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Evidence

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EVIDENCE

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In July 1975, the Federal Rules of Evidence went into effect. This culminated a ten year effort of the United States Supreme Court and both houses of Congress to produce such rules. Although this was a long and thorough process, gaps inevitably remain. Furthermore, there are areas in which the ultimate test, standard, or rule must be determined by constitutional principles, by the interaction of the Constitution and the new rules. This interaction may require close examination of the exact nature of certain types of evidence and privileges in order to ensure that constitutional protections are maintained and that the general tendency of the new rules to liberalize the admission of evidence and encourage the presentation of trustworthy evidence to the trier of fact is furthered.

During the 1975-1976 term, the Court of Appeals for the Seventh Circuit decided several cases which involved evidentiary problems. One of these cases clearly demonstrates the close examination of the nature of certain evidence required by interaction with the Constitution. Two others demonstrate the process of filling gaps in the new rules by leaving to the discretion of the trial judge matters which may formerly have been subject to more limited rules.

THE RELATIONSHIP BETWEEN THE PRIVILEGE AGAINST SELF-INCRIMINATION AND THE ATTORNEY-CLIENT PRIVILEGE

In *In re January 1976 Grand Jury*,¹ the Court of Appeals for the Seventh Circuit considered for the first time the relationship between the fifth amendment privilege against self-incrimination² and the attorney-client privilege.³ In *Genson*, two people were suspected of robbing a federally insured savings and loan. The government's investigation revealed that one of

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1. 534 F.2d 719 (7th Cir. 1976) [hereinafter referred to in the text as *Genson*].

2. The fifth amendment, in pertinent part, reads as follows: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V.

3. The other circuits are split upon this question. *See, e.g.*, *United States v. Kasmir*, 499 F.2d 444 (5th Cir. 1974) (attorney does have standing to assert the privilege for the client); *Bouschor v. United States*, 316 F.2d 451 (8th Cir. 1963) (attorney does not have standing to raise the privilege on behalf of the client)

the two suspects had been employed by Genson, an attorney, and that both suspects had visited Genson within three hours after the robbery. In addition, one suspect had transferred \$200 cash to one of Genson's associates. The government informed Genson that the money he had received from the suspect might be proceeds of the robbery but Genson refused to answer any questions concerning the case on the basis of the attorney-client privilege.

One week later Genson was served with a subpoena duces tecum requesting production of any money paid to him by the suspects after the time the robbery was committed.⁴ Genson's motion to quash the subpoena was denied and he was ordered to appear before the grand jury and to comply with the subpoena. Genson appeared but refused to comply or to answer any questions about receiving money from the suspects. The government's motion to compel testimony and to produce evidence was granted and Genson was held in contempt for refusing to comply with the subpoena or the court's order. Genson appealed the contempt citation and based his refusal to comply on the attorney-client privilege and his client's fifth amendment privilege against self-incrimination.

The three judge panel unanimously agreed that the contempt citation should be affirmed but could not agree on the reasons for this result.⁵ For this reason, Judge Pell's opinion considered all the issues before the court⁶ while the concurring opinion of Judges Bauer and Tone, which represents the majority opinion,⁷ only found it necessary to consider one of these issues.⁸ Because the United States Supreme Court's subsequent decision in *Fisher v. United States*,⁹ raises further questions about the fifth amendment testimonial privilege and the attorney-client privilege, this article will consider all of the issues raised in *Genson*.

The first question raised was whether Genson, an attorney, had standing to assert his client's fifth amendment privilege against self-incrimination.¹⁰ It

4. The text of the subpoena as given in the opinion reads as follows: "[a]ny and all monies paid or delivered to you or into your care, custody, and control by Paul Bijeol or Sharon K. Holloway, . . . or their agents, subsequent to 9:00 A.M. on Tuesday, December 30, 1975." 534 F.2d at 721.

5. Judge Pell decided that although the transferring of the money to Genson was testimonial in nature, Genson did not have standing to assert the client's privilege against self-incrimination. Further, Judge Pell held that the attorney-client privilege did not apply to the transfer of the funds and that the refusal to apply this privilege did not violate his client's sixth amendment right to counsel. *Id.* at 722-30. Judges Bauer and Tone, however, found the turning over of the money to be non-testimonial. *Id.* at 730-31 (Tone and Bauer, J.J., concurring).

6. These issues concerned the fifth amendment privilege against self-incrimination, the attorney-client privilege, and the sixth amendment right to counsel. *Id.* at 721.

7. *Id.*

8. Since Judges Bauer and Tone found that money itself is non-testimonial, there was no need to consider the other issues. *Id.* at 731. See note 6 *supra*.

9. 425 U.S. 391 (1976).

10. 534 F.2d at 724.

was Judge Pell's opinion that whatever fifth amendment privilege adhered to the client, this privilege did not encompass production or disclosure by the attorney.¹¹ This view is in accord with the clear direction of the United States Supreme Court for more than half a century.¹²

In *Hale v. Henkel*,¹³ Hale, the secretary-treasurer of a corporation, was ordered by the grand jury to appear and produce certain documentary evidence regarding antitrust litigation then pending against the corporation. Hale refused to answer on the ground that to do so would incriminate the corporation. The Court rejected this defense and held that:

The right of a person under the Fifth Amendment to refuse to incriminate himself is a purely personal privilege of the witness. *It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person.*¹⁴

The trend evident in the cases following *Hale*¹⁵ is that the privilege is limited to the person whose private records are being subpoenaed and that the privilege does not extend to any other person who has the records in his possession.¹⁶ Therefore, the only remaining question is whether the relationship of attorney-client is so unique as to create an exception to those cases which hold that the privilege is a purely personal one. The relationship of attorney-client was found sufficiently unique in *United States v. Judson*.¹⁷ There the Internal Revenue Service subpoenaed all of a taxpayer's documents in his attorney's possession which related to the taxpayer's liability. The attorney objected on the ground that surrender of the documents might incriminate his client. The Ninth Circuit first distinguished *Hale* as simply

11. *Id.* at 727.

12. *E.g.*, *Hale v. Henkel*, 201 U.S. 43 (1906).

13. *Id.*

14. *Id.* at 69-70 (emphasis added).

15. *See Bellis v. United States*, 417 U.S. 85 (1974) (the Court held that neither a partnership nor the individual partners are shielded from compelled production of partnership records on self-incrimination grounds); *Couch v. United States*, 409 U.S. 322 (1973) (a client's fifth amendment rights were held not violated by the issuance of a summons to the client's accountant to produce records in the accountant's possession).

16. 417 U.S. at 87-101; 409 U.S. at 327-36.

17. 322 F.2d 460 (9th Cir. 1963). Other cases which also held that the attorney had standing to raise the client's fifth amendment privilege are: *United States v. Kasmir*, 499 F.2d 444 (5th Cir. 1974); *Colton v. United States*, 306 F.2d 633 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963); *Brody v. United States*, 243 F.2d 378 (1st Cir.), *cert. denied*, 354 U.S. 923 (1957); *Application of House*, 144 F. Supp. 95 (N.D. Cal. 1956).

However, *Kasmir* was decided by the United States Supreme Court in the same opinion as *Fisher v. United States*, 425 U.S. 391 (1976). The Ninth Circuit also seems to have departed from its own holding in *Judson* in *In re Michaelson*, 511 F.2d 882 (9th Cir.), *cert. denied*, 421 U.S. 978 (1975). Most of the cases follow the view expressed in *Genson* that the attorney has no standing to raise the client's privilege against self-incrimination. *See, e.g.*, *United States v. Goldfarb*, 328 F.2d 280 (6th Cir.), *cert. denied*, 377 U.S. 976 (1964), and the cases collected in Lay, *Attorney's Assertion of His Client's Privilege Against Self-Incrimination in Criminal Tax Investigations*, 21 U. MIAMI L. REV. 854 (1967).

holding that a corporation could not invoke the fifth amendment and then proceeded to view as unsatisfactory a number of alternatives available to a client if his attorney could not claim the privilege against self-incrimination.¹⁸

First, the client could choose to withhold all potentially incriminating evidence from his attorney. This would, however, significantly decrease the effectiveness of the attorney's representation. Second, the client could deliver the documents to the attorney and then remain in the presence of the attorney whenever the attorney used them. This would be necessary in order to preserve the client's possessory rights over the documents and to retain the client's fifth amendment rights regarding the evidence. Finally, the client could deliver possession, exert no effort to remain in control of the documents and thus lose his privilege against producing them. This court could not accept the anomaly that "the taxpayer walked into his attorney's office unquestionably shielded with the Amendment's protection and walked out with something less. . . ."¹⁹ By also holding that the relationship of attorney-client superceded a mere agent-principal relationship, the court determined that an attorney could, in some circumstances, invoke his client's privilege against self-incrimination.²⁰

Judge Pell rejected the *Judson* line of cases and found that any rule subsequently adopted in tax fraud cases would be inapplicable to the facts of *Genson* when he stated that:

The recognition that an attorney need not produce stolen monies in response to a subpoena would provide a mechanism by which a member of a learned profession could become the privileged repository of the fruits of a violent crime. There is no reason for thinking that the policy of respecting the private enclave of individual citizens reaches that far.²¹

Judge Pell's view regarding the question of standing has been specifically affirmed by the United States Supreme Court in the subsequently decided case of *Fisher v. United States*.²²

In *Fisher*, the Internal Revenue Service subpoenaed from Fisher's attorney records pertaining to Fisher's tax returns. The Court affirmed the Third Circuit's refusal to quash the subpoena on fifth amendment grounds²³ and reaffirmed the cases which held that the privilege against self-incrimination is an intensely personal privilege which can be claimed only by the person who holds the privilege.²⁴

18. 322 F.2d at 463, 466-68.

19. *Id.* at 466.

20. *Id.* at 467.

21. 534 F.2d at 727.

22. 425 U.S. 391, 394-96 (1976).

23. As mentioned in note 17 *supra*, the Court also reversed *United States v. Kasmir*, 499 F.2d 444 (5th Cir. 1974). *Kasmir* had relied heavily upon *Judson* which quashed a subpoena in a similar case. See text accompanying notes 17-20 *supra*.

24. 425 U.S. at 396-97.

Fisher had claimed that a taxpayer had a legitimate expectation of privacy for the records in his attorney's hands. The Court, however, responded by noting that not every invasion of privacy violated the fifth amendment and held that only those invasions where the taxpayer was compelled to turn over records which would incriminate him were protected.²⁵ Since the fifth amendment, which protects a citizen from being a compulsory witness against himself, protects the taxpayer's records only while they are in his possession, the Court found that there was no compulsion directed against this citizen because the records were in a third party's hands.²⁶ Thus, any compulsion caused by the subpoena would be directed not to the taxpayer but to the attorney.

While *Fisher* has set to rest any lingering doubts about the personal nature of the privilege against self-incrimination, and the question of who has standing to assert it,²⁷ the policy issue raised by *Judson* still persists.²⁸ The major problem is that a client can enter his attorney's office covered with the privilege against self-incrimination and exit without it, simply because he sought the advice of that person necessary to represent his interests in the judicial process. *Fisher's* answer was that while the fifth amendment no longer protected the client, the attorney-client privilege did.²⁹ Although the attorney in *Fisher* had not explicitly raised the question of the attorney-client privilege, the Court construed his argument as though he had.

Since the policy basis of the attorney-client privilege is to encourage clients to make full disclosure to their attorneys,³⁰ communications made by the client to the attorney in confidence, for purposes of obtaining legal assistance, are traditionally protected against compulsory disclosure.³¹ However, because the privilege has the effect of keeping out relevant testimony, it

25. *Id.* at 397. The Court noted that one of the purposes served by the fifth amendment is protection of privacy. However, this protection of privacy is limited to those cases covered by the amendment, *i.e.*, those cases involving testimonial self-incrimination. The Court stated it as follows:

If the Fifth Amendment protected generally against the obtaining of private information from a man's mouth, or pen, or house, its protections would presumably not be lifted by probable cause and a warrant or by immunity. The privacy invasion is not mitigated by immunity; and the Fifth Amendment's strictures, unlike the Fourth's are not removed by showing reasonableness. The Framers addressed the subject of personal privacy directly in the Fourth Amendment. . . . They did not seek in still another Amendment—the Fifth—to achieve a general protection of privacy but to deal with the more specific issue of compelled self-incrimination.

Id. at 400. Thus, private incriminating conversations are admissible so long as they are not compelled. *Katz v. United States*, 389 U.S. 347 (1967).

26. 425 U.S. at 397-99.

27. Thus, *Fisher* confirmed Judge Pell's rejection of any other notion.

28. See text accompanying note 19 *supra*.

29. 425 U.S. at 402-05.

30. *Id.* at 403.

31. C. McCORMICK, TEXT ON EVIDENCE 175 (2d ed. 1972) [hereinafter cited as McCORMICK].

has been strictly limited to those areas necessary to achieve its purpose.³² Thus, statements that are not made for the purpose of obtaining legal advice are not privileged.³³ Therefore, all courts have held that if a document might be obtained from the client, it may be obtained from the attorney³⁴ and that a client cannot make a pre-existing document privileged simply by sending it to his attorney.³⁵

The converse of the rule that a document can be obtained from the attorney, if it can be obtained from the client, was specifically approved in *Fisher*.³⁶ In so doing, the court endorsed Wigmore's dictum that "*when the client himself [is] . . . privileged from production of the document either as a party at common law . . . or as exempt from self-incrimination, the attorney having possession of the document is not bound to produce.*"³⁷

Thus, the policy question raised by the Ninth Circuit in *Judson* was answered in *Fisher*. While both the Ninth Circuit and the United States Supreme Court agree about the result, the striking difference is the means by which that result is obtained. According to *Fisher*, it may not be obtained by raising the fifth amendment but only by invoking the attorney-client privilege.

This aspect of *Fisher*, however, differs from Judge Pell's opinion in *Genson*. Judge Pell assumed in the second part of the opinion that the client would be protected by the privilege against self-incrimination because the production of the money would be a testimonial disclosure.³⁸ In the third part of the opinion, he found that the money was not a confidential communication protected by the attorney-client privilege.³⁹ Thus, as the Court so aptly stated in *Judson*, the client does walk out of the attorney's office with less than when he walked in.

This seems at odds with *Fisher* because under *Fisher* the production of the money could not be compelled from the attorney if it could not be compelled from the client by subpoena. The essence of *Fisher*, however, is that the protections afforded a client do not decrease through consultation with his attorney even though they may vary. Thus, the determination of the fifth amendment privilege and the attorney-client privilege is coterminous. In other words, if the court finds that the client was protected by the privilege

32. *Id.* at 182.

33. *See, e.g., In re Horowitz*, 482 F.2d 72 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973); *Hughes v. Meade*, 453 S.W.2d 538 (Ky. 1970).

34. MCCORMICK, *supra* note 31, at 185.

35. *Id.*

36. 425 U.S. at 404-05.

37. *Id.* at 404 (original emphasis). 8 J. WIGMORE, EVIDENCE § 2307, at 592 (J. McNaughton rev. ed. 1961).

38. 534 F.2d at 723.

39. *Id.* at 727-29.

against self-incrimination while the material was in his possession, the court must also conclude that the material is protected by the attorney-client privilege while in the hands of the attorney.

The crucial aspect in the analysis, therefore, is the question which divided Judge Pell from the remainder of the panel; namely, whether the money delivered to Genson, either for safekeeping or as a fee, was producible in the hands of Genson's client?⁴⁰ Throughout the course of this century, the United States Supreme Court has developed the notion that the privilege against self-incrimination applies only to incriminating testimonial communications. Thus, the Court has refused to expand the privilege to the giving of blood samples,⁴¹ handwriting exemplars,⁴² and voice exemplars,⁴³ or to the donning of clothing.⁴⁴

Fisher held that the material asked for was neither incriminating nor testimonial.⁴⁵ In that case, the subpoena was directed to an accountant's work papers used in preparing his client's income tax return. The Court found that the fact that the papers might be incriminating was not sufficient.⁴⁶ Since they were prepared by the accountant, not the taxpayer, and contained no declarations by the taxpayer, they could not be considered incriminating statements of the taxpayer. Since the preparation of the papers was voluntary, they also could not be considered compelled by anyone. Thus, in the Court's opinion, the production of the papers was not compelled and the papers were not self-incriminating.⁴⁷

It was alleged by appellant that compliance with the subpoena would be a testimonial statement because it would communicate an admission that these were the papers requested. The Court, however, doubted that this was an incriminating testimonial statement because the papers were prepared by the accountant and because the client's production of them would not admit their accuracy and truthfulness.⁴⁸ Thus, the client was only admitting that he had the papers. The Court found that such an admission was not an incriminating testimonial statement because the papers themselves violated no law.⁴⁹ Thus,

40. Or as the court has phrased it, is the transmission of the money a testimonial communication? *Id.* at 723. The term "testimonial" is generally thought to include not only spoken words, but any conduct intended by the actor to communicate to another. MCCORMICK, *supra* note 31, at 264. Cf. FED. R. EVID. 801(a) ("A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.")

41. *Schmerber v. California*, 384 U.S. 757 (1966).

42. *Gilbert v. California*, 388 U.S. 263 (1967).

43. *United States v. Wade*, 388 U.S. 218 (1967).

44. *Holt v. United States*, 218 U.S. 245 (1910).

45. 425 U.S. at 409-11.

46. *Id.* at 409.

47. *Id.* at 411-13.

48. *Id.* at 412-13.

49. *Id.* at 411.

in complying with this subpoena, the taxpayer was merely expressing his belief that the papers produced were required and was not authenticating their genuineness.⁵⁰ For this reason the attorney in *Fisher* had to produce the papers because the client had no fifth amendment right to conceal the subpoenaed papers and therefore the papers were produceable in the client's hands.⁵¹

Thus, in order to determine whether the material subpoenaed violates the fifth amendment, three tests must be met. First, the papers or articles must be compelled. Second, the papers or articles must be incriminating. This test is further refined so that the effects must incriminate the person who currently possesses them. Thus, if the papers or articles were prepared by a third party, their possession could only be incriminating to the possessor if their possession were illegal. Third, the papers or articles must be testimonial. The effects must contain some communication which would tend to incriminate their possessor.

In *Genson*, Judge Pell split with the rest of the panel on the question of whether transmission of the money was testimonial.⁵² If, however, the tests derived from *Fisher* are applied to *Genson*, it appears that Judge Tone was correct that possession of the money would not be privileged in the hands of the client.⁵³ The first test is met because there is no doubt that a subpoena compels a response.

With regard to the second test, however, it is unclear whether possession of the money is incriminating within the meaning of the fifth amendment. Resolution of this question depends heavily upon the wording of the subpoena.⁵⁴ If the subpoena requires production of monies illegally obtained from a bank, the response certainly would be incriminating. However, if the subpoena merely asks for all monies received on a certain date, as did the subpoena in *Genson*, the response might not be incriminating because the production of all monies received would not imply that any of the money had been illegally obtained.

The determination of whether compliance with a subpoena involves incrimination is intertwined with the third test; namely, whether production of the money is a testimonial assertion. Again, the wording of the subpoena may be crucial. While the mere production of money does not imply any statement about that money, the production of certain monies may imply a statement. Thus, a testimonial assertion occurs if possession of the effects

50. In fact, in *Fisher* the taxpayer could not authenticate their genuineness because the records had been made by the accountant. *Id.* at 412-13.

51. *Id.* at 414.

52. 534 F.2d at 723.

53. *Id.* at 731.

54. See note 4 *supra*.

asked for by the subpoena either is illegal or is equivalent to a statement of participation in an illegal activity.

If the subpoena had been directed to Genson's client, he probably would have had to comply because it would not have been incriminating to admit that he had received money on that day and because production of such money would not be an assertion pertinent to anything other than the fact that he had received money on that day. If, however, the subpoena had requested money received from the bank, production would be incriminating because the testimonial assertion would be that the person subpoenaed possessed the money from the bank and such a possession is illegal. Thus, Judge Tone is correct in his finding that the money was non-testimonial.⁵⁵ Indeed, the Tone opinion begins at the proper point of analysis. The entire case turns on the question of whether that which the subpoena requested infringed the suspect's fifth amendment privilege against compelled self-incrimination. If it did not, then that is the end of the case. If it did, then the related problem of the attorney-client privilege arises. However, according to *Fisher*, the attorney-client privilege ought to apply to all documents protected by the fifth amendment.⁵⁶

FOUNDATION REQUIREMENTS FOR PROOF OF BIAS

*United States v. Marzano*⁵⁷ addressed a problem not specifically covered in the Federal Rules of Evidence. The issue was whether it is necessary, when attempting to impeach a witness by showing bias contained in his prior statement, to lay a foundation before introducing extrinsic evidence of this bias. In upholding the trial court's refusal to allow the introduction of this extrinsic evidence, the Seventh Circuit held that "[w]here bias is to be proved

55. 534 F.2d at 731.

56. *Fisher*, however, left open several questions:

(1) The Court specifically refused to discuss whether the taxpayer's papers sent to the accountant would be protected by the privilege in the taxpayer's hands. Thus, the assumption that a person's private records cannot be subpoenaed now appears in doubt.

(2) An additional question raised by *Fisher* concerns the underpinnings of the attorney-client privilege. Because the attorney-client privilege is basically a creature of the common law and because the details of the privilege have evolved in different ways in different states, the body of law concerning the scope of the privilege and those people protected by the privilege is not completely uniform. (McCORMICK, *supra* note 31, at 175-211). Under *Fisher* the attorney-client privilege is applicable to all cases where the client is privileged against production. 425 U.S. at 403-05. However, because of the manner in which the common law of attorney-client privilege has developed in the various jurisdictions, this result does not necessarily follow.

(3) The final question then is whether *Fisher* is binding on the states. There is no indication in *Fisher* that the part of the decision which concerns the attorney-client relationship is of constitutional dimensions. If it is, then it is binding on the states. If it is not, then a state court could hold that a person loses his privilege against self-incrimination when he turns a paper over to his attorney and that the state attorney-client privilege does not protect against that paper's disclosure.

57. 537 F.2d 257 (7th Cir. 1976).

by showing a prior statement, a foundation must be laid by calling the statement to the witness' attention so that the witness may explain or deny the statement."⁵⁸ Since the defendant in *Marzano* failed to confront the witness with his prior statement during cross-examination, the court held that the defendant could not introduce extrinsic evidence of the statement.⁵⁹

The defendant here stole over \$3,000,000 from Purolator Security, Inc.'s vaults and was convicted of conspiracy, taking money belonging to a federally insured bank, and transporting stolen money in interstate commerce. The defendant contended, inter alia, that the district court judge improperly precluded him from introducing testimony which would show that a witness was biased.

Impeachment of a witness by bias is one of several evidentiary points not addressed in the Federal Rules of Evidence.⁶⁰ However, one should not assume that by such omission Congress intended to eliminate bias as a method of impeachment. Bias has a long and honored history as a major method of impeachment.⁶¹ In some instances it even seems as though courts favor bias evidence.⁶² The probative value of evidence offered to show bias normally is lower than the probative value required for admission of substantive evidence.⁶³ Thus, evidence which is inadmissible for other purposes may be admitted if the evidence tends to show bias on the part of the witness.⁶⁴ Another reason for the liberal approach toward extrinsic evidence of bias is that in criminal cases it is possible that the exclusion of evidence showing the bias of government witnesses could deprive a defendant of his sixth amendment right to confrontation.⁶⁵ Most commentators suggest that bias is implicitly covered in rule 607 because that rule provides that any party may attack the credibility of any witness.⁶⁶ Thus, it is suggested that the absence of

58. *Id.* at 265.

59. *Id.* at 266-69.

60. See K. REDDEN & S. SALTZBURG, FEDERAL RULES OF EVIDENCE MANUAL 407-14, which discusses the necessity of reference to and reliance upon common law rules and principles of evidence in conjunction with use of the Federal Rules of Evidence.

61. See 3A J. WIGMORE, EVIDENCE §§ 943-69 (J. Chadbourn rev. ed. 1970).

62. See 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 607[03], at 607-17 (1975) [hereinafter cited as WEINSTEIN].

63. *E.g.*, State v. Cadena, 9 Ariz. App. 369, 452 P.2d 534 (1969).

64. See, *e.g.*, Aguilar v. Reynolds Well Serv., Inc., 234 S.W.2d 282 (Tex. Civ. App. 1950), where the court held that proof that a witness was the insurance agent of one of the parties was admissible to show the bias of the witness, even though normally the subject of insurance may not be mentioned. This is explicitly confirmed by FED. R. EVID. 411. The same approach is used in offers of compromise. FED. R. EVID. 408.

65. Davis v. Alaska, 415 U.S. 308, 315-18 (1974). The sixth amendment, in pertinent part, reads as follows: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." U.S. CONST. amend. VI.

66. See, *e.g.*, WEINSTEIN, *supra* note 62, at 607-17. Rule 607, in pertinent part, reads as follows: "The credibility of a witness may be attacked by any party, including the party calling him." FED. R. EVID. 607.

any language excluding bias tacitly approves it.⁶⁷

Because there is no legislative history on bias in general, there also is no guidance on the subsidiary question of whether a foundation is necessary to introduce extrinsic evidence of bias. The only indication in the Federal Rules of Evidence is contained in rule 613(b) which requires a foundation in order to introduce extrinsic evidence of a prior inconsistent statement.⁶⁸ The Seventh Circuit in *Marzano* also noted that the rationale for rule 613(b) seemed applicable to situations where bias is to be proved by showing a prior statement.⁶⁹

The Advisory Committee for the Federal Rules of Evidence noted that rule 613(b) continued the foundation requirement but relaxed the method of laying the foundation.⁷⁰ Instead of the traditional requirement that the witness' attention must be directed to the prior inconsistent statement on cross-examination,⁷¹ under rule 613(b) the witness must merely be given an opportunity to explain the prior inconsistent statement and the opposite party must be afforded an opportunity to examine the witness about the statement.⁷² The traditional reason for requiring a foundation when impeaching by prior inconsistent statement has been to prevent unfair surprise to the witness, to allow the witness to explain the discrepancy, and to save time.⁷³ It would seem that these reasons should also apply to prior statements being used to show bias.⁷⁴ However, rule 613(b) also indicates that these objectives can be achieved through a flexible approach whereby the trial judge exercises his considerable discretion.⁷⁵

While state courts have not entirely agreed that a foundation is necessary to show bias,⁷⁶ the federal courts before enactment of the Federal Rules of

67. Ladd, *Some Observations on Credibility: Impeachment of Witnesses*, 52 CORNELL L. Q. 239 (1967); Slough, *Impeachment of Witnesses, Common Law Principles and Modern Trends*, 34 IND. L.J. 1 (1958); Hale, *Bias Affecting Credibility*, 1 HASTINGS L.J. 1 (1949); Hale, *Impeachment of Witnesses by Prior Inconsistent Statements*, 10 S. CAL. L. REV. 135 (1937).

68. Rule 613(b), in pertinent part, reads as follows: "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interest of justice otherwise require." FED. R. EVID. 613(b).

69. 537 F.2d at 265.

70. WEINSTEIN, *supra* note 62, at 613-14, provides the Advisory Committee Comment on FED. R. EVID. 613.

71. WEINSTEIN, *supra* note 62, at 613-14.

72. See note 68 *supra*.

73. MCCORMICK, *supra* note 31, at 72.

74. *Id.* at 80.

75. See note 68 *supra*. An example of this discretion is probably the court's power to control the order of proof under FED. R. EVID. 611(a). See WEINSTEIN, *supra* note 62, ¶607[03], at 607-33.

76. Compare *State v. Shaw*, 93 Ariz. 40, 378 P.2d 487 (1963) (foundation required) with *Kidd v. People*, 97 Colo. 480, 51 P.2d 1020 (1935) (no foundation required).

Evidence had generally required that a foundation must be laid.⁷⁷ While there has been some suggestion that the federal courts were split on this question,⁷⁸ the Seventh Circuit accurately noted that most of the cases not requiring a foundation were clearly distinguishable because those cases usually held that a foundation was unnecessary when the proof of bias was by past conduct rather than by past statement.⁷⁹ Thus, the Seventh Circuit adopted what it thought was the clearly prevailing federal view on the question.⁸⁰

The court, however, did not consider whether a foundation would be necessary if the impeachment by bias was through conduct instead of by a prior statement.⁸¹ Many jurisdictions and rule 613(b) accept this distinction⁸² because evidence of conduct is not thought to involve elements of surprise to the witness.⁸³ Nevertheless, it could be argued that there is a greater need to explain conduct than there is to explain prior statements. It is probably inadvisable for the court to adopt any strict rule distinguishing between conduct and prior statements. As McCormick correctly points out: "words and conduct are usually intermingled in proof of bias, and 'nice and subtle distinctions' should be avoided in shaping this rule of trial practice."⁸⁴

Indeed, the better view in this situation is not to have any rule at all. It seems that the policy considerations of unfair surprise, explanation by the witness, and savings of time should be well within the discretion of the trial court. Requiring a foundation where a statement is involved will not always guarantee that those policy considerations will be advanced. Conversely, there may be occasions when those factors would indicate that some foundation should be required even though conduct, prior statement or both is involved. Indeed, the commentators are probably correct when they intimate that the entire question should be left to the trial court judge's discretion based on the above factors.⁸⁵ It seems that this could be assumed under rule 611(a)

77. *United States v. Kahn*, 472 F.2d 272 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973); *Smith v. United States*, 283 F.2d 16 (6th Cir. 1960), *cert. denied*, 365 U.S. 847 (1961).

78. Annot., 87 A.L.R.2d 407, 427 (1963).

79. 537 F.2d at 265. The most commonly cited case for the proposition that no foundation is necessary is *Ewing v. United States*, 135 F.2d 633 (D.C. Cir. 1942), *cert. denied*, 318 U.S. 776 (1943). However, the discussion there is clearly dicta as the proper foundation questions had indeed been asked. The same is true of *Greatbreaks v. United States*, 211 F.2d 674 (9th Cir. 1954). In other cases, *e.g.*, *Comer v. Pennsylvania R.R. Co.*, 323 F.2d 863 (2d Cir. 1963), the bias was contained in prior conduct as opposed to a prior statement. The position of the federal courts is more accurately set out in *United States v. Kahn*, 472 F.2d 272 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973), and *Smith v. United States*, 283 F.2d 16 (6th Cir. 1960), *cert. denied*, 365 U.S. 847 (1961), which require a foundation.

80. 537 F.2d at 265.

81. *Id.*

82. *Id.* See WEINSTEIN, *supra* note 62, at 613-14, which provides the Advisory Committee Comment on FED. R. EVID. 613. The Advisory Committee's comment to that rule expressly notes that it does not apply to evidence of prior inconsistent conduct.

83. MCCORMICK, *supra* note 31, at 75.

84. *Id.* at 80.

85. See WEINSTEIN, *supra* note 62, ¶ 607[03], at 607-33.

and perhaps that is the reason why there is no specific section in the Federal Rules of Evidence on the role of a foundation in bias cases.

PAST RECOLLECTION RECORDED

In *United States v. Senak*,⁸⁶ the Seventh Circuit approved the admission into evidence of a witness' statement which had been written down three years after the event in question. The court held it was admissible as a past recollection recorded.⁸⁷ Senak, a pauper's attorney, was charged with using his position to extract money from persons he had been appointed to represent. At the trial, the government presented a witness who testified about the conversations which she could remember having with the defendant. After an attempt to refresh her recollection about other conversations failed, the prosecution introduced substantively a statement taken from her by the government three years after the conversations had taken place. The witness testified that she believed that the statement was accurate when taken.

By affirming the admissibility of the statement,⁸⁸ the court further illustrated that discretion is one of the major modern trends in the law of hearsay. While discretion has become the hallmark of the law of evidence in many areas,⁸⁹ the rule against hearsay had been thought to be impervious to it.⁹⁰ However, in recent years it has become clear that trial court judges are exercising their discretion to admit hearsay testimony when it is pertinent to the case.⁹¹ Indeed, one recent commentator remarked that this trend had become so predominant that "there are few cases today where the outcome of a well-tryed case would have been different had it not been for the hearsay rule, where a good court was prevented from admitting persuasive hearsay."⁹²

The Federal Rules of Evidence have rendered explicit what had been implicit. Although the hearsay sections of the Federal Rules of Evidence⁹³ restate the traditional exceptions to the hearsay rule, they also contain an open ended provision for admitting other trustworthy statements.⁹⁴ Rule 803(5)⁹⁵

86. 527 F.2d 129 (7th Cir. 1975), cert. denied, 425 U.S. 907 (1976).

87. *Id.* at 138.

88. *Id.* at 142.

89. MCCORMICK, *supra* note 31, at 755-56.

90. *Id.*

91. *Id.* at 755.

92. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 343 (1961).

93. FED. R. EVID. 801-806.

94. See FED. R. EVID. 803(24) and FED. R. EVID. 804(b)(5) which provide for admissibility of statements not specifically covered by the other exceptions if certain requirements are met.

95. Rule 803(5), in pertinent part, reads as follows:

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly.

FED. R. EVID. 803(5).

illustrates how this process has affected records of past recollection. The common law exception, among other requirements, permitted past recollection recorded only when it was made at or near the time of the event that the person was writing about.⁹⁶ This requirement was designed to assure that the event was recorded before the witness began to forget the details of the occurrence.⁹⁷ However, as the words "at or near the time" began to take on a significance of their own, some courts began to exclude some written recollections based upon a time gap alone.⁹⁸ Also, other courts began to recognize that some events remain fresh in the memory for a long time while others fade more quickly.⁹⁹ These variations indicate that there should not be a rigid time requirement applicable to all instances of past recollection recorded.

This approach has been adopted in rule 803(5). This rule substitutes for the "at or near the time" standard, a broader standard of "when the matter was fresh in his memory."¹⁰⁰ Thus, it is clear that the trial judge now has the discretion to decide whether, from all the facts and circumstances of the case, a particular memorandum was made when the matter was fresh in the declarant's memory.

In *Senak*, the court used this discretionary approach to approve the admissibility of a writing as past recollection recorded that clearly would not have been admitted under the traditional formulation of the rule. Under the common law, this gap of three years from the event to the writing would have been fatal. Now the question of time is just one factor the trial judge should take into account in determining admissibility instead of being the sole determining factor. Other factors which the trial judge might take into consideration are the quality of the memory embodied in the recording, the nature of the event, and whether the recording was in response to questions asked by an interested party.¹⁰¹ In *Senak*, all these factors were taken into account. There the information was elicited by the government, clearly an interested party. However, the court also felt that the asking for money by an attorney appointed to handle a case without a fee was an event which would lodge itself in the mind of the person questioned. The court also noted that the quality of recollection contained in the recording seemed to be high because the declarant had read through the statement and had struck out several inaccurate portions. In considering all the circumstances involved in the

96. MCCORMICK, *supra* note 31, at 712.

97. *Id.* at 714.

98. *See, e.g.,* Gigliotti v. United Illuminating Co., 151 Conn. 114, 193 A.2d 718 (1963) (statement recorded six weeks after the event).

99. *See* cases cited in 3 J. WIGMORE, EVIDENCE § 745, at 94-96 (J. Chadbourn rev. ed. 1970).

100. *See* note 95 *supra*.

101. 4 WEINSTEIN, *supra* note 62, ¶ 803(5)[01], at 803-137.

making of the memorandum, the court could not hold that the trial judge had abused his discretion in admitting the document.¹⁰²

The methodology of *Senak* probably represents the future direction of hearsay cases. Instead of fairly rigid rules, the trial judge will determine, in his discretion, whether the basis of any particular hearsay exception is satisfied. Thus, the role of the appellate tribunal will correspondingly be reduced to determining whether the judge abused his discretion. This will result in a deepening of the trend to confine evidentiary questions to the trial level. Therefore, the appellate court will only occasionally find that a trial judge was incorrect on an evidentiary point and this will probably only occur in criminal cases tried by a jury.¹⁰³

CONCLUSION

Thus, we have seen three cases in which the Seventh Circuit has furthered modern trends in the law of evidence and filled gaps in the new rules in accordance with those trends. In *Genson* we saw that the United States Constitution may require close examination of the nature of various types of evidence and privileges. It must be observed that under the facts of this case this examination resulted in the determination that the evidence sought was not protected and the privilege asserted was unavailable, which is in line with the general trend toward greater admissibility and fewer privileges in other areas of the law of evidence.

At first glance it might seem that the result in *Marzano* is contrary to the modern trend. If viewed, however, not as upholding an exclusion but as upholding the discretion of the trial court, it can be seen that *Marzano* is in fact consistent with the modern trend. By leaving the matter in the hands of the trial judge, the ultimate effect will probably be greater admissibility in the long run.

Senak clearly demonstrates the movement toward greater admissibility and, through its emphasis on discretion, greater liberalization of the rules of evidence.

102. 527 F.2d at 142.

103. See McCORMICK, *supra* note 31, at 755.