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The Second Circuit and the Federal Rules of Evidence

Paul F. Rothstein
Georgetown University Law Center, rothstei@law.georgetown.edu

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COMMENTARY: THE SECOND CIRCUIT AND THE FEDERAL RULES OF EVIDENCE

*Paul F. Rothstein**

The most significant development in federal trial procedure in recent years has been the enactment of the Federal Rules of Evidence, effective July 1, 1975.[1] In the intervening two years since the Rules became effective, the courts of the Second Circuit have had occasion to make several illuminating applications of and references to them.

An examination of some of these decisions provides insight into the kinds of questions that are coming up not only in the Second Circuit, but around the country, and the kinds of answers that are being given. It is not the bizarre or unusual case that will tell us whether and how the rules are working, but the mine-run of cases; and this circuit provides a good sampling. The following discussion will also include a few decisions which, although not from the Second Circuit, are sufficiently "next door" to be of interest to the Second Circuit lawyer.

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* Professor of Law, Georgetown University Law Center, Washington, D.C.; Author, numerous books and articles on evidence and trials, including several on the Federal Rules of Evidence and the student text, Evidence in a Nutshell (West Publ. Co. 1970). Advisor to the United States Senate Judiciary Committee on several projects, including the Rules of Evidence and Rules of Criminal Procedure; Reporter, National Conference of Commissioners on Uniform State Laws; Chairman, Association of American Law Schools, Evidence Section; Member, Continuing Legal Education Board and National Council, Federal Bar Association; Member, D.C. and Illinois Bars and the Bars of several federal courts; Columnist, New York Law Journal.

[1] Pub. L. No. 93-595, 88 Stat. 1929 (Jan. 2, 1975), *amended by* Pub. L. No. 94-113, 89 Stat. 576 (Oct. 16, 1975) (re-instating stricken Rule 801(d)(1)(C), relating to statements of identification as exempt from the hearsay rule) and Pub. L. No. 94-149, 89 Stat. 805 (Dec. 12, 1975) (making spelling and grammar corrections and rewriting Rule 410, relating to the admissibility of certain pleas and accompanying statements). For an excellent recent symposium on the Rules, see 9 U. CALIF. DAVIS L. REV. xxxvii (1976). *See also* P. ROTHSTEIN, FEDERAL RULES OF EVIDENCE (Clark Boardman Co., looseleaf service, updated through 1977); P. ROTHSTEIN, UNDERSTANDING THE NEW FEDERAL RULES OF EVIDENCE (N.Y.L.J. Press 1973) (biennial supplements).

ARTICLE II: JUDICIAL NOTICE

Article II of the Rules establishes a test of virtual indisputability before "adjudicative facts" (facts of the type customarily found by the trier-of-fact) will be judicially noticed, leaving other types of fact (*e.g.*, legislative or policy-type facts) unregulated.[2] That the distinction between "adjudicative" and other facts would be murky and difficult to administer had been predicted, although some such distinction was nonetheless recognized as essential.[3]

After remarking on the difficulty of drawing the distinction, the trial judge in *Goodman v. Stalfort*,[4] held that the act of adding charcoal lighter fluid to lighted coals, resulting in burns, was contributory negligence as a matter of law. He arrived at this by taking judicial notice of the nature and development of charcoal lighter fluid, the grey appearance of ignited charcoal, and the ignition caused by adding lighter fluid. These facts were considered common knowledge under Rule 201. The same judge, in another decision,[5] took notice of matters not of general common awareness, but commonly known in the district—also licensed by the rule—*i.e.*, knowledge that, in 1974, many taxpayers received notices that the refunds to which they were entitled were being applied to amounts erroneously stated as still due for 1971. Thus, a taxpayer's claim for a refund, unsupported by further information, was held to state a claim, and discovery was ordered on his behalf.

ARTICLE IV: RELEVANCY AND ITS LIMITS

This Article of the Rules defines relevancy broadly;[6] it also grants the judge a wide power to balance relevance against prejudice, time consumption, and confusion;[7] codifies particular appli-

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[2] *See generally* Lenox, *The Use of Non-Legal Data in the Decision-Making Process*, 1 GLENDALE L. REV. 177 (1976); Comment, *Judicial Notice: Rule 201 of the Federal Rules of Evidence*, 28 U. FLA. L. REV. 723 (1976). For discussions of Rule 201, see United States v. Salzmann, 417 F. Supp. 1139 (E.D.N.Y. 1976) (judicial notice taken that Israel has extradited certain persons upon request by the United States, although not required by treaty to do so); Antco Shipping Co. v. Sidermar, 417 F. Supp. 207 (S.D.N.Y. 1976) (201(b)—doubt concerning purpose of contract clause prevents judicial notice of purpose).

[3] P. ROTHSTEIN, THE FEDERAL RULES OF EVIDENCE, *supra* note 1, at 34. Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 GEO. L.J. 125, 161 *passim* (1973).

[4] 411 F. Supp. 889 (D.N.J. 1976).

[5] Neal v. United States, 402 F. Supp. 678 (D.N.J. 1975).

[6] *See* FED. R. EVID. 401.

[7] *See id.* 403. *See also* United States v. Araujo, 539 F.2d 287 (2d Cir. 1976);

cations of such balancing;[8] and provides for related policy matters.[9] The conceptual breadth of relevancy, and the fact that the countervailing considerations of time and prejudice will not lightly overcome relevance (under Rule 403, they must be "undue" and must "substantially outweigh" probativity), combined with the trial judge's broad discretion in these matters, are illustrated in a government official's recent bribe solicitation trial. In *United States v. Iaconetti*,[10] Judge Weinstein held that evidence of the solicitee's prompt consultation with a business partner and lawyer after the meeting with the government official gave rise to an inference that something related to the business had occurred at the meeting, and also held that repetition of some allied matter to rebut defendant's version of the meeting did not run afoul of the balancing provisions.

Another group of cases focused on character evidence. Rule 404 generally prohibits the use of other crimes and wrongs to help establish the charged crime, but makes certain exceptions in subsection (b) for proving motive, intent, knowledge, and other similar purposes, subject, of course, to the balancing process.[11] Three recent rulings have shed some light on how this operates. In *United States v. Johnson*,[12] the Second Circuit stated that, under the catchword of "motive," Rule 404 would allow the showing, in a robbery case, of the use of robbery proceeds for payment in a narcotics operation. In *United States v. Flores*,[13] owing to a legal technicality relating to extradition treaties, the defendant, although indicted for conspiracy, could be charged with no conspiratorial acts occurring prior to a certain date, but only with those following that date; nevertheless, evidence of the earlier actions was admissible to prove "knowledge or intent." And in *United States v. Jackson*,[14] although evidence of defendant's flight from custody,

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United States v. Dwyer, 539 F.2d 924 (2d Cir. 1976); United States v. Robinson, 544 F.2d 611 (2d Cir. 1976).

[8] *See* FED. R. EVID. 404-406 (character, habit, practice); *id.* 407-410 (remedial measures, compromises, payments, pleas); *id.* 411 (insurance).

[9] *See id.* 407-410 (remedial measures, compromises, payments, pleas). Insofar as they are not related to relevance, probativity, prejudice, and time, the privilege aspects of these rules speaks to encouraging desirable conduct and fostering particular policies.

[10] 406 F. Supp. 554 (E.D.N.Y.), *aff'd* 540 F.2d 574 (2d Cir. 1976), *cert. denied*, 97 S. Ct. 739 (1977).

[11] *See* FED. R. EVID. 403; text accompanying note 7 *supra*.

[12] 525 F.2d 999 (2d Cir. 1975), *cert. denied*, 424 U.S. 920 (1976).

[13] 411 F. Supp. 38 (S.D.N.Y. 1976).

[14] 405 F. Supp. 938 (E.D.N.Y. 1975). Other Second Circuit cases on Rule 404

subsequent evasion of police, and use of false identification, was considered probative of the crime charged when found to be embraced by several Rule 404(b) catchwords, the decision illustrates effectively that the inquiry does not stop there—the balancing of Rule 403 must also be considered. On the one hand, infirmities in the Government's identification created a premium on this evidence; on the other hand, though probative, it was only weakly so, because the defendant might have been evading arrest owing to another crime for which he had been recently indicted. And prejudice would accrue from the unsavory circumstances surrounding the evasion—guns in the car, for example. Furthermore, if the flight evidence were introduced, the inquiry could not fairly be cut short without opening up the subject of the other indictment, which might have accounted for the flight. Judge Weinstein's innovative solution was an attempt to obtain the legitimate value of the evidence without the bad side effects, by ruling that the evidence would be inadmissible at trial if the defendant would stipulate that he had used a false name after the robbery.

Rule 407, generally banning evidence of subsequent remedial measures as indicative of fault, is not confined to personal injury cases, as is frequently assumed. This is illustrated by *SEC v. Geon Industries, Inc.*,[15] where evidence of defendant brokerage firm's subsequent change of rules to prevent its registered securities representatives from engaging in certain suspect trading practices, was not allowed to be taken as tending to prove prior negligent supervision of its offending employee. And in *Smyth v. Upjohn Co.*,[16] the court properly disallowed the use of evidence that defendant drug company had put stronger warnings on its drug product following plaintiff's adverse reaction to the drug. This constituted a subsequent remedial measure and was held to be outside the Rule's exception for showing feasibility, since the ability of the company to issue a stronger warning was not controverted. While Rule 407 permits subsequent remedial measures to be used for purposes other than implied admissions of culpable conduct or negligence—such as ownership, control, or feasibility of precautionary measures—the Rule requires that such other issues be "controverted." Although certain other similarly structured Article IV

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are United States v. Payden, 536 F.2d 541 (2d Cir. 1976), and United States v. Viruet, 539 F.2d 295 (2d Cir. 1976).

[15] 531 F.2d 39 (2d Cir. 1976).

[16] 529 F.2d 803 (2d Cir. 1975).

rules do not expressly incorporate the same requirement,[17] it would be wise to interpret them in a fashion requiring at least a genuine issue.

ARTICLE V: PRIVILEGES

Instead of providing specific rules of evidentiary privilege, Rule 501 provides for the application of the "principles of the common law" of privileges "interpreted in the light of reason and experience," except in certain state-law cases, where state privilege law applies. Matters such as bans on evidence of remedial measures, offers of compromise, evidence of insurance, and character evidence, being in Article IV, are not regarded as privileges. Article V covers such questions as the existence and scope of marital and medical privileges, privileges related to attorneys, accountants, journalists, and informants, and privileges covering governmental secrets.

In one recent case,[18] an anonymous cashier's check was sent to the IRS to cover overdue tax payments. The IRS sought from the lawyer both the identity of his client on whose behalf the check was sent, and the bank's records relating to the issuance of the check, to identify the purchaser. The court overruled a claim of attorney-client privilege on both items, holding that a federal tax matter was among those areas governed by the "common law . . . reason and experience" standard in Rule 501, and concluding that, under this standard, neither item was privileged: The bank records were not confidential communications by the client to the attorney; and a client's identity is not covered by the privilege.[19]

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[17] *See* FED. R. EVID. 408 (compromise); 411 (insurance).

[18] Gannet v. First Nat'l State Bank, 410 F. Supp. 585 (D.N.J.), *rev'd on other grounds sub nom.* United States v. First Nat'l State Bank, 540 F.2d 619 (3d Cir.), *and aff'd in part sub nom.* Gannet v. First Nat'l State Bank, 546 F.2d 1072 (3d Cir. 1976).

[19] For a similar recent ruling within the Second Circuit, see United States v. Mackey, 405 F. Supp. 854 (E.D.N.Y. 1975), holding that the identity of a taxpayer, the general nature of the legal services rendered, and publicly available information about ownership interests were unprivileged, and reserving, on other allegedly privileged matters, the question whether the evidence comes within the exception to the privilege for matters in "furtherance of crime or fraud." There are contrary rulings on the identity question. *See, e.g.*, United States v. Jones, 517 F.2d 666 (5th Cir. 1975) (citing Rule 501); Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960) (decided prior to the effective date of Rule 501). For a recent case agreeing that the *nature* of the services rendered must be disclosed, see United States v. Osborn, 409 F. Supp. 406 (D. Ore. 1975).

In a case involving criminal grand jury proceedings,[20] the qualified privilege for an attorney's work-product, covering materials prepared in anticipation of litigation, was imported into the "common law . . . reason and experience" standard, in the same form as has been codified for discovery in civil cases by Federal Rule of Civil Procedure 26(b)(3), although no such privilege was recognized at common law. Relying on a recent Supreme Court ruling recognizing the privilege as a matter of judge-made law in the trial of a criminal case,[21] this district court resolved, for itself at least, the conflict[22] over the question whether Rule 501 uses the term "common law" strictly to refer to a period of history, thus precluding new privileges, or in the looser sense of a common law process permitting recognition of new privileges based on general policies found in the common law (or at least new privileges that have considerable authority in modern cases, statutes, or rules[23]). The case

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[20] *In re* Grand Jury Investigation (Sturgis), 412 F. Supp. 943 (E.D. Pa. 1976).

[21] United States v. Nobles, 422 U.S. 225 (1975).

[22] 412 F. Supp. at 947 n.3. The following cases involve privileges or exceptions thereto, unknown at common law, under the federal common law branch of Rule 501: United States v. Allery, 526 F.2d 1362 (8th Cir. 1975) (extending the common law exception to marital privilege for crimes against a spouse to cover crimes against a child of a spouse); United States v. Meagher, 531 F.2d 752 (5th Cir. 1976) (refusing to recognize a federal physician-patient privilege); *In re* Grand Jury Impanelled Jan. 21, 1975 (Freedman, Cortese), 541 F.2d 373 (3d Cir. 1976) (refusing to recognize a prothonotary privilege); United States v. Cortese, 540 F.2d 640 (3d Cir. 1976) (same); United States v. Craig, 528 F.2d 773 (7th Cir. 1976) (recognizing a state-legislator privilege but holding it waived on the facts), *rehearing en banc*, 537 F.2d 957 (7th Cir. 1976) (refusing to recognize such a privilege). For cases within the Second Circuit, see United States v. King, No. 76-CR-482 (E.D.N.Y. Dec. 29, 1976) (recognizing a qualified privilege for state income tax returns); Edney v. Smith, 425 F. Supp. 1038 (E.D.N.Y. 1976) (recognizing a *qualified* psychotherapist privilege). *Cf.* Richards of Rockford, Inc. v. Pacific Gas & Elec. Co., 71 F.R.D. 388 (N.D. Cal. 1976) (creating a new privilege—a researcher's privilege—in discovery stage of case involving the state-law branch of Rule 501, where state law would not recognize; invokes inherent power of court over discovery to do so; but see Rule 1101, which makes Rule 501, and, thus, state privilege law, binding in this type of case; or does it?). Several of these cases suggest that the earlier draft of the Rules, approved by the Supreme Court but altered by Congress to delete the codification of particular privileges, may help in fashioning a modern "common law" under Rule 501. Others disagree.

[23] It is on this latter basis that a claim of physician-patient privilege, for example, can be distinguished from a claim of parent-child or researcher-source privilege. Although policies of confidentiality and encouragement of communication, information, and professional or personal relationships can be found in the common law to support all of these claims, modern statutes and decisions among the states tend to support the physician-patient privilege, but not the other two.

It should be remembered that Rule 501 refers not to the "common law," but to "*principles* of the common law" as "*interpreted* in the light of [modern] *reason and experience*." This would seem to license at least *some* new privileges, not previously

also made it clear, as does Rule 1101, that Rule 501 applies to grand jury investigations.

Another very significant decision in the area of privilege, *Kaufman v. Edelstein*,[24] involved an expert's privilege to resist process to compel him to perform as a witness. Its thorough examination in the material immediately following this Commentary, however, will not be repeated here.

ARTICLE VI: WITNESSES

Article VI of the Rules treats the issue of witnesses' competency in much the same fashion as Article V handles privileges, except that, instead of a "common law . . . reason and experience" standard for federal-issue litigation, a very narrow, exclusive list of incompetencies is provided. Article VI also regulates certain other matters concerning presentation of witnesses, particularly impeachment and cross examination.

Rule 608(b) allows specific instances of conduct to be brought out—on cross-examination only—to impeach a witness if strongly probative of incredibility. This is illustrated by *Lewis v. Baker*,[25] in which the Second Circuit permitted a falsified employment application to be introduced on the issue of credibility during cross-examination.

Three cases involving impeachment of the criminal defendant as a witness illustrate the operation of Rule 609, which allows certain convictions to be brought out for impeachment. The Rule allows evidence of felonies that are not crimes of "dishonesty or false statement" only upon an assessment that probativity outweighs prejudice to the defendant.[26] The burden is on the Government,[27] and it is noteworthy that the requirement for exclusion is

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recognized, in cases where they share common policies with existing privileges. *See generally* P. ROTHSTEIN, UNDERSTANDING THE NEW FEDERAL RULES OF EVIDENCE 197 *passim* (N.Y.L.J. Press, Supp. 1975).

[24] 539 F.2d 811 (2d Cir. 1976).

[25] 526 F.2d 470 (2d Cir. 1975).

[26] It is now fairly well agreed that larceny, robbery, assault, and narcotics violations, as distinct from embezzlement, perjury, and fraud, are not normally crimes of "dishonesty or false statement" (although Congress purposely left the matter somewhat vague due to an inability to agree on specific crimes that could be used). *See* Virgin Islands v. Toto, 529 F.2d 278 (3d Cir. 1976); Virgin Islands v. Testamark, 528 F.2d 742 (3d Cir. 1976). *See also* United States v. Smith, No. 75-1920 (D.C. Cir. Dec. 17, 1976); United States v. Millings, 535 F.2d 121 (D.C. Cir. 1976). *But see* United States v. Carden, 529 F.2d 443 (5th Cir. 1976) (petit larceny involves "dishonesty").

[27] *See* Statement of Rep. William L. Hungate, Conferee on the Rules enactment,

not that probative value must be "substantially outweighed," as it is under Rule 403 (the "balancing" rule mentioned earlier). A slight imbalance is enough under Rule 609. Presumably, use of Rule 403 is preempted under 609.

In *United States v. Brown*,[28] the court, examining Rule 609, held that a seven-year-old felony narcotics conviction (not involving dishonesty or false statement) could not be used to impeach a defendant charged with narcotics violations because of the similarity of the crimes. In *United States v. Jackson*,[29] the court excluded a more recent felony assault conviction (not involving dishonesty or false statement) in a robbery case, largely because of the attenuated relationship between assault and credibility. Despite the fact that both judges in these two cases ordered exclusion, they sharply disagreed on the criteria governing the "balancing" assessment. The judge in *Brown* believed that similarity of the crimes was the principal consideration, and apparently paid less attention to the nature of the crime as it relates to credibility. He disagreed with expressions in many cases that the length of time between the impeaching crime and the trial is critical, believing instead that remoteness reduces not only probativity, but also prejudice. He also rejected the *Jackson* court's suggestions that necessity for encouraging defendant to testify can be a key factor and that a strong Government case makes impeachment of the defendant less important and the impeaching evidence less necessary. He believed, instead, that strength in the remainder of the Government's case makes prejudice from impeachment evidence less likely because the jury is less inclined to be irrationally swayed by it in relation to the other evidence in the case.

The *Jackson* court mentioned two contingencies which would change its ruling of exclusion: (1) if the defendant were to suggest that he had not been in trouble with the law, or (2) if he were to introduce assault convictions of government witnesses without prior court permission. The first seems directly related to the probativity-prejudice assessment; the second seems less so, and requires some innovation under the rules.

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and Chairman, House Judiciary Subcommittee on Criminal Justice, 120 CONG. REC. H. 12253 (daily ed. Dec. 18, 1971); Statement of Cong. Dennis in the debate following, *id.*at 12255 *et seq. See also* United States v. Smith, No. 75-1920 (D.C. Cir. Dec. 17, 1976), and United States v. Mahone, 537 F.2d 922, 929 (7th Cir. 1976), suggesting that the best practice is for judges to make express findings on this issue, with an on-the-record hearing.

[28] 409 F. Supp. 890 (W.D.N.Y. 1976).

[29] 405 F. Supp. 938 (E.D.N.Y. 1975).

In *United States v. Canniff*,[30] the Second Circuit cited Rule 609(d) for the proposition that a narcotics defendant who has taken the stand normally may not be asked on cross-examination about prior juvenile adjudications for impeachment purposes. But the court found that such inquiries did not require reversal in this case because (1) the defendant had claimed in his direct testimony to have had a clean record; (2) the prosecution's cross-examination question to the defendant had been based on some information; and (3) the defendant had answered the question in the negative.

ARTICLE VIII: HEARSAY

Rule 801(d)(1)(A) changes the traditional rule that prior inconsistent statements of a witness who testifies at trial are admissible only for impeachment purposes, but not as substantive evidence unless the statement is within an independent hearsay exemption or exception.[31] Under the new Rule, such statements are characterized as not hearsay at all, and thus are admissible as substantive evidence, without the necessity of finding an independent exception or exemption, provided that certain enumerated required conditions are met and that neither other rules nor the Constitution are transgressed. The required conditions are that the witness presently be on the stand subject to examination concerning his prior inconsistent statement, and that such statement have been given under oath subject to the penalty of perjury at a trial, hearing, disposition, or other proceeding, whether in the same case or not, and regardless of whether there was any opportunity to cross-examine. The precise meaning of "proceeding" is uncertain. It is clear that grand jury investigations are encompassed. But what about other agency investigations under oath? What about a statement before a notary? Also somewhat uncertain is exactly what is meant by "inconsistent." How inconsistent must the statement be? Will lack of memory of facts once remembered be inconsistent? The Second Circuit has not addressed these matters, but has shed some light on other aspects of the Rule.

In *United States v. Blitz*,[32] a complex securities fraud case,

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[30] 521 F.2d 565 (2d Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976).

[31] *But see* Letendre v. Hartford Acc. & Indem. Co., 21 N.Y.2d 518, 269 N.Y.S.2d 183, 236 N.E.2d 467 (1968), and Vincent v. Thompson, 50 App. Div. 2d 211, 377 N.Y.S.2d 118 (2d Dep't 1975), which present the possibility that, in New York, prior inconsistent statements may properly be admissible for their truth by constituting a new exception to or exemption from the hearsay rule in civil cases.

[32] 533 F.2d 1329 (2d Cir. 1976), *cert. denied*, 97 S. Ct. 65 (1976).

one co-conspirator contested the admission into evidence of the incriminating grand jury testimony of another co-conspirator, whose testimony at the present trial was inconsistent with his grand jury testimony. All the conditions for admissibility under Rule 801(d)(1)(A) were met: The declarant (1) testified at the present trial and thus was subject to examination concerning the prior statement, which was (2) inconsistent with his testimony, and (3) given under oath subject to the penalty of perjury at another proceeding. The Second Circuit held the statement admissible, relying in part on the new rule (technically not yet binding at the trial) and on its earlier decision in *United States v. De Sisto*,[33] which had formed the basis for a special Second Circuit exception to the hearsay rule, developed before the adoption of the Federal Rules of Evidence, for statements made at a *former trial* or *grand jury* proceeding *in the same case*. This "*De Sisto* exception" has now been engulfed and rendered largely unnecessary by the new rule.

In a decision handed down just prior to *Blitz*, the Second Circuit had acknowledged the existence of a "current of modern opinion" in favor of Rule 801(d)(1)(A). *United States v. Jordano*[34] involved a conviction for robbery of a bank messenger. The defendant's girlfriend had given grand jury testimony implicating the defendant in the crime charged. When the Government called her as its witness at trial, however, she denied the facts related before the grand jury and the truth of that testimony, claiming coercion by the authorities. The Government then offered the witness' grand jury testimony, which was held admissible as substantive evidence of the crime charged, the court citing both Rule 801(d)(1)(A) and *De Sisto*. The court thus felt that it was not bound to adhere rigidly to the traditional requirement that one may not impeach one's own witness unless the testimony comes as a surprise,[35] since this was affirmative evidence rather than impeachment.

Rule 801(d)(1)(B) exempts witnesses' prior consistent statements from the hearsay rule under certain conditions, *viz.*, to rebut an express or implied charge of recent fabrication or improp-

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[33] 329 F.2d 929 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964).

[34] 521 F.2d 695 (2d Cir. 1975).

[35] Defendants charged that the requisite surprise was lacking since the witness had recanted her grand jury testimony at a prior trial. *Id.* at 697.

er influence or motive. Traditionally, prior consistent statements were admissible only on the issue of credibility (a non-hearsay usage), not for their truth (a hearsay use). Even then, the aforementioned conditions (arising out of considerations of economy) had to be complied with. Under the new Rule, such statements are characterized as non-hearsay and are thus admissible as substantive evidence, *i.e.*, for their truth, as well as on the issue of credibility.

In *United States v. Iaconetti*,[36] a federal government contract inspector was convicted of soliciting and accepting a bribe from two government suppliers. The Government's chief witness was one Lioi, an officer in a corporation seeking a government contract. Lioi testified that the defendant, upon conducting a pre-award survey, had solicited a bribe in exchange for his approval in awarding the contract to Lioi's firm. Upon taking the witness stand, the defendant not only denied having requested a bribe, but charged that it was in fact Lioi who had offered him an unsolicited bribe. In rebuttal, the Government presented as witnesses Lioi's business partner and the firm's attorney, who testified that, on the day of the alleged bribe, Lioi had related to them the defendant's request for payment. It was this testimony to which the defendant objected, grounding his arguments on the hearsay rule. The lower court held that this evidence was nevertheless admissible, relying alternatively on three Rules, the first of which was Rule 801(d)(1)(B). As described by the district court, this Rule would appear to be clearly applicable: the declarant, Lioi, testified at trial and was subject to cross-examination; the statement testified to by the two witnesses was consistent with Lioi's testimony; and it was offered to rebut an implied charge of improper motive—defendant's allegation that it was Lioi who had attempted to bribe *him*. However, on appeal, the Second Circuit declined to consider whether the testimony would be admissible under this Rule, preferring to rest its conclusion of admissibility on the other Rules cited by the lower court, which embodied other exemptions from or exceptions to the hearsay rule.[37] The decision thus suggests, as have earlier Second Circuit decisions,[38] that the court may feel

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[36] 406 F. Supp. 554 (E.D.N.Y.), *aff'd*, 540 F.2d 574 (2d Cir. 1976), *cert. denied*, 97 S. Ct. 739 (1977).

[37] *See* text accompanying notes 41-42, 53-59 *infra*.

[38] *See, e.g.*, United States v. Blitz, 533 F.2d 1329 (2d Cir.), *cert. denied*, 97 S. Ct. 65 (1976); United States v. Briggs, 457 F.2d 908, 910 n.3. (2d Cir. 1972). Most of the criticism of the new Rule came from Judge Friendly, who also opposed the Rule in

that Rule 801(d)(1) goes too far in a criminal case when used against the defendant, and should not be employed where not absolutely mandatory.

Turning to another of the Article VIII provisions, Rule 801(d)(2)(B) comports with the traditional rule that a statement not made by a party is nonetheless considered an admission by him, and is offerable against him for its truth, when he has manifested his adoption of or belief in its truth. One example is an admission by silence, that is, concurrence in a statement by remaining silent when the party would be expected to deny it. The only modification that the new Rule made is its labelling this kind of statement as not hearsay at all, while traditionally such a statement would be considered an exception to the hearsay rule—a distinction of no real significance.

United States v. Flecha[39] demonstrates how the courts will look to common law principles in determining whether the evidence falls within Rule 801(d)(2)(B). There, five defendants were told to stand next to one another in line, after having been arrested on drug-related charges but before *Miranda* warnings were given them. One defendant then said to Flecha in Spanish, "Why so much excitement? If we are caught, we are caught." The trial judge allowed this statement in evidence against Flecha. Although the Second Circuit ultimately found this to be harmless error in light of all the other incriminating evidence, it engaged in a detailed analysis of the common law principle of admission by silence to show why the trial judge's admission of this evidence constituted error. This was done "to prevent future reliance on the 'working rule' so rightly condemned by Wigmore and other eminent jurists . . . ."[40] From the maxim "silence gives consent," there apparently developed the disreputable "working rule" that anything said in a party's presence was receivable against him as an admission. The *Flecha* panel stressed that the qualifications to this principle must not be overlooked: There is no such admission unless the circumstances indicate that a non-acquiescing person in the party's position would have responded to the statement with a denial. The court found that the present case typified the situation where a response

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Congress and is responsible, in some measure, for its passage in a narrower form than originally proposed. *See* Rothstein, *The Proposed Amendments*, *supra* note 3, at 147.

[39] 539 F.2d 874 (2d Cir. 1976).

[40] *Id.* at 878.

could not be expected from the party. Although Flecha was not being questioned by the authorities and had not been given *Miranda* warnings at the time of the statement, he clearly may have been aware of the advisability of silence under the circumstances of his arrest, regardless of his belief in the truth or falsity of the incriminating implications of the statement. The Second Circuit panel also pointed out that it was natural for Flecha to have made no response, considering the substance of the statement directed at him—it was, after all, undeniably true that he had been "caught."

Rule 801(d)(2)(C) similarly classifies as non-hearsay party-admissions, statements that are made by a person who is authorized by the party to make the statement. The trial court in *United States v. Iaconetti*[41] held that the testimony of the Government's two rebuttal witnesses was admissible both under this provision and Rule 801(d)(1)(B), as related above. When the defendant requested the bribe from Lioi to facilitate his firm's obtaining the contract, defendant thereby impliedly authorized Lioi to confer with his business associates. This followed because the defendant was familiar with the organization of Lioi's business and the necessity of discussion with the others to procure the requested payments. Under this reasoning, when Lioi reported the defendant's request to the two witnesses, he was making a statement authorized by the defendant, which would therefore be receivable against the defendant as an admission. The Second Circuit agreed with this reasoning, but only insofar as it related to Lioi's statements to his business partner (who would necessarily be consulted on such business decisions), not as it related to Lioi's statements to the firm's attorney, with whom the defendant would not reasonably have expected Lioi to consult.[42]

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[41] 406 F. Supp. 554 (E.D.N.Y. 1976), *discussed in* text accompanying notes 36-37 *supra*.

[42] To complete the picture of vicarious party admissions, the reader should also be aware of Rules 801(d)(2)(D) (agent's statements relating to agent's job) and (E) (co-conspirator statements). On the latter provision, see United States v. Lam Lek Chong, 544 F.2d 58 (2d Cir. 1976) ("preponderance of evidence" required to show defendant's connection with conspiracy; arrest terminates conspiracy). *Compare* United States v. Beasley, No. 75-4373 (5th Cir. Jan. 7, 1977) (requires only "prima facie case" of conspiracy and "slight evidence" of defendant's connection); United States v. Hassell, No. 76-1272 (8th Cir. Jan. 10, 1977) ("slight evidence" of *declarant's* connection with conspiracy). *See also* FED. R. EVID. 104, which governs determinations of this nature, and, on the relationship between the two Rules, United States v. Petrozziello, No. 76-1111 (1st Cir. Jan. 21, 1977), and United States v. Herrera, 407 F. Supp. 766 (N.D. Ill. 1975).

Rule 803, the first of two Rules outlining the specific exceptions to the hearsay rule, is concerned with situations where the availability of the declarant is immaterial to the admissibility of the evidence, while Rule 804 provides for exceptions that exist only when the declarant is unavailable. Rule 803(6), the federal codification of the book entries rule, resembles the Federal Business Records Act,[43] which the new Rule supersedes. Thus, recent cases decided during the transition period which construe the requirements of the Business Records Act may be instructive in providing an insight into future application and construction of Rule 803(6).

One such case is *United States v. Pent-R-Books, Inc.*,[44] involving the federal statute regulating the mailing of pandering advertisements—the "Pandering Law."[45] Under this law, once an addressee has received such matter through the mail,[46] he may request that the Postal Service issue an order to the sender prohibiting further mailings to him beyond a certain date. Upon violation of the prohibitory order, the Postal Service can demand that the Attorney General seek a compliance order from the district court against the mailer. In *Pent-R-Books*, twenty violated orders charged against the defendant had reached the district court. The parties submitted the administrative record, essentially showing the preceding steps, to the district court, and made cross-motions for summary judgment. The defendant, however, challenged the admissibility of certain evidence contained in the administrative record as hearsay. This evidence consisted of notations made by the complaining addressees, forwarded by them to the Postal Service, indicating the receipt of mailings and their dates following the prohibitory order. The defendant contended that these notations did not fall within the Business Records Act's requirements for admissibility, since the fact of receipt of the mailings and their dates were entries made not by Postal Service employees but by third parties—the addressees. No business employee of the Postal Service had personal knowledge of those facts.

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[43] 28 U.S.C. § 1732(a) (1970), *repealed by* enactment of the Federal Rules of Evidence, Pub. L. No. 93-595, *supra* note 1, at § 2(b).

[44] 538 F.2d 519 (2d Cir. 1976), *cert. denied*, 97 S. Ct. 1175 (1977). *See also* Fernandez v. Chios Shipping Co., 542 F.2d 145, 154 (2d Cir. 1976) (utilizing the Rule as well as Rule 702 (experts) in dealing with competency of a surveyor's report and a marine carpenter to testify to the cause of an accident).

[45] 39 U.S.C. § 3008 (1970).

[46] Pandering materials are mailed advertisements which the addressee believes to be "erotically arousing or sexually provocative." 538 F.2d at 521.

Although the Second Circuit found this contention not unmeritorious, it found more persuasive the liberal construction given the statute by the Ninth Circuit in *United States v. Lange*.[47] Under both courts' reasoning, more emphasis was placed on the reliability of the records than on an adherence to the technical requirements of the rule. The *Pent-R-Books* court thus found that, since the notations had been forwarded to the Postal Service on the sole initiative of complaining citizens who desired action to be taken for their benefit, "[t]he manner by which these records came into the administrative files is an inherently reliable standard operating procedure."[48] Thus, the letters were held to be admissible as business records kept by the Postal Service.

There have been contrary decisions under the Business Records Act,[49] and the *Pent-R-Books* construction would seem more difficult, though not impossible, to sustain under Rule 803(6), which is worded somewhat more explicitly. An earlier draft of Rule 803(6) would have precluded this construction, although the change to the present draft does not appear to have been made for this reason.[50] The guarantees of reliability peculiar to the business context do not pertain to the addressees. Thus, it would seem that, unless another exception to the hearsay rule could be found, guaranteeing to some extent the reliability of the statements of these addressee-declarants, the evidence, under the Rule, should not be admitted.[51] A possible candidate for such an exception might be Rule 803(24) or 804(b)(5), which allow for the creation of new exceptions where trustworthiness is reasonably assured (as may be here), need is found, and *notice is given*.[52]

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[47] 466 F.2d 1021, 1024-25 (9th Cir. 1972).

[48] 538 F.2d at 529.

[49] *See, e.g.*, United States v. Thompkins, 487 F.2d 146 (8th Cir. 1973); United States v. Burress, 412 F.2d 677 (4th Cir. 1969).

[50] *See generally* P. ROTHSTEIN, UNDERSTANDING THE NEW FEDERAL RULES OF EVIDENCE, *supra* note 23, at 414-17.

[51] *See, e.g.*, United States v. Bohle, 445 F.2d 54 (7th Cir. 1971); United States v. Maddox, 444 F.2d 148 (2d Cir. 1971).

[52] The problem of the admissibility of Postal Service records and the specific problem that the addressees were not functioning as part of the Postal Service are issues that can arise not only under Rule 803(6) (business records), but also under Rule 803(8) (official records); these two exceptions apparently overlap in some situations. Query, what happens if they conflict? On Rule 803(8), subdivision (C) (agency factual findings as an exception to the hearsay rule), *see* United States v. Corr, 543 F.2d 1042, 1051 (2d Cir. 1976) (SEC release offered by defendant not allowed; "not a determination of facts after administrative proceedings," but only an informal pronouncement during on-going proceedings). On Rule 803(10) (absence of official record as proof of absence of fact, as an exception to the hearsay rule), *see* United

Rule 803(24), like Rule 804(b)(5), provides an "open-ended exception for reliable and necessary hearsay [requiring] careful exercise of judicial discretion."[53] The primary condition for this broad authorization to admit hearsay is that the statement must have circumstantial guarantees of trustworthiness equivalent to those of the specific hearsay exceptions listed by the Federal Rules. Once this criterion is satisfied, the court must additionally find that three other requirements are met: the hearsay must be "material"; reasonably needed because other evidence on the point is difficult to get; and not contrary to both the "interests of justice" and the "purposes of the Rules." Finally, admissibility of the evidence is conditioned upon notice being provided to the adverse party of the proponent's intention to offer the statement, including particulars, sufficiently in advance of trial to allow for preparation by the adverse party.

United States v. Iaconetti[54] presents an interesting and instructive example of the application of this discretionary and broadly termed exception. The district court held, and the Second Circuit agreed, that the testimony of both of the Government's rebuttal witnesses (set forth above)[55] would be admissible under this Rule. The primary criterion—that of trustworthiness—was met since the declarant was available for cross-examination and the statement was made soon after the alleged bribe had occurred and to the appropriate persons. These facts, said the district court, "would seem to mitigate the risks of insincerity and faulty memory."[56] The court interpreted the requirement that the statement be offered to prove a material fact as requiring more than simply meeting Article IV's requirement of relevancy. It also prohibits use of the evidence "for trivial or collateral matters."[57] The requirement of need, *i.e.*, that the statement be more probative on the point than any other reasonably obtainable evidence, was also met, since the testimony of these rebuttal witnesses was found to be the best evidence to corroborate the account of Lioi, the

States v. Robinson, 544 F.2d 110, 114-15 (2d Cir.), *cert. denied*, 97 S. Ct. ___ (1976) (nondiligent record search; inadmissible). *See also* United States v. Grady, 544 F.2d 598 (2d Cir. 1976) (Rule 803(8)(B)'s exclusion of matters observed by police officers in criminal cases not applicable to police's "routine lists" of gun serial numbers since not observations of criminal activities).

[53] United States v. Iaconetti, 406 F. Supp. 554, 558 (E.D.N.Y. 1976).

[54] *Id.*

[55] *See* text accompanying notes 36-37 *supra*.

[56] 406 F. Supp. at 559.

[57] *Id.*

prosecution's chief witness, as solicitee in the alleged conversation with the defendant. Finally, the broad requirement that the "interests of justice" and the "general purposes of the Rule" be served by introduction of the evidence was summarily held to be met, for the jury was entitled to all clarifying evidence in a case of this nature, posing clear conflicts of credibility. On the question of notice, both *Iaconetti* courts agreed that, although notice had *not* been given in advance of the trial, and the proponent thereby failed to comply strictly with the Rule, the opponent (defendant) nevertheless received the requisite notice during the trial, sufficiently in advance of actual use. The reason for this leniency rests on the genuine need for latitude in such situations—where the necessity for this hearsay evidence does not become apparent until after the commencement of the action.[58] However, the Second Circuit also stressed the importance of the notice requirement and warned that the flexibility shown by the panel in this case would only be accorded "in those situations where requiring pre-trial notice is wholly impracticable."[59]

Rule 804(b)(1) codifies the former testimony exception to the hearsay rule. If the declarant is presently unavailable as a witness, this Rule provides for the admissibility, even in a criminal case, of testimony given by him as a witness at another hearing, if the adverse party "had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination." The thrust of the "similar motive" requirement was the object of inquiry by the Second Circuit in *United States v. Wingate*.[60] The defendants were convicted of conspiracy to distribute heroin. After his arrest, defendant Smith had made certain admissions about his and defendant Wingate's participation in the narcotics activities. Before commencement of the trail, Smith moved to suppress his statement on the ground that it had not been made voluntarily. The trial judge denied the motion at the conclusion of the suppression hearing, and the evidence was introduced against Smith at the joint trial. Because Smith asserted his fifth amendment right to

[58] This problem had been predicted. *See Hearings on the Federal Rules of Evidence Before the Senate Judiciary Comm.*, H.R. REP. NO. 5463, 93d Cong., 2d Sess. 275 *passim*. (June 4-5, 1974) (testimony of Paul F. Rothstein); P. ROTHSTEIN, UNDERSTANDING THE NEW FEDERAL RULES OF EVIDENCE, *supra* note 23, at 439-40. The 1974 Uniform Rules of Evidence, which largely mirror the Federal Rules of Evidence, omit the requirement that notice must precede trial.

[59] 540 F.2d at 578 n.6.

[60] 520 F.2d 309 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976).

remain silent at the trial, Wingate sought to introduce Smith's suppression hearing testimony, which had repudiated Smith's earlier inculpatory statement, claiming that the later testimony was exculpatory.

In affirming the trial court's decision to exclude the suppression hearing testimony, the Second Circuit found an absence of similarity of issues in the two proceedings—the Government was effectively denied any meaningful opportunity to cross-examine the declarant at the time when his former testimony was given. The court reasoned that, while the issue at the present trial, for which Wingate sought to introduce Smith's testimony, was the involvement of Wingate in a narcotics conspiracy, the issue at the suppression hearing—*i.e.*, the issue to which the Government confined its cross-examination—was the voluntariness of Smith's admission, a precondition to its use in the Government's case against Smith. Therefore, since the prosecutor had no opportunity to cross-examine Smith on the question of Wingate's guilt, Smith's former testimony was inadmissible when offered by Wingate on this issue. The court thus reaffirmed its fidelity to previous approaches which required a certain identity of issues between the two proceedings. But it avoided the mechanical strictness of some former decisions which had failed to recognize the reason for the requirement and blindly required an exact identity on all scores.[61] The court properly placed emphasis on the adequacy of opportunity and incentive to cross-examine by the party against whom the testimony is offered, rather than on a strict notion of exact identity between the two proceedings. The new Rules put the inquiry back on the right track by phrasing the requirement in terms of its rationale ("similar motive") rather than in terms of identity of issues.

ARTICLE IX: AUTHENTICATION

Article IX of the Federal Rules of Evidence sets forth the standards governing authentication and identification of evidence. Rule 901(a) articulates the basic requirement in broad and general terms: "The requirement of authentication and identification as a condition precedent to admissibility is satisfied by evidence suffi-

[61] *See* Rothstein, *The Proposed Amendments to the Federal Rules of Evidence (Updated)*, 24 FED'N OF INS. COUNSEL Q. 54, 79-81 (1974). One might raise the question whether, in the case under discussion, the evidence should have been admitted on another theory—to reduce the prejudicial effect of, or put in proper perspective, the repudiated statement.

cient to support a finding that the matter in question is what its proponent claims." Rule 901(b) explains this general language by giving illustrations, drawn from prior law, of what would satisfy this requirement. One example is found in subsection (b)(4). Distinctive characteristics of the document, such as its contents, can constitute sufficient authentication, when "taken in conjunction with circumstances."

That this Rule codifies traditional rules of authentication is demonstrated by *United States v. Natale*,[62] where defendants were convicted of conspiracy and the substantive crime of extortionate credit transaction. At the trial, the Government introduced into evidence a black notebook allegedly belonging to one of the defendants, and seized at the time of the arrest. It contained entries recording several credit transactions, including the ones that were the subject of the prosecution. The defendants contended that the notebook had not been properly authenticated since the record failed to show that the notebook belonged to either defendant. The court of appeals rejected this argument, and stated the general rule that, in proving a connection between an exhibit and the defendant, the prosecution need only show "a rational basis from which the jury may conclude that the exhibit did, in fact, belong to the appellants."[63] Furthermore, under established precedent, "while 'mere contents' are ordinarily insufficient evidence of genuineness, contents may be considered in conjunction with other circumstances."[64] After quoting the newly enacted Rule, the *Natale* panel listed the circumstances supporting authenticity: the presence of the defendants at the location where the evidence was discovered—which was also the place where the victim had conducted meetings with the defendants concerning the transactions; the admission by one defendant that the office was his; the fact that the notebook was in a desk used by both defendants; and the fact that the notebook referred to the loans the victim testified to. Thus, the contents of the evidence, when "taken in conjunction with circumstances," was sufficient evidence of authenticity, whether tested by common law requirements or by Rule 901. Whether any *one* of these circumstances alone would "do the trick" is uncertain. Rules 901(a) (quoted above) and 901(b) point in different directions on this point. Rule 901(a) suggests that all that is

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[62] 526 F.2d 1160 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976).

[63] 526 F.2d at 1173.

[64] *Id. See* United States v. Sutton, 426 F.2d 1202, 1207 (D.C. Cir. 1969).

needed is enough to justify a reasonable person in concluding authenticity, but the examples in (b) (which make it clear, for example, that a signature purporting to be mine is not sufficient evidence that it is mine) seem to require more.

Another illustration in Rule 901(b) of evidence that supports a finding of authenticity appears in subsection (5), which treats the issue of voice identification. Under this provision, a witness can identify a voice when his "opinion [is] based upon hearing the voice at any time under circimstances connecting it with the alleged speaker."

A recent application of this Rule, in *United States v. Albergo*,[65] involved a defendant who had been called to testify before a grand jury concerning the Government's investigation of a stolen airline tickets racket. He denied any knowledge of the alleged racket, and was subsequently prosecuted for perjury. At that trial, the Government introduced into evidence four telephone conversations recorded from wiretaps. The male speaker in those conversations revealed knowledge of the airline tickets racket—incriminating evidence if the speaker could be identified as the defendant. After these tapes had been introduced, one Officer Paulsen of the New York City Police Department was called as a witness and identified the defendant as the male speaker. As a foundation for the identification, Paulsen testified that he had listened to five-hundred taped recordings of the defendant's voice, and had on one occasion heard the defendant speaking with a group of other men.

The court initially relied on case authority for the general rules of admissibility of telephone conversations: The identity of the speaker must be satisfactorily established; and the jury must reasonably be able to find that the alleged identification was accurate. As applied to the circumstances of this case, the *Albergo* panel held that the testimony of the identifying officer was quite sufficient to support a reasonable conclusion that the officer had accurately identified the defendant as the speaker. The defendant urged, however, that due process was lacking in this situation, where identification of his voice was not supported by a face-to-face conversation between him and the identifying witness. While not rejecting this argument in its entirety, leaving open the possibility of applying such due process arguments in "some conceivable

[65] 539 F.2d 860 (2d Cir. 1976).

circumstances,"[66] the Second Circuit did not accept it in this case, since its application here would "make a mockery of Rule 901,"[67] with its express authorization of voice identification based upon a hearing of the voice "at any time under circumstances connecting it with the alleged speaker."

Rule 902 enumerates a list of documents that are self-authenticated, *i.e.*, that do not require "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility." Such self-authenticated documents include certified copies of public records, as described in Rule 902(4). One recent case relying on this Rule to sustain the admissibility of evidence is *United States v. Pent-R-Books, Inc.*,[68] discussed earlier.[69] This case demonstrates and resolves the potential conflict between Rule 902 of the Federal Rules of Evidence and Rule 44(a)(1) of the Federal Rules of Civil Procedure, which seem to overlap. (No provision was made for this when the Evidence Rules were enacted.) The defendant claimed that the administrative records of the Postal Service, which were offered into evidence by the Government, were not admissible under Rule 44(a)(1) because they were not certified by a custodian of records, but by a postal official who was not a custodian. Without deciding whether Rule 44(a)(1) would recognize this certifier, the court held that Rule 902, which would be applicable on remand, would nevertheless justify admissibility, by its expansion of the means of authentication of official documents and their copies. According to Rule 902(4), copies of official records can be authorized by certification of either the custodian "or other person authorized to make the certification," assuming the remaining conditions of Rule 902 are complied with. Thus, under the broader authority of Rule 902, certain documents formerly inadmissible can now be received into evidence. An additional contention made by the defendant was that the certificate, which referred simply to "annexed documents," failed to adequately describe the documents. Again, the court disagreed, and refused to hold that the documents were rendered inadmissible by this lack of specificity. However, the court

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[66] *Id.* at 864.

[67] *Id.* On the somewhat analogous problem of a witness indentifying the defendant in bank robbery surveillance photos, see United States v. Robinson, 544 F.2d 110 (2d Cir.), *cert. denied*, 97 S. Ct. ___ (1976) (treated as a problem involving Rule 701, lay opinion).

[68] 538 F.2d 519 (2d Cir.), *cert. denied*, 97 S. Ct. 1175 (1976).

[69] *See* text accompanying notes 44-52 *supra*.

did note that a listing in the certificate of the individual documents would be better practice.

CONCLUSION

A survey of the evidence work in the Second Circuit confirms what was expected—that the new Rules of Evidence are solving more questions than they are raising; that they are not revolutionary new concepts to judges and lawyers, but carry forward long familiar principles; that they are convenient focuses for evidence rulings and for cataloging the law of evidence; and that, in general, the purposes of the codifiers are being implemented, although, of course, not fully.[70] The survey also confirms that the "Rules" are not, by-and-large, "rules" at all, in the sense of completely self-contained, self-executing prescriptions. Instead, they require interpretation, judgment, discretion, and resort to preexisting law to give them content. As such, they are guidelines, or standards, only. It is to be expected that the Second Circuit will be seen as a leader around the country, and that its interpretations will hold sway well beyond its borders, not only in the federal system, but also amongst the increasing numbers of states that are adopting rules patterned after the Federal Rules of Evidence.[71]

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[70] For a discussion of the themes and goals of the federal evidence codification and what it may be expected to accomplish, see Rothstein, *Some Themes in the Proposed Federal Rules of Evidence*, 33 FED. BAR J. 21 (1974).

[71] The following states have adopted or are about to adopt such rules, as of the present writing: Arkansas, Colorado, Florida, Illinois, Minnesota, Maine, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Vermont, and Wisconsin. It should also be noted that, in 1974, the National Conference of Commissioners on Uniform State Laws revised their 1953 Uniform Rules of Evidence. The 1974 Uniform Rules, approved by the A.B.A. and recommended to the states for adoption, are substantially the same as the Federal Rules of Evidence. Even Canada has a proposed code drawing heavily on the Federal Rules of Evidence. Law Reform Commission of Canada, *Report, Evidence* (Dec. 1975). For a comparison of that code with ours, see Rothstein, *An Evidence Code: The American Experience*, 36 CRIM. L. REPORTS [OF CANADA] 274 (March 1977).