DEVELOPMENTS IN FIFTH CIRCUIT EVIDENCE LAW: 2010-2011

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I. INTRODUCTION

During the period of this Survey, July 2010 to June 2011, the Fifth Circuit issued opinions on a number of significant evidence-related issues, including the Confrontation Clause, hearsay, authentication, character evidence, permissible impeachment, and summary evidence.[1] This was an interesting but not groundbreaking year for evidence issues in the Fifth Circuit.

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1. *See infra* Section II.

Finally, the United States Supreme Court approved the proposed "style" amendments to the Federal Rules of Evidence.[2] Although the amendments are intended to make the rules clearer and easier to read without changing substantive meaning, the extent of the amendments is significant.

II. SIGNIFICANT FIFTH CIRCUIT OPINIONS ON EVIDENCE

A. Impeachment by the "Magnitude of the Benefit" to the Witness Is Not Permissible in the Fifth Circuit

In *United States v. Wilson*, the Fifth Circuit addressed whether a defendant can explore a witness's credibility by asking him about the magnitude of the benefit he received from a plea agreement.[3]

Following Hurricane Katrina, Kern Wilson, a retired Army officer and civil engineer, moved to New Orleans seeking work as a recovery consultant on various government reconstruction projects.[4] Wilson and another engineer, Raul Miranda, both joined an emergency-relief consortium that worked under a federal contract with the United States Army Corps of Engineers (USACE), and both Wilson and Miranda assisted the USACE in evaluating bids.[5]

Wilson and Elizabeth Heinrich, a dirt and sand supplier and subcontractor, became romantically involved, and Miranda—who was a friend of Heinrich's—passed confidential information to her during the bidding process of a major project.[6] On multiple occasions, Miranda provided information to Heinrich directly or through Wilson, and in exchange for Miranda's tips, Heinrich agreed to pay Miranda and Wilson.[7] Heinrich conveyed the tips to the bidding contractor she was working for so that it could improve its bid and be awarded the project, but the contractor instead informed the USACE that it suspected Heinrich had obtained information from an inside source.[8]

After federal law enforcement officials investigated the claims, Miranda pled guilty to bribery in exchange for his agreement to testify against Wilson and Heinrich and a dramatically reduced prison sentence: four months instead of the sixty to eighty months that he would have faced at trial.[9] The Government charged Wilson with one count of conspiracy to commit bribery and one count of bribery.[10]

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2. *See infra* Section III.
3. United States v. Wilson, 408 F. App'x 798 (5th Cir. Nov. 2010) (per curiam).
4. *Id.* at 800.
5. *Id.*
6. *Id.* at 800-01.
7. *Id.* at 801.
8. *Id.*
9. *Id.* at 802.
10. *Id.*

At trial, the district court limited cross-examination of Miranda, the Government's star witness.[11] During cross-examination of Miranda, jurors learned that Miranda had reached a plea agreement with the Government; that in exchange for pleading guilty on one count, the Government would not charge him on other counts; and the Government would limit Miranda's sentence.[12] Wilson's counsel wanted to probe further, but the district court held that Wilson could not ask about the sentencing range that was specified in the body of the plea agreement.[13] Specifically, the district court stated:

> All I'm going to let you do is ask him what his understanding [is], if he has one, as to what sentence he's going to get because of his Plea Agreement and if he expects or hopes to get a reduced sentence because of his testimony, and that's it, and let's get off this Plea Agreement.[14]

After Wilson was convicted, he challenged this and certain other evidentiary and legal rulings.[15] With regard to the cross-examination limitation, Wilson asserted that his Sixth Amendment right to cross-examine the witnesses against him was violated.[16] Citing the United States Court of Appeals for the Third Circuit's decision in *United States v. Chandler*, Wilson asserted that a defendant has a right to cross-examine a witness's motivation to lie at trial because jurors are left unaware of the magnitude of the sentence reduction that witness received or is promised to receive based on his testimony at trial.[17]

The Fifth Circuit panel disagreed.[18] It held that the Sixth Amendment's Confrontation Clause only affords a defendant "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."[19] Looking to an earlier Fifth Circuit decision, *Burbank v. Cain*, the panel held that a defendant's Confrontation Clause rights are violated if he is not permitted to ask about the existence of a plea agreement.[20] The panel expressly rejected the Third Circuit's decision in *Chandler*, however, as "not in alignment" with its conception of the Confrontation Clause.[21] Thus, the panel found no error with the district court's exclusion of any evidence regarding the magnitude of the benefit received by a plea-bargaining witness, and it affirmed the judgment below.[22]

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11. *See id.*
12. *Id.* at 802-03.
13. *Id.* at 803.
14. *Id.* (alteration in original).
15. *See id.* at 802.
16. *Id.*
17. *Id.* at 803-04 (citing United States v. Chandler, 326 F.3d 210, 221-23 (3d Cir. 2003)).
18. *Id.* at 803
19. *Id.* (quoting Delaware v. Fensterer, 474 U.S. 15, 20 (1985)).
20. *Id.* at 804 (citing Burbank v. Cain, 535 F.3d 350, 356 (5th Cir. 2008)).
21. *Id.*
22. *Id.*

B. The Estate of Meyer Levy and the State of Property Valuation Evidence

In *Michael R. Levy v. United States*, the Fifth Circuit considered an estate's challenge to a property valuation.[23] Meyer Levy, a Plano, Texas rancher owned an approximately 100-acre tract and a partnership interest at the time of his death.[24] The Levy Estate believed his estate should be valued at $6 million, but the United States valued his ranch alone at $23,286,412 and found that the estate owed $3.2 million more to the government in estate taxes.[25] The Levy Estate paid the assessed taxes and sued for a refund.[26] At trial, the jury found that the property value was $25 million and found that Levy's partnership interest should be valued at its full value without any discount for lack of control and marketability.[27]

The Levy Estate appealed, challenging the trial court's admission of (1) evidence of ongoing negotiations over the sale of the property; (2) the final sales price of the property; and (3) evidence of the listing price of the property.[28] The Estate also challenged other evidentiary matters, including admissibility of the Government's expert's testimony and the listing agent's testimony about the value of the property,[29] but those issues are not discussed below because they do not involve a discussion of any novel issues or distinguish prior precedents.

First, the Fifth Circuit held that the United States Supreme Court's general rule that offers to purchase property are inadmissible did not apply where the offers at issue were made by sophisticated developers.[30] The panel noted at the outset of its discussion that the United States Supreme Court held more than 100 years ago that offers to buy and sell property are not admissible on the issue of fair market value.[31] In "virtually every case," however, where the court has applied that "general rule, the offers came from third parties [who were] frequently unidentified."[32] The panel said that the "general rule" did not apply in this case because "the proposals came from identified, sophisticated developers who could be reasonably expected to have investigated the value of the land before making a proposal."[33] Further, the developers who made the

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23. Levy v. United States, 402 F. App'x 979 (5th Cir. Dec. 2010) (per curiam).

24. *Id.* at 982; *see* Steven Kreytak, *Levy Set to Take on U.S. Government in Tax Case*, AUSTIN AMERICAN-STATESMAN (Feb. 16, 2009, 11:40 AM), http://www.statesman.com/blogs/content/shared-gen/blogs/austin/courts/entries/2009/02/16/out_of_mayors_race_levy_set_to.html.

25. *Levy*, 402 F. App'x at 982.

26. *Id.*

27. *Id.*

28. *Id.*

29. *See id.* at 983-85.

30. *Id.* at 982.

31. *Id.* (citing Sharp v. United States, 191 U.S. 341, 348 (1903)).

32. *Id.* (citing Univ. Computing Co. v. Lykes-Youngstown Corp., 504 F.2d 518, 545-46 (5th Cir. 1974)).

33. *Id.*

offers and participated in sales negotiations "could have been called to testify" and could have been cross-examined.[34]

As further justification for its ruling, the panel cited its 1970 opinion in *Sammons v. United States*, in which the court allowed purchase offers to be admitted when they were part of ongoing negotiations that resulted in a contract under substantially the same terms as the offer.[35] Here, the evidence showed that all of the reasonable offers to purchase the Levy ranch were between $20 million and $25 million and that the final sales price—albeit two years after Levy's death—was $25 million.[36] Thus, under the *Sammons* precedent, the offers were admissible because they were in line with the final purchase price.[37]

Second, the panel rejected the Levy Estate's argument that the final sales price was inadmissible.[38] The estate argued that the sale, which occurred two years after the relevant valuation date, was too remote in time and the amount paid was contingent on the City of Plano's approval of rezoning.[39] The panel rejected these arguments. While the "eventual sale of the property must be within a reasonable time," the Fifth Circuit previously found that it was not an abuse of discretion to admit evidence of the sale of a comparable property three and a half years after the evaluation date.[40] Thus, because the sale date was not too remote in time and concerned the actual sale at issue, the panel declined to find an abuse of discretion.[41]

Regarding the rezoning contingency, the panel found that the trial court acted properly in allowing the jury to consider the final sales price.[42] Specifically, the court found that the City of Plano had published a land-use plan that contemplated rezoning the Levy ranch as single-family homes.[43] Thus, it was not reasonable or realistic to conceive that the property would be rezoned after the purchase for use as single-family homes and as a retirement community.[44]

Third, the trial court did not err by admitting evidence of the listing price.[45] The panel stated that its reason for allowing this evidence is because "an owner is competent to give his opinion on the value of his property," and the listing price purportedly represented Meyer Levy's opinion.[46] Quizzically,

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34. *Id.*
35. *Id.* (citing Sammons v. United States, 433 F.2d 728, 731 (5th Cir. 1970)).
36. *Id.* at 982-83.
37. *See id.*
38. *Id.*
39. *Id.* at 983.
40. *Id.* (citing Atl. Coast Line R. Co. v. United States, 132 F.2d 959, 963 (5th Cir. 1943) ("[A]n actual sale remote in time affords no standard." (alteration in original)); Jayson v. United States, 294 F.2d 808, 810 (5th Cir. 1961) (comparable sale three and a half years after sale at issue)).
41. *Levy*, 402 F. App'x at 983.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* (citing King v. Ames, 179 F.3d 370, 377 (5th Cir. 1999)).

later in its opinion, when discussing the listing agent's testimony, the panel stated that the listing agent *never* testified that Levy told him that he wanted a particular price for the property and that the listing price of the property was his "own action," not Levy's.[47] The panel did not resolve this discrepancy, and based on the entirety of the court's opinion, it appears that the listing price did *not* represent the decedent's opinion on the value of the Plano ranch.[48] Thus, it is unclear whether the listing price should have been admissible.

Finding no error in the district court's ruling on evidentiary rulings, the panel affirmed the trial court's judgment on the jury's verdict.[49]

C. No Harm?: Three Clear Evidentiary Errors and Improper Argument but All Found to Be Harmless

In *United States v. Ford*, the Fifth Circuit issued a per curiam opinion affirming Ford's conviction and ten-year sentence for being a felon in possession of a firearm, despite finding three clear evidentiary errors and that the prosecutor's closing argument was improper.[50]

In February 2009, a police officer received a tip that a black man was receiving stolen merchandise at a particular house, and two detectives went to investigate.[51] The officers saw Ford pull into the driveway of the house at issue, and they asked Ford for consent to search the house based on the pretense that they were investigating a burglary.[52] Ford consented, and during their search, the officers found merchandise and a pistol.[53] One officer later testified that Ford admitted that he traded these items for drugs, but Ford denied ever making that admission and also testified that a person who did yard work for him left the items in a bag the day before the search, which Ford brought inside for safekeeping.[54] Ford was tried and convicted for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).[55]

At trial, the district court: (1) allowed the Government to cross-examine Ford about inadmissible prior convictions; (2) allowed the Government to cross-examine Ford about his post-*Miranda* silence in violation of *Doyle v. Ohio*; and (3) permitted an agent of the Bureau of Alcohol, Tobacco, and Firearms (ATF) to testify that a firearm possessed by Ford *in a prior case* was

47. *Id.* at 984.
48. *Id.*
49. *Id.* at 989.
50. United States v. Ford, 402 F. App'x 946 (5th Cir. Nov. 2010) (per curiam).
51. *Id.* at 947.
52. *Id.*
53. *Id.*
54. *Id.* at 947-48.
55. *Id.* at 947.

stolen.[56] Ford challenged these rulings and the improper closing arguments made by the prosecutor.[57]

In summary fashion, the panel held that *even if* the district court abused its discretion by admitting improper prior acts as evidence under Rule 404, violating Ford's Fifth Amendment rights by asking about his post-*Miranda* silence in violation of clear Supreme Court precedent in *Doyle v. Ohio*, and violating Ford's Sixth Amendment rights by admitting the ATF agent's testimony, such abuses were harmless.[58] In addition, the appellant complained that the prosecutor's closing argument was improper and harmful, but the panel found that even if the argument was assumed to be improper, it was harmless.[59] Why? The panel found that the case turned on whether the jury believed the officers' testimony or Ford's "far less plausible" story, and the "jury had sufficient reason to credit the officers' testimony over Ford's, even without evidentiary errors" and improper argument.[60]

Judge E. Grady Jolly concurred in the court's judgment but noted that the Assistant United States Attorney's conduct "eschewed professional training" and "put in jeopardy an otherwise clear conviction."[61] Judge Jolly called attention to the fact that the Government conceded on appeal that the ATF agent's testimony was inadmissible and violated Ford's Sixth Amendment Confrontation Clause rights, and the prosecutor wrongfully sought to "inflame the jury" by offering inadmissible evidence.[62] Although the errors did not require reversal, Judge Jolly's concurring opinion serves as a reminder to prosecutors that this circuit will "demand a higher decree of professional prosecution than [was] seen here."[63]

D. Criminal Conviction Reversed for Relying on Inadequately Authenticated Notebooks to Prove Conspiracy

In *United States v. Jackson*, the Fifth Circuit took the unusual step of granting a rehearing and withdrawing its previous opinion.[64] The substance of the opinion remained largely the same, reversing Jackson's conviction for conspiring to possess with the intent to distribute more than five kilograms of cocaine.[65] However, it avoided a separate concurrence by Judge Dennis and

56. *Id.* at 948 (citing Doyle v. Ohio, 426 U.S. 610 (1976)).
57. *Id.*
58. *Id.* at 948-49.
59. *Id.* at 949.
60. *Id.* at 948-49.
61. *Id.* at 949 (Jolly, J., concurring).
62. *Id.* at 949-50.
63. *Id.* at 950.
64. United States v. Jackson, 636 F.3d 687, 690 (5th Cir. Mar. 2011).
65. *See* United States v. Jackson, 625 F.3d 875, 878 (5th. Cir. Nov. 2010), *withdrawn and superseded on reh'g*, *Jackson*, 636 F.3d 687; *Jackson*, 636 F.3d at 690.

served to "clarify and further expound that our evidentiary and constitutional analyses are two separate and distinct considerations."[66]

In *Jackson*, the panel addressed the admissibility of two notebooks purportedly created by Jackson's alleged co-conspirator and provided to the Government without comment during a proffer session that failed to produce a plea bargain.[67]

A Drug Enforcement Agency task force investigation identified Arturo Valdez as part of a drug-trafficking organization and obtained wiretap surveillance including phone conversations with one "Cory" with whom Valdez had plans to engage in various cocaine and other narcotics transactions.[68] Following the arrest of Valdez and thirty other individuals, Valdez agreed to participate in a "proffer session" as part of plea negotiations with federal authorities.[69] During that session, Valdez produced two notebooks containing seventy-eight pages of handwritten names, numbers, and notes.[70] The names "Cory," "Corey," and "Cor." appear throughout the notebooks.[71]

At trial, the Government's witness testified—and the prosecutor argued during closing—that the name Cory (or Corey) identified Jackson and that the entries in the notebooks reflected payments and amounts of cocaine that Jackson bought and distributed as part of the conspiracy.[72] Critically, the Government offered the notebooks solely through the officer who received them from Valdez during the proffer session.[73] The proffer session failed to produce a plea bargain, and no statement about the notebooks by Valdez was ever introduced at Jackson's trial.[74] Jackson objected on Sixth Amendment, hearsay, and authentication grounds, and the objections were overruled.[75] The jury found Jackson guilty of one count of conspiring to possess with intent to distribute more than five kilograms of cocaine, and Jackson was given a 235-month prison sentence based largely on drug-quantity calculations made using information in the ledgers supplied by Valdez and admitted at trial.[76]

On appeal, Jackson's sole challenge was to the trial court's admission of notebooks over his objections.[77] The Government argued that the notebooks were nontestimonial business records that by their nature do not offend the Confrontation Clause or alternatively, nontestimonial statements made by a co-conspirator during the course and in furtherance of a conspiracy.[78]

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66. See *Jackson*, 625 F.3d at 886-91; *Jackson*, 636 F.3d at 690.
67. *See Jackson*, 636 F.3d at 691.
68. *Id.*
69. *Id.*
70. *Id.*
71. *See id.*
72. *Id.*
73. *See id.* at 691-92.
74. *Id.*
75. *Id.*
76. *See id.* at 692 n.1.
77. *See id.* at 692.
78. *Id.*

Judge Jolly, writing for the panel, first addressed the Sixth Amendment implications of its evidentiary analysis, noting that business records ordinarily fall outside the category of testimonial statements implicating Sixth Amendment rights,[79] not because they are per se nontestimonial but only *generally* nontestimonial, recognizing that exceptions may exist "because the Confrontation Clause, as a constitutional right, cannot be circumscribed by merely invoking the evidentiary rules of hearsay."[80]

The panel then turned to whether the notebooks were properly authenticated as business records under Federal Rule of Evidence 901(a) with "evidence sufficient to support a finding that the matter in question is what its proponent claims."[81] Noting that the Fifth Circuit has upheld the authenticity of drug ledgers as business records with circumstantial evidence in other instances, the panel distinguished the present case where the purported records were (1) produced by an alleged co-defendant at a proffer session in which he had a motive to obtain a benefit for himself, (2) where there is no evidence in the record that the co-defendant represented that he was the recorder of the ledgers, and (3) where there is no evidence in the record that the ledgers were prepared by someone with knowledge of the transactions they supposedly recorded or whether they recorded transactions at all, in that they do not facially convey they are applicable to the conspiracy charged and have no dates.[82] The panel further noted that no handwriting analysis was performed, "and no member of the drug-trafficking organization testified relating to their trustworthiness."[83] Noting that the standard for authentication is not a burdensome one, the panel found the Government failed to meet it in this case.[84] Because there was therefore no proof that these "business records" were authentic, the panel found that the "ledgers' entries become merely statements, made at an unknown time and conveyed at a proffer session" relating (through a DEA officer's translation for the jury) to the very testimony that Valdez "would [have been] expected to provide if called at trial," and that the Government thereby "failed to meet its burden of establishing that the 'drug ledgers' . . . [were] nontestimonial."[85]

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79. *Id.* (citing Crawford v. Washington, 541 U.S. 36, 56, 68 (2004); Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2539-40 (2009); United States v. Morgan, 505 F.3d 332, 339 (5th Cir. 2007) (per curiam)).

80. *Id.* at 692 n.2 (citing *Melendez-Diaz*, 129 S. Ct. at 2538).

81. *Id.* at 693.

82. *Id.* (citing United States v. Arce, 997 F.2d 1123, 1128 (5th Cir. 1993)).

83. *Id.* at 694.

84. *See id.* at 693-94 (citing United States v. Barlow, 568 F.3d 215, 220 (5th Cir. 2009)).

85. *Id.* at 696.

E. Conflict Regarding Summary Evidence; Best Practice to Ensure That the Underlying Information Has Been Admitted

In *United States v. Armstrong*, the Fifth Circuit considered and affirmed the convictions for mail fraud and conspiracy to commit mail fraud.[86] The named defendants and others participated in a large-scale insurance fraud spanning seven years whereby they: removed homeowners' furniture and moved in already flood-damaged furniture; intentionally flooded fifty homes and a commercial building; filed false reimbursement claims for flood damage based on inflated invoices provided by companies controlled by other members of the conspiracy; and provided false information to insurance companies investigating (and paying) the claims.[87]

At the trial of two of the conspirators, the court admitted a summary exhibit prepared by an analyst with the Federal Bureau of Investigation.[88] The exhibit, titled "Debbie Ramcharan Occurrences totaling $1,576,239.79, 2/18/2000-3/28/2001," included a photograph of defendant Debbie Ramcharan and the lines connecting her photo to three properties that were flooded by the conspirators.[89] Critically, all of the information included on the chart was already before the jury via previously admitted exhibits or testimony.[90] Ramcharan was convicted and appealed, *inter alia*, the district court's decision to admit the summary chart.[91]

Ramcharan's challenge hinged on Federal Rule of Evidence 1006.[92] Rule 1006 provides: "[t]he contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation."[93]

Next, the panel found that the circuit's "precedent conflicts on whether rule 1006 allows the introduction of summaries of evidence that is already before the jury, or whether instead it is limited to summaries of voluminous records that have not been presented in court."[94] In the court's 2001 opinion in *United States v. Bishop*, a Fifth Circuit panel held that summaries may be presented "based . . . on testimony and documentary evidence presented to the jury."[95] In the court's 2003 opinion, *United States v. Buck*, however, a panel held: "Th[e] use of summaries [allowed under rule 1006] should be distinguished from charts and summaries used only for demonstrative purposes

86. United States v. Armstrong, 619 F.3d 380, 382 (5th Cir. Sept. 2010).
87. *See id.* at 382-83.
88. *Id.* at 383.
89. *Id.*
90. *Id.*
91. *Id.* at 382-83.
92. *Id.* at 383-84.
93. *Id.* at 383 (alteration in original) (quoting FED. R. EVID. 1006).
94. *Id.*
95. *Id.* at 383 n.1 (omission in original) (quoting United States v. Bishop, 264 F.3d 535, 547-48 (5th Cir. 2001)).

to clarify or amplify argument . . . . Although some Courts have considered such charts and summaries under Rule 1006, the Rule is really not applicable because pedagogical summaries *are not evidence*."[96]

The court expressly reserved judgment on how the conflict should be resolved.[97] The court held, however, that the admission of a summary where the information contained in that summary is already before the jury is harmless error.[98] Thus, a prudent practitioner will follow the Government's example in this case and ensure that all of the information and conclusions in the summary chart are already supported by the evidence before the jury.[99]

F. Statements Made Before There Is an Actual Dispute or Difference of Opinion Are Not Excludable Settlement Discussions Under Rule 408

In *MCI Communications Services Inc. v. Hagan*, the Fifth Circuit addressed the admissibility of a statement by one of the defendant's attorneys; the statement occurred when the alleged damage-causing act had already been committed but there was not yet an actual dispute or a difference of opinion about who caused the damage and the amount of damages incurred.[100]

Defendant Hagan owned property in Louisiana on which he and his friend, Defendant Joubert, would go duck hunting.[101] At trial, defendants claimed that Joubert drove Hagan's backhoe onto a concrete boat ramp to clear driftwood from the ramp in order to launch the airboat that they would hunt from the next day.[102] When they returned, they found MCI contractors on the property working to repair a severed underground fiber-optic cable.[103] According to Hagan, one of the contractors told him, "the down time on the cable was costing $20,000 a minute."[104] Hagan then called Andre Coudrain, an attorney who had represented Hagan in the past.[105] Coudrain then called MCI the next day and told MCI employee Robert Bergeron that Hagan had been installing a boat ramp and asked what the damage to the cable would cost.[106]

At trial, MCI attempted to call Robert Bergeron to testify about this conversation, but the district court excluded testimony about the conversation as a settlement discussion under Federal Rule of Evidence 408.[107]

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96. *Id.* at 383-84 n.1 (first and second alterations in original) (emphasis added) (quoting United States v. Buck, 314 F.3d 786, 790 (5th Cir. 2003)).

97. *See id.* at 383-84.

98. *Id.* at 384.

99. *See id.* (rejecting the argument that the summary was prejudicial on the basis that it "did not suggest any conclusions unsupported by the evidence").

100. MCI Comm'n Servs., Inc. v. Hagan, 641 F.3d 112, 114 (5th Cir. May 2011).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 117.

105. *Id.* at 116.

106. *Id.*

107. *Id.*

Applying the standard for excluding testimony under Rule 408, the Fifth Circuit panel concluded that Coudrain's statement to Bergeron could not be a statement intended to be part of negotiations toward compromise because "there was not yet an actual dispute or a difference of opinion about who caused the damage to MCI's cable and how much the damage was costing MCI" as required under Fifth Circuit precedent.[108] The panel noted that "Coudrain may have intended the call to begin the process of settlement discussions, but because there was not yet an actual dispute[,] his statement likely cannot qualify as a negotiation toward compromise."[109] The panel found "that it was likely error for the district court to exclude Bergeron's testimony under Rule 408."[110]

The panel, however, did not stop its analysis there.[111] Noting that Coudrain's statement was offered as an out of court statement offered for the truth of the matter, it was not hearsay as to Hagan under Federal Rule of Evidence 801(d)(2)(D) because Coudrain was operating as his agent.[112] There was no evidence, however, that Coudrain was Joubert's agent, and Coudrain's statement would have been inadmissible as to Joubert.[113] Because the two defendants were tried together, the panel held that the district court did not abuse its discretion in excluding Bergeron's testimony.[114]

G. Authentication Requirements of a Company's Rewards Card Offered for Defendant's Knowledge of Drugs Found in the Same Bag

In *United States v. Ned*, the Fifth Circuit considered whether a company's reward card, which was registered to the defendant, was properly admitted as a business record under Federal Rule of Evidence 803(6).[115]

After a heated argument with his girlfriend, defendant Eugene Ned called police to help him retrieve his belongings from an apartment they shared.[116] That same night, his girlfriend called police to inform them that Ned was in possession of drugs in a Gucci bag and may be selling drugs at a local nightclub.[117] Police located Ned's vehicle and were alerted to the presence of narcotics by a drug-detecting dog.[118] In the car, police recovered a Gucci bag containing a quantity of drugs, a motel room key, and an Auto Zone reward

108. *Id.* at 117 (citing Lyondell Chem. Co. v. Occidental Chem. Corp., 608 F.3d 284, 295 (5th Cir. June 2010)).
109. *Id.*
110. *Id.*
111. *See id.*
112. *Id.*
113. *See id.*
114. *See id.* at 117-18.
115. United States v. Ned, 637 F.3d 562, 569 (5th Cir. Apr. 2011) (per curiam).
116. *Id.* at 565.
117. *Id.*
118. *Id.* at 566.

card.[119] Ned was subsequently convicted of possession with intent to distribute cocaine base.[120] On appeal, Ned challenged only the knowledge element.[121]

At trial, the Government offered an Auto Zone reward card found in the Gucci bag and Auto Zone records indicating that the card was registered to "Eugene Ned" as linking Ned to the vehicle in which the drugs were found.[122] A district manager for Auto Zone testified "about the rewards the Auto Zone card offers its customers and explained how the card is scanned and used by Auto Zone" and how Auto Zone keeps this information in its normal course of business.[123] Ned objected to this testimony "on the grounds that the government failed to establish that the card registration was a regularly-kept business record" because the manager who testified admitted "that she was not present when the Auto Zone customer applied for the customer card and that Auto Zone did not verify the identification of the customer applying for the card."[124]

In analyzing the admissibility of the Auto Zone reward card records under Federal Rule of Evidence 803(6), the panel first noted that "[t]here is no requirement that the witness who lays the foundation for the admission of a record under the business records exception to the hearsay rule be the author of the record or be able to personally attest to its accuracy."[125] The witness must be able to "explain the record keeping system of the organization and vouch that the requirements of the business records exception are met."[126]

The panel found the district manager's testimony sufficient to authenticate the card and registration records under Federal Rule of Evidence 803(6) and held that the district court did not err in admitting them as records.[127]

H. Verifying Signature of False Document Sufficient for Authentication; Attacking Contents Goes to Weight

In *United States v. Isiwele*, the Fifth Circuit addressed the admissibility of documents presented by the defendant where the witnesses authenticated their signatures but disputed the substance of the documents.[128]

Defendant Isiwele was the owner of a durable medical equipment supply company that provided supplies to customers under both Medicare and Medicaid, including power wheelchairs.[129] Applicable Medicare rules require

119. *Id.*
120. *Id.*
121. *Id.* at 568.
122. *Id.* at 566.
123. *Id.* at 569-70.
124. *Id.* at 570.
125. *Id.* (citing United States v. Armstrong, 619 F.3d 380, 384-85 (5th Cir. 2010)).
126. *Id.* (citing United States v. Jones, 554 F.2d 251, 252 (5th Cir. 1977) (per curiam)).
127. *See id.*
128. United States v. Isiwele, 635 F.3d 196, 200 (5th Cir. Mar. 2011).
129. *See id.* at 198.

that a beneficiary of a power wheelchair first obtain a prescription from a physician in which the physician determines "that the beneficiary cannot use a cane, walker, rollator, or manual wheelchair."[130] Medicare eliminated these documentary requirements following Hurricanes Rita and Katrina in an effort to meet beneficiaries' needs.[131] Isiwele instructed a recruiter "to go into elderly and low-income communities and gather billing information from Medicare/Medicaid beneficiaries."[132] Isiwele's company used the waiver to bill Medicare and Medicaid $587,382.65 for power wheelchairs and related accessories and was reimbursed a total of $297,381.04.[133]

At trial, Isiwele sought to introduce, as prior inconsistent statements of three beneficiaries who were government witnesses, documents entitled "Request for Replacement of DME Lost in Hurricane" and purportedly signed by the beneficiaries.[134] The documents purported to request Isiwele's company's assistance "in obtaining a replacement for my equipment, a(an) POWERCHAIR, which was lost in [H]urricane RITA."[135] "On cross examination, each of the three witnesses identified his or her signature on one of these documents" but explained "that they had not previously owned power wheelchairs that were lost in Hurricane Rita."[136] The witnesses testified that their signature was genuine or looked like their signature but either did not know how the signature got there or disagreed with the contents of the document.[137] "The district court refused to admit the documents on the ground that they had not been properly authenticated because the witnesses did not absolutely adopt the substance of the documents."[138]

The Fifth Circuit panel noted that under that Circuit's precedent, "[p]roof that a document has been signed is sufficient to charge a signatory with its contents."[139] The panel concluded that the Government's arguments on the suspicious circumstances in which the documents were produced "properly [went] to the weight of the evidence, not to its authenticity."[140]

The panel held that it was error for the district court to exclude these documents but ultimately found the error harmless because a "jury would have found beyond a reasonable doubt that Isiwele was guilty of filing fraudulent claims for reimbursement of power wheelchairs" for these three witnesses even if the documents had been admitted.[141]

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130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 199.
135. *Id.* (alterations in original).
136. *Id.* at 200.
137. *Id.*
138. *Id.*
139. *Id.* (alteration in original) (citing United States v. Whittington, 783 F.2d 1210 (5th Cir. 1986)).
140. *Id.* at 201.
141. *Id.* at 202.

III. STYLISTIC AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

On April 26, 2011, the United States Supreme Court approved amendments to Federal Rules of Evidence 101-1103, which were proposed by the Advisory Committee on Evidence Rules and approved by the Judicial Conference at its September 2010 session.[142] The Advisory Committee on Evidence Rules recommended the amendments as stylistic amendments only, which are intended to make the rules clearer and easier to read without changing the substantive meaning.[143]

A detailed comparison of the restyled Evidence Rules to the Evidence Rules in their current form is provided in the Report of the Advisory Committee on Evidence Rules.[144]

Although a significant motive for revision was to eliminate archaic phrases, the Committee was also cognizant of the substantial body of law that informs—and at times lends a judicial gloss to—such phrases that should not be disturbed.[145] The restyled Federal Rule of Evidence 404(b) is an example of the tension between archaic phrases and acquired meaning, in which the phrase "action in conformity therewith" is replaced with "in accordance with."[146] In contrast, the Committee retained the title "Subsequent Remedial Measures" for Federal Rule of Evidence 407.[147] Some commentators have noted, however, the title's usefulness is derived from its status as a legal term of art rather than its lexical coherence.[148]

The Supreme Court transmitted the rules and amendments and new rules to Congress "in accordance with the Rules Enabling Act, and [such rules] will take effect on December 1, 2011, unless Congress enacts legislation to the contrary."[149]

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142. Memorandum from James C. Duff to the Chief Justice of the U.S. and Associate Justices of the Supreme Court, *Transmittal of Proposed Amendments to the Federal Rules of Evidence* (Dec. 16, 2010), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Supreme%20Court%202011/Duff-transmittal-EV.pdf.

143. COMM. ON RULES OF PRACTICE AND PROCEDURE, EXCERPT FROM THE REPORT OF THE JUDICIAL CONFERENCE 4, http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Supreme%20Court%202011/Excerpt_ST_Report-Evidence.pdf (last visited Mar. 13, 2012).

144. *See* Memorandum from Judge Robert L. Hinkle, Chair, Advisory Comm. on Evidence Rules, to Honorable Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice and Procedure, *Report of the Advisory Committee on Evidence Rules* 7-99 (May 10, 2010), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Supreme%20Court%202011/EV_Report.pdf.

145. *See id.* at 3-5.

146. *Id.* at 22.

147. *Id.* at 26.

148. *See* James J. Duane, *Some Comments on the Proposed Style Revision of the Federal Rules of Evidence* 14-15 (Feb. 16, 2010), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2009%20Comments%20Committee%20Folders/EV%20Comments%202009/09-EV-018-Comment-Duane.pdf.

149. *Supreme Court Approved Rules Amendments (Apr. 26, 2011)*, U.S. COURTS, http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/PendingRules/SupremeCourt042611.aspx (last visited Mar. 15, 2012).