simply because the disclosure of fee information might incriminate the client.[102]

The Eleventh Circuit then offered illustrations of when fee information and information related to fees is privileged and when it is not. If the documents reveal only the amount of attorney's fees, then they would not fall within the last link exception. If, however, the documents contained information other than the amount of attorney's fees, then the district court would have to determine whether that information would be pro-

95. 279 F.2d 623 (9th Cir. 1960).

96. 517 F.2d 666 (5th Cir. 1975). In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

97. 896 F.2d at 1270-71.

98. *Id.* at 1271 (citing *Jones*, 517 F.2d at 674-75) (emphasis added in *Rabin*).

99. *Id.*

100. *Id.* at 1271-72.

101. *Id.* at 1272.

102. *Id.* at 1272-73.

tected by the attorney-client privilege.[103] For example, the Eleventh Circuit stated a receipt may state that a fee had been received "to secure services in paying unpaid taxes to [the] IRS."[104] This "obviously" would reveal privileged information and thus the last link doctrine would require that it be protected from disclosure.[105]

In a concurring opinion, Judge Tjoflat argued that the last link exception should be abolished because of "its inherent inconsistency with the crime-fraud exception to the attorney-client privilege."[106] Judge Tjoflat noted that when the Court decided *Baird*, the crime-fraud exception excluded only communications concerning future criminal or fraudulent conduct from the protection of the attorney-client privilege. According to Judge Tjoflat, however, the crime-fraud exception today is much broader and includes, in proper circumstances, communications with an attorney intended to conceal evidence of prior misconduct.[107] Thus, the identity of a client could never be privileged if the clients retained the attorney in an effort to conceal a past crime, which is what happened in *Baird*. Consequently, a court today considering a situation similar to that in *Baird* would reach a result different than that reached in *Baird*.[108] Judge Tjoflat urged the Eleventh Circuit to sit en banc and "take a careful and critical look at [the] ill conceived [last link] doctrine."[109]

In a much shorter opinion, the Eleventh Circuit also held that the last link doctrine applies only to those situations in which the disclosure of nonprivileged fee information would result in the disclosure of other privileged communications that the client reasonably expects will be kept confidential. In *In re Grand Jury Proceedings (Newton)*,[110] the Eleventh Circuit simply held that there was insufficient information in the record to allow it to conclude that the disclosure of fee information would necessarily reveal other privileged information.[111]

X. Rule 606: Competency of Juror as Witness

Courts have always harbored a deep and abiding fear of inquiries into jury deliberations.[112] Anyone who has spent much time talking with jurors after their deliberations and who has been shocked and surprised at their

103. *Id.* at 1273-75.
104. *Id.* at 1275.
105. *Id.*
106. *Id.* at 1279.
107. *Id.*
108. *Id.* at 1281.
109. *Id.* at 1283.
110. 899 F.2d 1039 (11th Cir. 1990).
111. *Id.* at 1043.
112. *See, e.g.*, McDonald v. Pless, 238 U.S. 264 (1915).

reasoning processes can understand this fear. While a verdict may be just, the process leading to it often is not. The Rules provide a rational compromise between the desire to ensure an impartial jury on one hand and, on the other, the strict prohibition of common law that a juror may not impeach his own verdict. Rule 606(b)[113] deems a juror incompetent to testify as to the validity of a verdict except with regard to extraneous prejudicial information or influence.

In *United States v. Cuthel*,[114] defendant, who had been convicted on narcotics charges, requested the district court to interview jurors to determine the validity of the jury's verdict. This request was prompted by a telephone call from an unidentified juror who allegedly stated that "we were pressured into making our decision" and by a letter sent by an alternate juror to the prosecutor.[115] The district court denied this request, and defendant appealed. The Eleventh Circuit affirmed, relying in part upon rule 606(b).[116] The court noted that the bare statement by a juror that she was pressured suggested only "the normal dynamic of jury deliberations" and did not evidence improper outside influence sufficient to warrant an inquiry under rule 606(b). The Eleventh Circuit also rejected defendant's argument that the letter by the alternate juror suggested that outside influence was injected into the jury room. The court reasoned that it would be impossible for the alternate juror to be an outsider until the deliberations had started, and at that point, the alternate juror was separated from the rest of the jury. Therefore, the Eleventh Circuit affirmed defendant's conviction.[117]

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113. FED. R. EVID. 606(b).

114. 903 F.2d 1381 (11th Cir. 1990).

115. *Id.* at 1382.

116. *Id.* Local Rule 16(E) of the Southern District of Florida prevented defendant from contacting the juror to obtain additional facts concerning the circumstances of the "pressure" brought to bear on her. The district court ruled, and the Eleventh Circuit agreed, that defendant had not shown sufficient cause to allow further inquiry under the local rule. 903 F.2d at 1382 n.2.

117. It would be a manifest abuse of discretion to not include quotations from the alternate juror's letter to the prosecutor. The alternate juror, who wrote the prosecutor to extend his "congratulations," noted that the "facts alone were not sufficient but with the way in which you laid them out before us, gave us a better understanding of the case." 903 F.2d at 1384. After making several prescient points concerning the merits of the prosecutor's case, the alternate juror closed by noting that all of the jurors were

> impressed by the suits [and] ties you wore [and] those Argyle socks too. When things became dull where we were trying to keep from falling asleep after sitting for so long we notice things like that. It all started off that first day by us remarking in a laughing manner about how bright yellow it was. As the days went by [and] you continued to wear sharp suits [and] bright ties, we starting [sic] remarking about it. There was only one negative remark [and] it was that you should use wooden hangers to hang your slacks over so as to prevent the crease across your knee.

If extraneous information or outside influence is injected into the jury room, then the district court may inquire further to determine the extent of any prejudice to the jury's deliberations. This inquiry, however, is also subject to the limitations of rule 606(b).[118] In such a situation a new trial is required only "if the evidence poses a reasonable possibility of prejudice to the defendant."[119]

XI. Rule 608: Evidence of Character and Conduct of Witnesses

As discussed above,[120] rule 404(b) governs the admission of extrinsic act evidence for substantive purposes. Rule 608[121] governs the admissibility of extrinsic act evidence to impeach a witness. Arguably this is a distinction with little practical difference; a juror, having heard sworn testimony, no doubt will find it difficult to appreciate such a distinction. Nevertheless, and often for this very reason, lawyers should be aware of, and prepared to take advantage of, the difference between substantive and impeachment evidence. A crucially helpful fact may be wholly inadmissible as substantive evidence, yet may be admissible to impeach. Even with a limiting instruction from the court, getting that fact into evidence for impeachment purposes only is infinitely better than not getting it in at all.

Rule 608(b), on its face, prohibits the admission of "extrinsic evidence" of "extrinsic acts" for the purpose of attacking or supporting credibility.[122] A witness, however, may be cross-examined about specific acts that are probative of truthfulness or untruthfulness. Thus, rule 608 permits the proof of extrinsic acts, but only with what can be called "intrinsic" evidence.

The prohibition against proving extrinsic acts, other than by cross-examination, applies only to evidence offered to impeach the *general credi-*

Id. at 1384-85.

118. *See* United States v. Rowe, 906 F.2d 654 (11th Cir. 1990); United States v. De La Bega, 913 F.2d 861 (11th Cir. 1990).

119. 906 F.2d at 656 (citing United States v. Perkins, 748 F.2d 1519, 1533 (11th Cir. 1984); United States v. Howard, 506 F.2d 865 (5th Cir. 1975)).

120. *See supra* text accompanying notes 33-75.

121. Fed. R. Evid. 608.

122. Unfortunately, the phrase "extrinsic evidence" as used in rule 608(b) has an entirely different meaning from the phrase "extrinsic act evidence." The latter refers to evidence of acts other than the act or incident in question. Both rule 404(b) and rule 606(b) address permissible use of extrinsic act evidence. Rule 608(b), however, also addresses whether such acts may be proved by "extrinsic evidence" or whether a party is limited to establishing the extrinsic act through cross-examination. The prohibition against extrinsic evidence of extrinsic acts is intended to prohibit time consuming forays into ancillary issues. *See* 10 J. Moore & H. Bendix, Moore's Federal Practice § 608.21 (2d ed. 1988 & Supp. 1991).

bility of a witness.[123] Extrinsic evidence that contradicts the material testimony of a witness is not inadmissible merely because it concerns prior bad acts.[124] Put another way, a witness may "open the door" to impeachment with extrinsic evidence of extrinsic acts that disproves his testimony concerning a material fact.

The Eleventh Circuit's decision in *United States v. Cardenas*[125] arguably broadens the circumstances that "open the door" to impeachment by extrinsic evidence of specific instances of conduct. As discussed above,[126] the Eleventh Circuit affirmed defendant's conviction, holding that extrinsic act evidence was properly admitted under 404(b).[127] As additional support for its holding, the Eleventh Circuit concluded that the evidence was also admissible under 608(b) because defendant, on direct examination, denied the charges against him, stating that he had never sold or given cocaine to his former roommate as alleged by the government.[128] On *cross-examination*, defendant testified that he had never sold cocaine and had not used cocaine since he was twenty or twenty-one years old. The government then adduced extrinsic evidence of defendant's prior drug dealings that contradicted defendant's testimony on *cross-examination*.[129] The Eleventh Circuit began its reasoning on firm ground, noting that rule 608(b) prohibits the use of extrinsic evidence to impeach the general credibility of a witness, but does not bar the admission of extrinsic evidence to disprove a witness' testimony as to a material fact. The court concluded that defendant's involvement with drugs was a material issue "insofar as Cardenas testified [on cross-examination] that he had never sold cocaine and had not used it in many years."[130] The jury could have interpreted this testimony to mean that defendant could not have been a knowing and willful participant in the drug conspiracy and could not have intended to possess and distribute cocaine. Therefore, the Eleventh Circuit concluded that "defendant introduced evidence intending to show his innocence regarding drugs, thereby making his true involvement with drugs a material issue."[131] Accordingly, the Eleventh Circuit held that the extrinsic act evidence was admissible under rule 608 to contradict defendant's material testimony.[132]

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123. *See* Treadwell, *Evidence*, 39 MERCER L. REV. 1259, 1275 (1988); Treadwell, *Evidence*, 40 MERCER L. REV. 1291, 1306-07 (1989).

124. *See* sources cited *supra* note 123.

125. 895 F.2d 1338 (1990).

126. *See supra* text accompanying notes 43-50.

127. 895 F.2d at 1339.

128. *Id.*

129. *Id.* at 1345.

130. *Id.* at 1346.

131. *Id.*

132. *Id.*

The problem with this reasoning, as pointed out by the dissent, is that defendant did not raise the issue of his prior involvement with drugs. Rather, this issue was raised by the government in its cross-examination of defendant. The dissent's point seems to be well taken. It hardly seems fair that the government should be allowed to ask a defendant about criminal activity not a part of the charges against him and then, when the defendant understandably denies any involvement in such activity, claim that the door has been opened to the admission of extrinsic act evidence. Even Georgia appellate courts, generally conservative in criminal matters, do not allow such a bootstrap technique.[133]

XII. Rule 609: Impeachment by Evidence of Conviction of a Crime

Prior to December 1, 1990, rule 609(a) allowed the use of felony convictions to attack the general credibility of a witness if the district court determined "that the probative value of admitting this evidence outweigh[ed] its prejudicial affect to the defendant."[134] As discussed in some detail in *Brown v. Flury*,[135] this rule caused considerable confusion among the circuit courts in three respects: (1) whether the balancing test applied to both civil and criminal cases; (2) whether the balancing test required the court to consider prejudice to plaintiffs and nonparty witnesses as well as defendants; and, (3) whether the balancing test of rule 403 applied even if not required by rule 609(a).[136]

By an amendment effective December 1, 1990, the Supreme Court sought to alleviate this confusion.[137] The amended rule differentiates between witnesses generally and criminal defendants. It is arguable, though,

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133. *See* Arnold v. State, 193 Ga. App. 206, 387 S.E.2d 417 (1989). Indeed, Georgia law specifically prohibits the impeachment of a defendant by evidence of bad character. O.C.G.A. § 24-9-84. To this extent, Georgia law stands in stark contrast to rule 608, which applies to all witnesses and which does not provide any special protection for criminal defendants.

134. Fed. R. Evid. 609(a), 28 U.S.C. app. at 759 (1988).

135. 848 F.2d 158 (11th Cir. 1988).

136. *Id.* at 159.

137. The amended rule reads as follows:

> (a) General rule—For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

Fed. R. Evid. 609.

that the difference is not substantive, but rather seeks only to clarify the application of rule 609. Regarding witnesses other than an accused, the new rule provides that felony convictions shall be admissible to attack credibility "subject to Rule 403."[138] Rule 403 provides that evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or considerations of delay, waste of time, or cumulative evidence. Regarding criminal defendants, felony convictions shall be admitted only if "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused."[139] Evidence that "any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement."[140]

XIII. RULE 704: OPINION ON ULTIMATE ISSUE

Rule 704 provides that testimony "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact" and, thus, expressly rejects the difficult to apply common law prohibition against an expert expressing an opinion on the ultimate issue that the jury is to decide.[141]

Unfortunately, rule 704 is often equally difficult to apply. Although courts generally reject testimony couched in legal terms, the Eleventh Circuit has affirmed the admission of testimony that an individual was "grossly negligent"[142] and that an incident was a "pure accident."[143]

It is difficult to reconcile these results with the Eleventh Circuit's decision in *Montgomery v. Aetna Casualty & Surety Company*.[144] In *Montgomery* plaintiff sought to recover from his insurer the cost of hiring a tax attorney in connection with a lawsuit filed against plaintiff. At trial, plaintiff elicited expert testimony to the effect that Aetna's policy required Aetna to retain a tax lawyer to represent plaintiff.[145] The Eleventh Circuit held that this testimony amounted to nothing more than a legal conclusion rather than an opinion on an ultimate issue of fact and was improperly admitted at trial.[146]

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138. *See supra* note 137 and accompanying text.
139. *Id.*
140. *Id.*
141. FED. R. EVID. 704(a).
142. Parker v. Williams, 855 F.2d 763, 777 (11th Cir. 1988). *See* Treadwell, *supra* note 41, at 1310.
143. Hanson v. Waller, 888 F.2d 806, 810 (11th Cir. 1989). *See* Treadwell, *supra* note 41, at 1370.
144. 898 F.2d 1537 (11th Cir. 1990).
145. *Id.* at 1540.
146. *Id.* at 1541.

In the Comprehensive Crime Control Act of 1984,[147] Congress amended rule 704 to prohibit an expert in a criminal case from stating an opinion regarding whether a defendant did or did not have the mental state or condition constituting an element of the crime or a defense of the crime.[148] By providing that such an ultimate issue is a matter for the trier of fact, the amendment, in effect, reverts to common law with regarding opinion testimony on the issue of insanity.[149] In *United States v. Manley*,[150] defendant attempted to avoid this limitation by couching his question as a hypothetical. Defendant, rather disingenuously, argued that he was not attempting to elicit an opinion on the ultimate issue in the case, but rather was asking for the expert's opinion only with regard to the hypothetical.[151] The Eleventh Circuit was not impressed with this fatuous attempt to circumvent rule 704 and affirmed defendant's conviction.[152]

XIV. ARTICLE VIII: HEARSAY

In previous survey articles, the review of cases interpreting the six Federal Rules of Evidence concerning hearsay has begun with a discussion of the inherent conflict between the use of hearsay in a criminal proceeding and the confrontation clause of the sixth amendment.[153] This conflict arises when the out-of-court statement of an unavailable witness is introduced, and a defendant is not "confronted with the witnesses against him."[154] It is particularly appropriate to discuss this in this Survey because the Supreme Court rendered a decision during the survey period concerning the hearsay testimony of a child in a molestation case. That issue has been particularly vexing for the Georgia appellate courts in the context of Georgia's Child Hearsay Statute.[155]

In *Idaho v. Wright*,[156] the trial court admitted the testimony of a doctor recounting his conversation with an alleged three year old molestation victim pursuant to Idaho's residual hearsay exception. The Idaho Supreme Court reversed defendant's conviction, holding that the hearsay testimony violated defendant's constitutional right to confront the wit-

147. Pub. L. No. 98-473, § 406(a), 98 Stat. 1837, 2067-68 (1984) (codified at 28 U.S.C. app. at 768 (1988)).

148. FED. R. EVID. 704.

149. *See* FED. R. EVID. 704 advisory committee's note.

150. 893 F.2d 1221 (11th Cir.), *cert. denied*, 111 S. Ct. 259 (1990).

151. 893 F.2d at 1222-23.

152. *Id.* at 1225.

153. U.S. CONST. amend. VI.

154. *Id.*

155. O.C.G.A. § 24-3-16 (Supp. 1990). *See* Treadwell, *Evidence*, 40 MERCER L. REV. 225, 257-59 (1988).

156. 110 S. Ct. 3139 (1990).

nesses against him.[157] The Supreme Court granted certiorari and affirmed.[158]

The Court began its opinion by conceding that a literal interpretation of the confrontation clause would bar the use of any out-of-court statement made by an unavailable declarant.[159] The Court, however, rejected such a literal interpretation and reaffirmed the two-part test for the admission of hearsay evidence established in *Ohio v. Roberts*.[160] First, the hearsay evidence must be necessary. Second, the hearsay statement may be admitted only "if it bears adequate 'indicia of reliability.' "[161] As discussed in previous surveys, courts long assumed that *Roberts* mandated a firm requirement that the declarant must be unavailable for the admission of hearsay to be necessary.[162] In *United States v. Inadi*,[163] however, the Supreme Court held that "the general requirement of unavailability did not apply to incriminating out-of-court statements made by a nontestifying coconspirator."[164]

In *Wright*, however, the parties agreed that the child was unavailable to testify, and, thus, the issue became whether the hearsay evidence bore sufficient indicia of reliability.[165] *Roberts* suggested that the requisite indicia of reliability could be found if the evidence fell within a firmly rooted hearsay exception, but the Court concluded that the Idaho residual exception to the hearsay rule did not meet this standard.[166] Therefore, the question became whether the hearsay statement was "supported by 'a showing of particularized guarantees of trustworthiness.' "[167] The Court examined the circumstances surrounding the statement and concluded that the child's statements were not particularly trustworthy.[168] Of particular note, the Court concluded that the trustworthiness of the statement could not be established by corroborating evidence, rather the statement "must possess indicia of reliability by virtue of its inherent trustworthiness."[169]

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157. *Id.* at 3145.
158. *Id.*
159. *Id.*
160. 448 U.S. 56 (1980); 110 S. Ct. at 3145-46.
161. 110 S. Ct. at 3146 (quoting 448 U.S. at 65).
162. *See* Treadwell, *Evidence*, 39 MERCER L. REV. 1259, 1279 (1988).
163. 475 U.S. 387 (1986).
164. 110 S. Ct. at 3146 (citing 475 U.S. at 394-400).
165. *Id.* at 3147.
166. *Id.*
167. *Id.* (quoting 448 U.S. at 66).
168. *Id.* at 3148.
169. *Id.* at 3150. In Maryland v. Craig, the Court held that a defendant's right of confrontation was not impinged by a Maryland statute permitting a child to testify by one way closed circuit television.

Although the hearsay statement in *Wright* was admitted pursuant to a residual hearsay exception, it would seem that a statement admitted pursuant to a Child Hearsay Statute would encounter the same difficulties; it is unlikely that the recent innovation of Child Hearsay Statutes constitutes a firmly rooted hearsay exception. *Wright*, however, does not stand for the proposition that all hearsay statements by the victim in a child molestation case are inadmissible. Rather, the "totality of the circumstances" must be examined in order to determine whether or not the statement can be considered sufficiently trustworthy to be admitted.[170]

In a short opinion, the Eleventh Circuit also addressed a constitutional challenge to a Child Hearsay Statute. In *Jones v. Dugger*,[171] defendant contended that evidence admitted pursuant to Florida's Child Hearsay Statute[172] impinged upon his sixth amendment right of confrontation.[173] The Eleventh Circuit disagreed, ironically enough, relying principally upon the fact that the child testified at the trial.[174] As discussed above, *Roberts* stands for the general proposition that if the witness is unavailable, then evidence of his out-of-court statements is necessary. One rationale of *Roberts* is that if the witness is available and testifies, then there is no need to implicate the right of confrontation by the admission of out-of-court statements. Relying on *California v. Green*,[175] however, a decision that predates *Roberts*, the court in *Dugger* concluded that the child's availability for cross-examination at trial satisfied the dictates of the confrontation clause.[176] The court noted, however, that its opinion should not be construed to uphold the constitutionality of Florida's Child Hearsay Statute in every setting. Rather, the court simply held that "the conduct of *this* trial fully preserved the appellant's sixth amendment right to confrontation."[177]

The hearsay rule of the Federal Rules of Evidence is short and to the point: hearsay is simply not admissible.[178] Of course, the rule is replete with exceptions, and in some contexts, hearsay evidence is admissible even though it does not fall within an exception. For example, the Eleventh Circuit held during the survey period that hearsay evidence may be considered in determining a defendant's sentence if the defendant is

170. *Id.* at 3149.
171. 888 F.2d 1340 (11th Cir. 1989).
172. FLA. STAT. § 90.803(23) (Supp. 1989).
173. 888 F.2d at 1342.
174. *Id.* at 1342-43.
175. 399 U.S. 149 (1970).
176. 888 F.2d at 1343.
177. *Id.*
178. FED. R. EVID. 802.

given an opportunity to refute the evidence and if the evidence bears " 'minimal indicia of reliability.' "[179]

Rule 801(d)(2)(B) provides that a statement is not hearsay if it is an adoptive admission by a party opponent.[180]

The Eleventh Circuit's decision in *United States v. Joshi*[181] illustrates the test governing the admissibility of alleged adoptive admissions by criminal defendants. In *Joshi* the district court admitted testimony by undercover officers that defendant nodded when a coconspirator identified defendant as a partner in illegal activity. On appeal defendant contended that the trial court erred because it did not make the inquiry required by *United States v. Jenkins*[182] before admitting the statement.[183] *Jenkins* articulated a two-part test for the admission of an adoptive admission. First, the statement must be such that an innocent defendant would normally respond when the statement is made.[184] The Eleventh Circuit concluded that this element of the test was not at issue because defendant actually responded, by virtue of his nod.[185] Second, *Jenkins* requires that sufficient facts exist which would allow a jury to conclude that defendant " 'heard, understood, and acquiesced in the statement.' "[186] In *Joshi* the district court did not make a preliminary finding that the alleged adoptive admission satisfied the *Jenkins* test, and the Eleventh Circuit criticized the district court for this omission.[187] Nevertheless, and notwithstanding that this was a "close question," the appellate court concluded that the evidence sufficiently established that defendant comprehended and adopted the statements in question.[188]

Rule 801(d)(2)(E) provides that statements by coconspirators are not hearsay.[189] In last year's survey, the author speculated that the Supreme Court's decision in *Bourjaily v. United States*,[190] which substantially relaxed the test for the admission of coconspirator statements, was responsible for the fact that rule 801(d)(2)(E) did not figure prominently in ap-

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179. United States v. Hairston, 888 F.2d 1349, 1353 (1989) (quoting United States v. Rodriguez, 765 F.2d 1546, 1555 (11th Cir. 1985)).

180. FED. R. EVID. 801(d)(2)(B).

181. 896 F.2d 1303 (11th Cir. 1990).

182. 779 F.2d 606 (11th Cir. 1986).

183. 896 F.2d at 1305, 1311-12.

184. *Id.* at 1311 (citing *Jenkins*, 779 F.2d at 612).

185. *Id.* at 1311-12.

186. *Id.* at 1311 (quoting *Jenkins*, 779 F.2d at 612).

187. *Id.* at 1312.

188. *Id.*

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

190. 483 U.S. 171 (1987).

pellate cases decided during 1989.[191] During this survey period, it would appear that *Bourjaily*, by lowering the level of scrutiny for coconspirator statements, again has had the effect of decreasing the number of appeals in which rule 801(d)(2)(E) is a major issue.

One decision involving coconspirator statements, *United States v. Byrom*,[192] however, merits discussion. In *Byrom* the district court admitted a videotaped conversation between defendant's coconspirator and a government informant. The government informant did not testify at trial, but the district court nevertheless admitted the tape in its entirety. The district court, however, instructed the jury that they were not to consider the informant's statements as evidence of the truthfulness of the statements. Rather, the jurors were to consider the informant's statements for the limited purpose of making the conversation intelligible. To understand the coconspirator's statements, the jurors had to hear the other half of the conversation.[193]

After a helpful discussion of the legal principles governing the admission of coconspirator statements, the Eleventh Circuit focused on its holding in *Bourjaily*. The court in that case held that, in making the factual determination preliminary to the admission of a coconspirator's statement, a district court may consider any evidence, including the coconspirator's statement, with the exception of evidence protected by privilege.[194] The court confirmed that the Eleventh Circuit now "applies a liberal standard in determining whether a statement is made in furtherance of a conspiracy."[195] In a footnote to *Byrom*, the Eleventh Circuit emphasized that the question relevant to determining the admissibility of a coconspirator's statement is whether the declarant and the defendant are members of the conspiracy. The fact that an informant is a party to the conversation is irrelevant.[196]

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191. Treadwell, *supra* note 41, at 1374. Prior to *Bourjaily*, the Eleventh Circuit applied the test formulated in United States v. James, 590 F.2d 575 (5th Cir.) (en banc), *cert. denied*, 442 U.S. 917 (1979), which provided that the government must prove by evidence other than the statement itself that a conspiracy existed, that the declarant and the defendant were members of the conspiracy, and that the coconspirators made the statement in furtherance of the conspiracy prior to the admission of coconspirator statements. *See* Treadwell, *Evidence*, 40 MERCER L. REV. 1291, 1313-14 (1989). *Bourjaily* overruled *James* to the extent that it prohibited district courts from relying on the coconspirators' statements sought to be admitted in making the preliminary factual determination concerning the existence of the conspiracy. *Id.* at 1314.

192. 910 F.2d 725 (11th Cir. 1990).

193. *Id.* at 732-33.

194. *Id.* at 734-35 (citing *Bourjaily*, 438 U.S. at 178).

195. *Id.* at 735.

196. *Id.* at 734 n.10.

Byrom, however, presented the additional problem that the informant did not testify, and thus his statements were potentially hearsay. The Eleventh Circuit concluded that the informant's recorded statements were not offered to prove their truth, but rather to place the conversation into context.[197] The coconspirator's statements, therefore, were admissible pursuant to rule 801(d)(2)(e), and the entire videotape, including the informant's statements, was admissible.[198]

In *United States v. Harris*,[199] the Eleventh Circuit focused on the requirement that the coconspirator's statement be in furtherance of the conspiracy. In *Harris* defendant contended that a coconspirator's statement, made a day after a drug run and confirming that some cocaine had been properly delivered, was a reminiscence and was not in furtherance of the conspiracy. Defendant apparently relied upon *United States v. Phillips*,[200] which held that an after-the-fact statement was inadmissible because it was not made in furtherance of the conspiracy.[201] After noting that review of a district court's determination that a statement was made in furtherance of a conspiracy is governed by the clearly erroneous standard, the Eleventh Circuit affirmed the trial court's decision.[202] The court reasoned that a coconspirator's statement keeping other conspirators informed of the conspiracy's progress is admissible.[203]

The "business records" exception to the hearsay rule is found in rule 803(6).[204] Typically, the foundation for the admission of business records is established by a custodian. As demonstrated by *United States v. Hawkins*,[205] however, this is not a rigid requirement, and the Federal Rules of Evidence permit the application of a very broad business records exception. In *Hawkins* defendants objected to the admission of checks, written by them, which had not been honored by their bank and which, consequently, had notations such as "insufficient funds" or "account closed." Defendants contended that these notations amounted to a statement by

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197. *Id.* at 737.

198. *Id.* In United States v. Jones, 913 F.2d 1552 (11th Cir. 1990), the Eleventh Circuit, citing *Byrom*, reaffirmed that an informant's participation in the conversation is irrelevant. *Id.* at 1563.

199. 908 F.2d 728 (11th Cir. 1990).

200. 664 F.2d 971 (5th Cir. Unit B 1981), *cert. denied*, 457 U.S. 1136 (1982).

201. 908 F.2d at 737 (citing *Phillips*, 664 F.2d at 1027).

202. *Id.*

203. *Id.* In United States v. Perez-Garcia, 904 F.2d 1534 (11th Cir. 1990), however, the Eleventh Circuit held that a district court improperly admitted a coconspirator's post-arrest statement as a coconspirator statement. Once the arrest has occurred, the conspiracy has terminated and thus the statement could not possibly have been made in furtherance of the conspiracy. *Id.* at 1540.

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

205. 905 F.2d 1489 (11th Cir. 1990).

the bank and, because a representative of the bank did not testify, were hearsay.[206]

The Eleventh Circuit noted that the business records exception does not require that the person who actually prepared the record testify and does not even require that the document be prepared by the business that has custody of it. Rather, the evidence is admissible if circumstantial evidence sufficiently demonstrates the trustworthiness of the document.[207] The court concluded that the bank's notations were a contemporaneous record of the status of the bank account which were made by bank employees with knowledge of that status, and that it was the regular practice of the bank to make such a record.[208] Thus, the court concluded that sufficient circumstantial evidence existed to demonstrate the trustworthiness of the bank's notations and that they were made in the regular course of the business.[209]

Similarly, in *United States v. Metallo*,[210] the Eleventh Circuit emphasized that the key word in determining the admissibility of a purported business record is "trustworthy."[211] In *Metallo* the Eleventh Circuit affirmed the admission of a Dun & Bradstreet report over an apparent objection that the contents of the report were not prepared by Dun & Bradstreet and, therefore, did not fall within the business records exception.[212]

Rule 803(8) provides for the admission of public records and reports as an exception to the rule against hearsay.[213] Previous surveys have discussed the Supreme Court's decision in *Beech Aircraft Corp. v. Rainey*.[214] In overruling an Eleventh Circuit decision, the Court held that public records and reports are not inadmissible merely because they state a conclusion or opinion.[215] The potential impact of this decision upon civil litigation cannot be overstated. Many incidents that give rise to civil litigation are the subjects of official investigations. For example, the Occupational Safety and Health Administration routinely generates reports concerning its investigations of certain on-the-job injuries. Such reports may now be admissible in any civil litigation arising out of the incident.[216]

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206. *Id.* at 1494-95.
207. *Id.* at 1494.
208. *Id.*
209. *Id.* at 1494-95.
210. 908 F.2d 795 (11th Cir. 1990).
211. *Id.* at 799.
212. *Id.*
213. FED. R. EVID. 803(8).
214. 109 S. Ct. 439 (1988). *See* Treadwell, *supra* note 41, at 1375-76.
215. 109 S. Ct. at 450.
216. *See* Treadwell, *supra* note 41, at 1375-76.

During the present survey year, the Eleventh Circuit demonstrated the potential far reaching affect of the *Rainey* decision. In *Glados, Inc. v. Reliance Insurance Co.*,[217] an action to recover insurance proceeds, defendant attempted to introduce into evidence the conclusion contained in a police investigation that plaintiff's owners had burned their business. The trial took place before the Supreme Court decided *Rainey*, and, in accordance with law existing at the time, the district court refused to admit the investigator's conclusions.[218] On appeal the Eleventh Circuit acknowledged that, as a result of *Rainey*, rule 803(8)(c) permits the admission of factually based conclusions.[219] Indeed, public reports containing such conclusions, the court wrote, are presumed to be admissible unless the sources of information for the report or other circumstances indicate that the report is not trustworthy. Upon consideration of the four factors enunciated by the Supreme Court in determining the trustworthiness of conclusions (timeliness of investigation, the skill and experience of the investigator, whether a hearing was conducted, and possible bias), the court concluded that the district court had erred in refusing to admit the investigator's conclusions.[220]

In *Barfield v. Orange County*,[221] another decision with particularly far-reaching potential, the Eleventh Circuit held that the results of an Equal Employment Opportunity Commission (the "EEOC") investigation of a discrimination claim are admissible under rule 803(8) in subsequent civil proceedings.[222] In *Barfield* the EEOC found "no reasonable cause" to believe that plaintiff's allegations of discrimination were true. Prior to her civil suit, plaintiff unsuccessfully moved in limine to exclude this report from evidence.[223] On appeal the Eleventh Circuit noted that its previous decisions holding EEOC reports admissible all involved bench trials. The Eleventh Circuit also acknowledged that the circuits are split on the question of whether such reports may be admitted in a jury trial.[224] Noting that rule 803(8) makes no distinction between jury trials and bench trials, the court concluded that the analysis for the admission of the report did not turn on whether the case was to be tried before a jury.[225] Because plaintiff offered no substantial evidence that the report lacked the trustworthiness required by rule 803(8), the Eleventh Circuit affirmed

217. 888 F.2d 1309 (11th Cir. 1987), *cert. denied*, 110 S. Ct. 3273 (1990).
218. 888 F.2d at 1310-12.
219. *Id.* at 1312.
220. *Id.* at 1312-13.
221. 911 F.2d 644 (11th Cir. 1990).
222. *Id.* at 651.
223. *Id.* at 649.
224. *Id.*
225. *Id.* at 650-51.

the district court's decision.[226] The Eleventh Circuit, however, noted that such reports may be inadmissible under rule 403 because their probative value is outweighed by their prejudicial effect.[227] Nevertheless, as the result of *Barfield*, EEOC reports may now be admitted in jury trials under rule 803.

Last year's survey addressed the Eleventh Circuit's decision in *United States v. Fernandez*[228] as reported in the advance sheets.[229] Publication of this opinion in the bound volume, however, was delayed pending disposition of a petition for rehearing.[230] The revised opinion was published during the present survey year.[231] In the initial opinion, the Eleventh Circuit held that the district court had erred in admitting the grand jury testimony of an unavailable witness pursuant to rule 804(b)(5), the residual or catch-all exception to the hearsay rule.[232]

Judge Kravitz, writing for the court in *United States v. Lang*,[233] followed her reasoning in *Fernandez* and concluded that the district court improperly admitted grand jury testimony pursuant to rule 804(b)(5).[234] Judge Kravitz noted that although other circuits have been "fairly flexible" in permitting the use of grand jury testimony under rule 804(b)(5), the Eleventh Circuit has never authorized the use of grand jury testimony under the authority of that rule.[235] On the other hand, Judge Kravitz acknowledged that the Eleventh Circuit has never adopted a per se rule excluding grand jury testimony.[236] Arguably, however, the Eleventh Circuit's test for the admission of hearsay evidence under rule 804(b)(5) makes it extremely unlikely that grand jury testimony will ever be admitted. In the Eleventh Circuit, grand jury testimony is admissible under rule 804(b)(5) only if it equals or exceeds the reliability of the exceptions found in rule 804(b).[237]

In *Lang* the government argued that the grand jury testimony was sufficiently trustworthy because the witness was defendant's father, he had firsthand knowledge of the subject matter of his testimony, and he had

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226. *Id.* at 651.

227. *Id.*

228. 880 F.2d 125 (11th Cir. 1989) (withdrawn from bound volume pending disposition of petition for rehearing).

229. Treadwell, *supra* note 41, at 1378.

230. Treadwell, *supra* note 41, at 1378.

231. 892 F.2d 976 (11th Cir.), *cert. dismissed*, 110 S. Ct. 2201 (1990).

232. Treadwell, *supra* note 41, at 1378-79.

233. 904 F.2d 618 (11th Cir. 1990).

234. *Id.* at 624-25.

235. *Id.* at 622-23.

236. *Id.*

237. *See id.* at 623 (citing United States v. Thevis, 665 F.2d 616, 629 (5th Cir. Unit B), *cert. denied*, 459 U.S. 825 (1982)).

been advised that he was not a target of the government's investigation.[238] The Eleventh Circuit concluded that the familial connection may well make the testimony even less trustworthy because of intrafamily rivalries and loyalties. The government's argument that the father's testimony was trustworthy because he had been told that he was not being investigated also failed to convince the court. The Eleventh Circuit pointed out that he had not been granted immunity, and it was conceivable that he may have feared a later investigation.[239] As pointed out in *Fernandez*, only extraordinarily trustworthy grand jury testimony is admissible. The father's testimony did not meet that standard.

XV. RULE 901: REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION

The Federal Rules of Evidence take a generally liberal and certainly practical view of the requirement that a party authenticate a document as a prerequisite to its admissibility.[240] As demonstrated in *Nolin v. Douglas County*,[241] however, the requirement of authentication does have some teeth. In *Nolin* plaintiff, while cross-examining defendant's sheriff, attempted to ask the sheriff questions about a document that plaintiff contended were defendant's personnel regulations. Defendant objected, contending that the document was not a correct copy of the regulations. When the district court refused to take judicial notice of the regulations, plaintiff attempted to authenticate the document through the sheriff who testified "that he was 'somewhat familiar' with it."[242] The district court ruled that this testimony was not sufficient "to support a finding that the [matter in question was] what it[s proponent claimed]."[243] At the close of plaintiff's case, plaintiff proffered what was apparently another copy of the regulations, contending that this copy "was self-authenticating because [defendant's personnel director had] certified the document to be a true and correct copy of the Douglas County Merit System."[244] Defendant argued that this second document was different from the first document and thus the requirement of proper authentication became even more crucial. The district court refused to admit the document on the grounds that it was not under seal.[245] The Eleventh Circuit held that the district

238. *Id.*
239. *Id.* at 623-24.
240. FED. R. EVID. 901.
241. 903 F.2d 1546 (11th Cir. 1990).
242. *Id.* at 1551.
243. *Id.* (paraphrasing FED. R. EVID. 901(a)).
244. *Id.* at 1551-52. Although the opinion is not explicit in this regard, presumably this certification was not made in court but rather was a written certification attached to the document.
245. *Id.* at 1552.

court did not abuse its discretion in refusing to admit either of the documents.[246] The court acknowledged that in a very similar case, *Stuckey v. Northern Propane Gas Co.*,[247] it had affirmed the district court's admission of a document, but noted that the objecting party in *Stuckey* did not offer any evidence to counter the very minimal showing necessary for authentication.[248] In *Nolin*, on the other hand, the court reasoned that defendant had offered sufficient evidence to bring into question the authenticity of the documents by pointing out that two different documents purporting to be the applicable regulations had been tendered.[249]

246. *Id.*
247. 874 F.2d 1563 (11th Cir. 1989).
248. 903 F.2d at 1552.
249. *Id.*