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# APPELLATE DEFERENCE: TURNING RULES INTO GUIDELINES

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## INTRODUCTION

Although codification of the law of evidence brought a desirable measure of certainty and predictability, many of the Federal Rules of Evidence were designed to provide flexibility by vesting considerable discretion in the trial judge. Rule 103 always contemplated that only harmful errors in the admission or exclusion of evidence are of any importance.[1] Moreover, the operation of other principles, such as the contemporaneous objection rule[2] and the giving of limiting instructions,[3] provide additional justifications for diminished appellate scrutiny of evidentiary matters. These principles sometimes operate to exempt evidentiary rulings from appellate review altogether. The misapplication of evidentiary rules rarely causes the reversal of a case,[4] and the rules often appear to operate more like suggestions than rules.

In reviewing the cases of the Tenth Circuit dealing with evidentiary matters, one finds a great deal of judicial energy expended to justify the affirmance of cases in which the trial court has significant discretion. The scope of appellate review is to identify only those trial court decisions that constitute abuses of discretion. However, even an abuse of discretion can be characterized as harmless error, so the strength of the case on the merits supersedes enforcement of the rules. Lost in the process are appellate interpretations and explications of the law of evidence,[5] and the atmosphere is one in which even prosecutorial misconduct involving the violation of evidentiary rulings has no operational consequence.[6]

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1. FED. R. EVID. 103(a) provides: "*Effect of erroneous ruling.* Error may not be predicated upon a ruling which admits or excluded evidence unless a substantial right of the party is affected." The Tenth Circuit stated in United States v. Rivera, 900 F.2d 1462, 1469 (10th Cir. 1990), "[a] non-constitutional error is harmless unless it had a 'substantial influence' on the outcome or leaves one in 'grave doubt' as to whether it had such effect" (quoting Kotteakos v. United States, 328 U.S. 750, 765 (1946)).

2. FED. R. EVID. 103(a)(1) provides that error must be harmful *and* a timely objection or motion to strike must appear in the record, with a specific ground stated.

3. FED. R. EVID. 105 provides that the court shall give limiting instructions restricting the evidence to its proper scope when requested.

4. Of over 2000 cases decided in the federal courts from July 1, 1988 to June 30, 1990, only 30 cases were found in which a court of appeals stated in an officially reported opinion that its reversal was due to an evidentiary error at trial. Marget A. Berger, *When, If Ever, Does Evidentiary Error Constitute Reversible Error?*, 25 LOY. L.A. L. REV. 893, 894 (1992).

5. *See, e.g.*, United States v. Sanders, 928 F.2d 940 (10th Cir. 1991); McEwen v. City of Norman, Okl., 926 F.2d 1539 (10th Cir. 1991).

6. *See, e.g.*, United States v. Short, 947 F.2d 1445 (10th Cir. 1991); United States v.

The Tenth Circuit cases involving evidentiary matters are, as might be expected, concentrated in those areas where the trial court retains the most discretion, and the evidence has the most impact. Cases about extrinsic acts[7] and expert witnesses are the most frequently litigated. Part I of this article examines the relevance rules with particular emphasis on extrinsic acts under Rule 404(b). Part II focuses on Rules 608 and 609, which also deal with extrinsic acts. Part III deals with issues involving expert witnesses and part IV reviews the Tenth Circuit's hearsay cases.

## I. RELEVENCE AND RULE 404(B)

Trial judges in criminal cases rarely exclude significant evidence proffered by the defense solely on Rule 403 grounds.[8] The Tenth Circuit affirmed the trial judge who did so in *United States v. Willie*[9], but over a dissent. In this case, the United States prosecuted a Native American "tax protester" for failure to file income tax returns. The defendant asserted a sincere, good faith belief that he need not file a tax return, which is relevant to the willfulness of his violation. In support of his defense, the defendant, Willie, sought to introduce (1) a copy of the United States Constitution, (2) a History of Congress from 1792, (3) pages of the session laws, (4) a Navajo Treaty, (5) the Coinage Act of 1965, and (6) letters from Willie to the Departments of Justice and the Treasury setting forth his contention that the tax laws do not apply to him as an Indian. The trial court excluded all the exhibits on the grounds that they would confuse the jury and would be subject to misuse; the court wanted to avoid the presentation of "law" to the jury that was different from what the judge would later instruct. The Tenth Circuit affirmed the trial court,[10] differentiating between the material's relevancy to the sincerity of defendant's belief that he need not file a return, and the sincerity of his belief that he should not need to file a return. Since only the former would be a proper purpose, the Court

Lonedog, 929 F.2d 568 (10th Cir. 1991). *See also* Viligia Bilaisis, Note, *Harmless Error: Abettor of Courtroom Misconduct*, 74 J. CRIM. L. & CRIMINOLOGY, 457, 475 (1983).

7. The term "extrinsic acts" encompasses evidence of similar happenings under FED. R. EVID. 401 and 403; prior acts under FED. R. EVID. 404(b); prior acts relevant to credibility under FED. R. EVID. 608 and prior crimes to impeach a witness under FED. R. EVID. 609.

8. FED. R. EVID. 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." When there is no prejudice involved, the exclusion of defendant's evidence for trial management concerns implicates the due process clause. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294 (1973).

9. 941 F.2d 1384 (10th Cir. 1991).

10. The discussion on the merits of the admissibility of this evidence was actually an alternative holding. *Id.* at 1391. The majority also found that the exclusion of the evidence was proper due to Willie's inadequate offer of proof under FED. R. EVID. 103(a)(2), the absence of plain error under FED. R. EVID. 103(d) and because the error, if any, was harmless beyond a reasonable doubt. *Id.*

ruled that the danger of jury confusion[11] outweighed the probative value.

The dissenting opinion by Judge Ebel straightforwardly asserted that evidence of statutory provisions, legislative history and similar official documents supported the reasonableness of the defendant's beliefs and were evidence that such beliefs were sincerely held.[12] Despite the compelling directness of the dissenting opinion, the majority was concerned about tax protesters and the burdens they might place on the courts. The majority feared the "slippery slope" and the prospect that a defendant might attempt to present the "accumulated weight of material presented at a two-week ['tax education'] seminar . . . ."[13] It is worth noting, however, that there was no such problem in this case, but *none* of defendant's documents were admitted. Concern about voluminousness or cumulativeness evidence may be addressed under Rule 403. Excluding *all* of the material that corroborated the sincerity of the defendant's views was neither necessary nor fair.

Much more common than Rule 403 cases[14] are cases decided under Rule 404(b). That rule is designed to control the admission of a special type of character evidence by excluding prior "bad acts" of a person unless such evidence has probative value with respect to some issue other than the person's character.[15] Trial court decisions under this rule generate the most litigated evidentiary issue on appeal, which is not surprising given the profound impact such evidence has on juries.[16]

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11. *Id.* at 1398.

12. *Id.* at 1401-2.

13. *Id.* at 1397.

14. The Tenth Circuit decided a few other cases on FED. R. EVID. 403 grounds. *See generally* United States v. Martinez, 938 F.2d 1078 (10th Cir. 1991) (one-half pound of cocaine, cash, a gun, and a scale recovered from house at which defendant stopped minutes before defendant sold cocaine to an undercover agent was admitted as "tools of the trade" evidence not outweighed by danger of unfair prejudice in cocaine distribution and conspiracy charge); Bingman v. Natkin & Co., 937 F.2d 553 (10th Cir. 1991) (allowing admission of evidence that two 60-year-old workers were laid off one year after the discharged employee, plaintiff in action, pursuant to the Age Discrimination in Employment Act); United States v. Haar, 931 F.2d 1368 (10th Cir. 1991) (holding the probative value of admitting evidence of a chemical catalog found in a storage locker rented by defendant convicted of methamphetamine production is not outweighed by risk of unfair prejudice).

15. FED. R. EVID. 404(b) provides:

> (b) OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

16. In a National Science Foundation project, the researchers studied the impact of certain kinds of evidence on groups of lawyers and laypersons. While these groups' responses were surprisingly divergent, the greatest agreement was found in connection with evidence suggesting other immoral conduct by the defendant. Such evidence was consistently rated as prejudicial. *See* Lee E. Teitelbaun, et. al., *Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?*, 1983 WIS. L. REV. 1147. *See also* James E. Beaver & Steven L. Marques, *A Proposal to Modify the Rule on Criminal Conviction Impeachment*, 58 TEMP. L.Q. 585 (1985). In this study, the authors cite primary research demonstrating that jurors nearly universally use the defendant's prior criminal record to conclude that the defendant was immoral and was therefore likely guilty of the crime charged. Additionally, the authors point to clinical research showing that jurors are unable to follow limiting instructions and that evidence of a prior criminal record nega-

While the admission of extrinsic acts under Rule 404(b) is discretionary in the trial court, a very specific methodology for exercising discretion was established by the higher courts. The United States Supreme Court decision in *Huddleston v. United States*[17] and the Tenth Circuit's opinion in *United States v. Record*[18] reflect the current standards for decision making under Rule 404(b).[19]

As with other evidentiary rules, the necessity for procedural requisites, the plain and harmless error rules[20] and the giving of limiting instructions[21] all serve to insulate the trial courts' decisions from appellate interference. In *United States v. Sanders*,[22] a RICO prosecution, the Tenth Circuit assumed, *arguendo*, that evidence of five different extrinsic bad acts of the defendant was erroneously admitted, but found either the defendant failed to object to the testimony offered, which operates as a waiver, or the court gave a limiting instruction, which "presumptively cur[es] any prejudicial impact on defendant."[23] With respect to the one instance where uncharged misconduct was admitted over defendant's objection and without the court giving a requested limiting instruction,[24] the Tenth Circuit found no reversible error and found the cumulative effect of all of the assumed errors did not affect the defendant's substantial rights.[25]

Similarly, although *United States v. Cardall*[26] requires the trial court to articulate precisely the basis for admission of extrinsic bad act evidence in a criminal trial, the failure to adhere to this requirement is harmless error if the decision to admit the evidence is deemed correct on appeal. Thus, in *United States v. Morgan*,[27] the admission of extrinsic

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tively affects even those jurors who attempt to avoid any prejudicial impact of the evidence. For another study reaching essentially the same conclusions, see Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions*, 9 LAW & HUM. BEHAVIOR, 37 (1985).

17. 485 U.S. 681 (1988).

18. 873 F.2d 1363 (10th Cir. 1989).

19. According to *Huddleston*, protection against unfair prejudice from extrinsic act evidence emanates from four sources:

> [F]irst, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402- as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice, . . . and fourth, from Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.

485 U.S. at 691-92.

20. FED. R. EVID. 103(a) & (d).

21. FED. R. EVID. 105.

22. 928 F.2d 940 (10th Cir. 1991).

23. *Id.* at 942 (citing United States v. Peveto, 881 F.2d 844, 859 (10th Cir. 1989), *cert. denied*, Hines v. United States, 110 S.Ct. 348 (1989)).

24. The court noted that the defendant did not request a limiting instruction, nor did he formally move to strike the testimony. *Id.* at 942 n.1.

25. *Id.* at 943.

26. 885 F.2d 656, 671 (10th Cir. 1989) (quoting United States v. Kendall, 766 F.2d 1426, 1436 (10th Cir. 1985), *cert. denied* 474 U.S. 1081 (1986)).

27. 936 F.2d 1561 (10th Cir. 1991).

act evidence was affirmed, although there was no precise articulation of the proper purpose for which the evidence was offered.

*Morgan* provides an interesting illustration of the difficulties encountered in the search for a "proper purpose" under Rule 404(b). In *Morgan*, the defendant was on trial for bank robbery. A witness was permitted to testify that the defendant participated in another (uncharged) bank robbery several weeks earlier. The Court stated, "The two robberies involved many similarities: both times a stolen car was used to drive to the banks; both involved robbers who wore masks made out of sweat pants; weapons were used in both; and the maroon-colored El Camino, which Mr. Morgan was in just prior to his arrest, *was seen* in the Bixby area following the robbery."[28] Noting that prior uncharged acts have probative value particularly when the act is "close in time and similar in method to the charged scheme,"[29] the Tenth Circuit concluded that the evidence was offered for a proper purpose. Absent from the court's reasoning was an explanation of how the defendant's participation in the prior bank robbery made it more probable that he participated in the charged bank robbery — besides showing defendant's "propensity" to rob banks, which is precisely the purpose forbidden by Rule 404. The admission of the prior bank robbery proved one thing: the defendant was a bank robber and, therefore, probably robbed the bank. The trial court's limiting instruction demonstrated the illogic of finding a *proper* purpose for admitting this testimony: the jury was told to consider the evidence of the similar act "in determining the state of mind or the intent with which the Defendant, Mr. Morgan, did the acts that are charged here in the indictment."[30] The instruction told the jury that the prior bank robbery demonstrated a bank-robbing state of mind or intent. Larcenous intent was not an issue in the case, therefore the jury would be likely to use the similar act as evidence of the defendant's character.

A proper purpose for admitting extrinsic act evidence was found in *United States v. Esparsen*,[31] where a witness was permitted to testify that one of the defendants threatened harm to the witness's children if she was the one "ratting" on him. Although this evidence constituted another crime, wrong or act under Rule 404(b), the court upheld its admissibility to show the defendant's guilty knowledge or consciousness of guilt. However, the trial court denied defendant's request that the jury be instructed to consider the defendant's threats as proof of knowledge, not as evidence of a violent person likely to commit illegal acts. The Tenth Circuit ruled that the defendant was entitled to such an instruction, but the failure was harmless error because other evidence of defendant's guilt was substantial and because the prosecution did not argue to the jury that they should consider the threat as evidence of the

28. *Id.* at 1572 (emphasis added).
29. *Id.* (quoting United States v. Record, 873 F.2d 1363, 1375 (10th Cir. 1989)).
30. *Id.* at 1573 n.5.
31. 930 F.2d 1461 (10th Cir. 1991).

defendant's propensity to commit crimes.[32]

Drug cases present many problems under Rule 404(b), but are fertile ground for the appropriate admission of extrinsic act evidence because knowledge and intent are often at issue. In *United States v. Jefferson*,[33] the defendant was a passenger in a car found to contain drugs. The defendant denied knowledge of the drugs. The driver, who had turned state's evidence, was permitted to testify about other trips with the defendant to purchase drugs in California for distribution in Denver. The prior acts were probative of the defendant's knowledge under Rule 404(b), particularly since the defendant denied such knowledge. Similarly, in *United States v. Poole*,[34] a large quantity of crack cocaine was found hidden in the defendant's restaurant. The defendant denied his possession of the drugs and any intent to distribute the drugs. Federal agents were permitted to testify to prior undercover drug deals they made with the defendant or observed him making. The Court analyzed the appropriate factors under *Huddleston*,[35] noting an appropriate limiting instruction, and affirmed the admission of the evidence on the issues of knowledge and intent.

Sometimes, of course, prior acts are not really extrinsic to the crime charged. In *United States v. Treff*,[36] the defendant was on trial for throwing a molotov cocktail at the house of his former supervisor at the Internal Revenue Service. The prior act admitted by the trial court had occurred two and one-half hours earlier on the same night—the defendant had shot and killed his wife. The court determined that although it was a close question, the act of killing his wife was not extrinsic to the charged crime, and Rule 404(b) did not apply to an act so inextricably intertwined with the crime charged that testimony concerning the charged crime would be confusing and incomplete without mention of the prior act.[37]

The trial judge in *United States v. Zimmerman*[38] failed to delineate between extrinsic acts under Rule 404(b) and direct (but inadmissible) evidence of the crime charged. In that case, the defendant lawyer was convicted of conspiring to defraud the creditors of a bankruptcy client by helping to hide assets. The government introduced out-of-court statements of one bankruptcy judge who, in the course of adjudicating the bankruptcy proceedings, opined that the law firm appeared either to be acting unethically or participating in an illegal conspiracy. A second bankruptcy judge referred the matter to the U.S. Attorney's office for possible prosecution, and the government introduced that letter as well. The trial judge admitted the evidence to show the defendant's "knowledge and intent" under Rule 404(b) and instructed the jury accordingly.

32. *Id.* at 1476.
33. 925 F.2d 1242 (10th Cir. 1991).
34. 929 F.2d 1476 (10th Cir. 1991).
35. *See* United States, 485 U.S. 681 (1988).
36. 924 F.2d 975 (10th Cir. 1991).
37. *Id.* at 981.
38. 943 F.2d 1204 (10th Cir. 1991).

The Tenth Circuit noted that the documents were not Rule 404(b) evidence at all, since they were not evidence of *other* crimes, wrongs or acts; rather, they were hearsay opinions of two judges who believed the defendant, or his law firm, was guilty of the crimes for which he was on trial.[39] The conviction was reversed because of the highly prejudicial character of the evidence.

Although the erroneous admission of evidence under Rule 404(b) is the ground most often asserted for reversal, the erroneous exclusion of such evidence may be grounds for reversal as well. In *Turley v. State Farm Mutual Automobile Insurance Co.*,[40] the plaintiff sued his insurer for failure to pay for the theft of his car. The insurer sought to introduce testimony of the plaintiff's ex-wife, which would reveal numerous fraudulent insurance claims the plaintiff previously filed, including a false slip and fall claim orchestrated by the plaintiff and one Brigman, who was also connected to the instant case as lessee of the claimed stolen car. The trial court excluded the evidence because the insurer had not sufficiently articulated a proper purpose under Rule 404(b), but the Tenth Circuit reversed, holding that the "articulation" requirement was not indispensable and that the prior insurance scam bore on the defense theory of fraud, on Brigman's knowledge, on Brigman's intent and absence of an accident or mistake in his dealings with State Farm, and on plaintiff's knowledge of the same.[41] Quoting the revisionist interpretation of Rule 404(b) found in *Huddleston*, the court declared that the thrust of Rule 404(b) was that evidence of other acts *was* admissible and that "Congress [in enacting 404(b)] was not nearly so concerned with the prejudicial effect of Rule 404(b) evidence as it was with ensuring that restrictions would not be placed on the admission of such evidence."[42]

The attitude favoring admissibility of extrinsic act evidence was apparent in *United States v. Lonedog*.[43] In that rape prosecution case, the defendant asserted that the complaining witness consented to intercourse. Through various witnesses, the following prior acts of the defendant were either established or were the subject of a question put by the prosecution: Defendant hit his former wife with a flashlight; his former wife filed a complaint of rape against him; his former wife wrote a letter to the social services department complaining about him; defendant served time in prison; defendant pointed a gun at a person unrelated to the instant case, and that defendant had "a reputation" on the Indian reservation. Some of this matter came in without objection, some over sustained objections with curative instructions given. After analysis for abuse of discretion and review for plain and cumulative error, the court ultimately concluded that despite the often unprofessional behavior of the prosecution, "the errors were effectively cured and that the jury pos-

39. *Id.* at 1211-12.
40. 944 F.2d 669 (10th Cir. 1991).
41. *Id.* at 675.
42. *Id.* at 675 (quoting United States v. Huddleston, 485 U.S. 681, 688-89 (1988)).
43. 929 F.2d 568 (10th Cir. 1991), *cert. denied* 112 S.Ct. 164 (1991).

sessed ample evidence to convict."[44]

Extrinsic acts are also governed by Rule 412 in the context of sexual assault. This highly specific rule was designed to prohibit the admission of the victim's prior sexual conduct to avoid potential jury prejudice against her. By excluding such matter generally, the rule dissociates the prior sexual behavior of the victim from the existence *vel non* of consent in cases where the defendant asserts consent as a defense. Rule 412 contains exceptions, one of which states that previous sexual acts are admissible when "offered by the accused upon the issue of whether the accused was or was not . . . the source of . . . injury . . . ."[45] This exception was aptly illustrated in a sad case involving the rape of an eight-year-old child. In *United States v. Begay*,[46] the prosecution relied heavily on medical testimony indicating the child was penetrated, but the trial court refused to allow evidence that the child had been abused by another man three months earlier. If permitted, the doctor would have testified that the indicia of penetration exhibited during the examination could be explained either by the current *or* the past abuse. The Tenth Circuit held that the failure to allow inquiry into the previous assault was not only evidentiary error, but constitutional error, since the confrontation clause was implicated. The court must find such constitutional errors are harmless beyond a reasonable doubt to affirm the conviction. The conviction in this case was reversed and remanded for a new trial because the court was not convinced the error was harmless beyond a reasonable doubt.

## II. Extrinsic Acts and Credibility

The admission of prior crimes and other extrinsic conduct for the purpose of demonstrating a witness's lack of credibility is governed by Rules 608 and 609. These rules generate nearly as much litigation as Rule 404. The tension lies between the probative impact of felonious character and wishful thinking that each accused person should stand in the dock on equal footing, subjected only to evidence about the immediate charges and unhaunted by a wayward past.[47] If a criminal defendant does not testify, her prior convictions are generally inadmissible. If the defendant does testify, her credibility is at issue, as is some prior conduct which bears on that credibility.

In some circuits, the courts have attempted to mediate these tensions by requiring the trial court to make explicit findings in which the probative value of prior crimes for impeachment is weighed against prej-

44. *Id.* at 575.
45. Fed. R. Evid. 412.
46. 937 F.2d 515 (10th Cir. 1991).
47. Historically, convicted felons were deemed incompetent to testify at all. The use of prior convictions to impeach is more rooted in this historic disability than in a rational relationship between crime and truth-telling. When felons became competent to testify, the vestiges of the disability appeared in statutes and rules allowing prior felonies to be shown for the purpose of affecting the witness's credibility. *See* 2 John H. Wigmore, Evidence § 488 (Chadborne rev. 1979).

udicial impact.[48] This balancing is required by Rule 609(a),[49] but the Tenth Circuit has held that a trial court's failure to make explicit findings in determining the admissibility of prior convictions is not a reversible error.[50] Indeed, a review of the Tenth Circuit cases involving a challenge to the admission of prior crimes evidence reveals no reversals.

Defense counsel often confront a tactical difficulty when their clients with prior convictions intend to testify. First, counsel must determine which, if any, of the defendant's acts will be admitted, accomplished by a motion *in limine*. If some or all of the evidence is ruled admissible, defense counsel must decide whether to raise these matters on direct examination to avoid the appearance of hiding the defendant's criminal record when the prosecution cross-examines. Most defense counsel believe that coming forward with the defendant's prior crimes is better, but doing so limits their ability to challenge the trial court's admissibility ruling on appeal. In *United States v. Davis*,[51] the defendant moved *in limine* to exclude a guilty plea entered in a prior drug case. His motion was denied, so defendant raised the conviction himself, apparently to demonstrate that he was the type to plead guilty when he was guilty, but would go to trial where, as now, he was not guilty. The Tenth Circuit ruled that the admission of the prior conviction was not reversible error when the defendant raised the issue as evidence of his own innocence.[52]

Similarly, in *United States v. Galloway*,[53] the defense counsel in a rape prosecution decided to use defendant's prior convictions as a way of illustrating that the defendant and the victim were "from two different worlds" and that they misunderstood each other's intentions. Even if some of the prior convictions were inadmissible, the court ruled that this argument was a legitimate tactical move that the court would not second-guess.[54]

In *United States v. Sides*,[55] the defendant, on trial for murder committed in the course of a robbery, made a motion *in limine* to exclude his prior convictions for robbery and aggravated battery. The trial judge reserved ruling on the motion, and when it came time for defendant to testify, defense counsel brought out the prior convictions on direct. The

48. *See* United States v. Rosales, 680 F.2d 1304, 1306 (10th Cir. 1981).
49. FED. R. EVID. 609(a) provides:
(a) GENERAL RULE. For the purpose of attacking the credibility of a witness,
(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.
50. *Rosales*, 680 F.2d at 1304.
51. 929 F.2d 554 (10th Cir. 1991).
52. *Id.* at 558.
53. 937 F.2d 542 (10th Cir. 1991).
54. *Id.* at 545.
55. 944 F.2d 1554 (10th Cir. 1991), *cert. denied* 112 S.Ct. 604 (1991).

Tenth Circuit ruled that in the absence of a contemporaneous objection, the admission of the prior convictions would be reviewed only for plain error, and the court concluded any error in the admission of the prior convictions was harmless beyond a reasonable doubt, given the overwhelming evidence of defendant's guilt.[56]

While the catch-22 illustrated by the three preceding cases is not new, it remains a grim reminder that the policies surrounding the admissibility of prior convictions are more hortatory than consequential. The rules of evidence operate more as guidelines honored only if a party's case is not strong enough to overcome their violation. Even the direct violation of a court order prohibiting the introduction of prior crimes evidence may not constitute reversible error. In *United States v. Short*,[57] a drug prosecution, the trial judge ruled *in limine* that if the defendant testified, the prosecution could cross-examine with respect to the defendant's prior felony conviction, but would not be allowed to reveal that the conviction was drug-related. When the prosecutor began cross examination he immediately asked:

"Q. Mr. Short, you're a convicted felon, aren't you?
A. Yes, sir.
Q. And that was a drug-related felony, wasn't it?
A. Yes, sir."[58]

At the next break, defense counsel objected to the prosecutor's violation of the judge's earlier ruling and asked for a mistrial. The trial judge reconsidered the earlier ruling in light of the direct testimony and decided the questioning about the prior drug conviction was proper. The motion for mistrial was denied. The Tenth Circuit affirmed the scenario by first assuming that the admission of the prior conviction *was* an abuse of discretion and prejudicial to the defendant, then by concluding that its admission was harmless given the overwhelming evidence against the defendant. The result: Neither the trial court nor the court of appeals ever engaged in the actual balancing of probative value and prejudicial effect required by Rule 609(a).[59] No appellate decision addressed whether admission of the prior crime was erroneous, and although the prosecutor's conduct was "not condone[d],"[60] there were absolutely no operational consequences attendant to the prosecutor's violation of the court's order.

Not only are prior crimes admissible to impeach a testifying defendant, inquiry is also permitted, if the court allows, into any extrinsic act probative of the witness's credibility. Under Rule 608(b),[61] the cross-

56. *Id.* at 1560.
57. 947 F.2d 1445 (10th Cir. 1991).
58. *Id.* at 1453.
59. It has been argued that deference to the trial court's discretion should not render the trial court's ruling virtually unreviewable. "This distends the notion of discretion. . . . The fact that the established standards may be vague or difficult to apply does not mean the courts have discretion to ignore those standards." Victor J. Gold, *Do the Federal Rules of Evidence Matter?*, 25 LOY. L.A. REV. 909, 917-18 (1992).
60. *Id.* at 1455.
61. FED. R. EVID. 608(b) provides:

examiner may ask questions about such acts, but he is bound by the witness' answer and may not use extrinsic evidence to prove the conduct if the witness denies it. In *United States v. Drake*,[62] the defendant was charged with mail fraud in the course of his direct testimony and cross-examination, the defendant made reference to his educational background and college degrees. By the time the cross-examination was finished, the defendant had been asked whether the "records" would reflect that he was kicked out of the University of Illinois for falsifying facts in a disciplinary investigation. The Tenth Circuit correctly ruled that inquiry into these matters was proper under Rule 608(b). The only real issue was whether the prosecutor should have been allowed to make the inquiry by referring to matters appearing in the defendant's "records" that were (appropriately) not admitted into evidence. The Court ruled that this style of questioning was improper, but harmless error. In other words, a good faith basis must exist before the cross-examiner may ask questions about extrinsic conduct, so it was entirely proper for the prosecution to have consulted the defendant's college records. The cross-examination itself, however, should not have been conducted with reference to the extrinsic evidence, but only through inquiry into the conduct itself.[63]

Rule 608 applies to all witnesses who testify, and the prohibition against extrinsic evidence about extrinsic conduct under that rule prevents courts from becoming embroiled in truly tangential matters. In *United States v. Young*,[64] the defendant was charged with stealing from her employer by opening a bank account in the employer's name and depositing his funds therein. She later withdrew funds for her personal use. The defendant wanted to demonstrate that the employer who testified against her had accused another employee of embezzlement and, therefore, was not credible in this case. When the employer denied he had done so, the defendant was "stuck with the answer" and was precluded from introducing the former employee to contradict the employer. This result would be the same whether the original question to the employer was considered an extrinsic act under Rule 608 or under 404(b). If the latter, Rule 611 has generally been interpreted to prevent extrinsic evidence where the impeachment matter is collateral.[65]

Similarly, a defendant who sought to use prior crimes evidence

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

62. 932 F.2d 861 (10th Cir. 1991).
63. *Id.* at 867.
64. 952 F.2d 1252 (10th Cir. 1991).
65. *Id.* at 1259.

against a prosecution witness was limited in how he might do so. In *United States v. Thomas*,[66] one of the prosecution witnesses testifying against the defendant admitted to one prior conviction and when the defendant wanted to prove that the witness had a second conviction by offering the court records through a court clerk, the government offered to so stipulate. The record was admitted, but the clerk was not permitted to testify. The Tenth Circuit ruled that this procedure fully complied with Rule 609(a).[67]

## III. EXPERT TESTIMONY

The use of expert testimony has greatly increased despite its expense, at least partly in response to the broad and easily met requirements of Rule 702.[68] Among the issues that continue to confront the courts are the overuse of expert testimony where it is not warranted and the reliability of expert testimony.

The Tenth Circuit has taken a liberal approach to the admission of expert testimony, and in the three cases decided in 1991, which arguably represent the overuse[69] of expert testimony, none of the instances warranted reversal, nor did the Court express serious reservations. In *McEwen v. City of Norman, Okla.*,[70] a motorcyclist's estate brought a § 1983 action against the police and the city claiming excessive force was used during the chase and in the arrest of the motorcyclist after he collided with a police car. The defendants presented Samuel Chapman, a professor of political science and the director of the Law Enforcement Administration degree program at the University of Oklahoma, who testified that he did not believe that the officers "intended" to establish a roadblock. Chapman did not believe that one of the police officers had "rolled" McEwen back and forth with his foot or used excessive force as testified by others. Chapman agreed that the police officer should not have been subjected to any disciplinary action arising out of his encounter with McEwen, and that this latter opinion was based in part on Chapman's assessment of the credibility of the witnesses he heard testify during the trial.[71]

The plaintiff filed a motion *in limine* to prevent the testimony of this

66. 945 F.2d 328 (10th Cir. 1991).

67. *Id.* at 330.

68. FED. R. EVID. 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

69. There is some overlap between FED. R. EVID. 702 and FED. R. EVID. 704(a). The latter states: "Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." While testimony on the "ultimate issue" is thus not proscribed, the Advisory Committee's notes to Rule 704 caution that Rules 701 and 702 provide "ample assurances against the admission of opinions which would merely tell the jury what results to reach, somewhat in the manner of the oath-helpers in an earlier day." FED. R. EVID. 704 advisory committee's note.

70. 926 F.2d 1539 (10th Cir. 1991).

71. *Id.* at 1546.

witness, but it was denied. Plaintiff's counsel made no contemporaneous objections to any of the testimony. The trial court gave a cautionary instruction to the jury, noting that Chapman had been permitted to testify to some matters "within [his] common knowledge," and telling the jury that they were not to surrender their "complete independence in finding the facts as you believe they exist from the evidence . . . ."[72]

The Tenth Circuit held first that the lack of objection made the admission reviewable only under the plain error rule, and concluded no plain error existed. The court stated that Chapman "did render opinions . . . which indicated to the jury the precise result the jurors should reach based on the evidence."[73] But the court also stated, "Arguably, his testimony was proper under Rules 702 and 704 . . . ."[74] Thus, the court never decided whether the testimony was correctly admitted or not. The question was avoided because of the lack of a contemporaneous objection.

The utility of expert testimony was also an issue in *United States v. McDonald*,[75] a criminal prosecution for possession of crack cocaine with intent to distribute. A supervisor for the Denver Metro Crack Task Force with extensive training concerning cocaine and cocaine trafficking was permitted to testify over objections about the significance of the quantity of the cocaine involved, its street value, how crack was cut and packaged, and that crack dealers commonly possess beepers, single-edged razor blades, and large quantities of cash and food stamps.

The Tenth Circuit examined this testimony asking whether, under Rule 702, the officer's specialized knowledge would assist the trier of fact in understanding the evidence, stating it was a common sense inquiry into whether a juror would be able to understand the evidence without specialized knowledge concerning the subject.[76] The court had no difficulty concluding that information about the quantity of the drugs and the use of pagers, beepers, razors and weapons would help the jurors understand the evidence. Somewhat less convincing was the court's allowance of expert testimony concerning the cash and food stamps. The court asked, "Why would someone have such a large quantity of money and food stamps upon his person? Without understanding the drug trade is a cash-and-carry business, and that both cash and food stamps are the medium of exchange in a drug transaction, the basic evidence would leave a juror puzzled."[77] It is certainly unlikely that the admission of expert testimony on these matters was reversible error, but it appears the court gave jurors little credit for being able to draw an obvious inference that any prosecutor could argue without the support of expert testimony.

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72. *Id.* at 1543-44.
73. *Id.* at 1546. *See supra* note 68, the Advisory Committee comment on the impropriety of such opinions.
74. *Id.*
75. 933 F.2d 1519 (10th Cir. 1991), *cert. denied* 112 S.Ct. 270 (1991).
76. *Id.* at 1522.
77. *Id.*

The third case requiring the court to distinguish between admissible expert testimony that assists the jury, even on the ultimate issue, and inadmissible expert testimony, which merely tells the jury how to decide the case, was *Wheeler v. John Deere Co.*.[78] In that case, a mechanical engineer with special expertise in the safe design of farm equipment was allowed to testify that a combine was "dangerous beyond the expectation of the ordinary user,"[79] a phrase reflecting a legal standard governing the case. The Tenth Circuit held this testimony was within the engineer's expertise and, given the technical nature of the case, "could have assisted the jury."[80]

It will be interesting to see whether or not the proposed amendments to Rule 702 will affect these holdings. The new language permits the expert opinion testimony only if the "information is reasonably reliable and will *substantially* assist the trier of fact to understand the evidence or to determine a fact in issue . . . ."[81] The Advisory Committee Notes to the proposal indicate more concern with the reliability of opinions based on questionable science than with the overuse of opinion testimony where it merely tells the jury how to decide the case.[82]

The *Wheeler* case raises the second commonly litigated issue arising in connection with the use of expert testimony: The sufficiency of the qualifications of experts to render opinions on certain topics. In *Wheeler*, for example, the court allowed the plaintiff's psychiatrist to testify that "momentary forgetfulness" was a human factor that should have been considered in designing the combine that injured the plaintiff. The court noted the doctor might not have been the "optimal" witness to speak on factors governing product design, but his lack of specialization only affected the weight of his testimony and not its admissibility.[83]

*Quinton v. Farmland Industries, Inc.*[84] illustrated the Tenth Circuit's liberal approach on the specialization issue. In that case a doctor of veterinary medicine was allowed to testify about the effect of substances on dairy cows, although he was not a specialist in the field of toxicology.

The one case reversed by the Tenth Circuit for an error in the treatment of expert testimony was *Werth v. Makita Electric Works, Ltd.*.[85] In that case, the judge excluded the opinions of two of the plaintiff's experts, effectively precluding the presentation of the plaintiff's theory of how the accident (involving the severing of plaintiff's fingers by a circular saw) occurred. The experts went to the plaintiff's home, set up the tables and other physical conditions existing at the time of the injury, and examined evidence, such as the location of blood spatters and the

78. 935 F.2d 1090 (10th Cir. 1991).
79. *Id.* at 1100.
80. *Id.* at 1100-01.
81. FED. R. EVID. 702 (Proposed Amendments 1991)(emphasis added).
82. *Id.* (Advisory committee's note).
83. Wheeler v. John Deere Co., 935 F.2d 1090, 1101 (10th Cir. 1991).
84. 928 F.2d 335 (10th Cir. 1991).
85. 950 F.2d 643 (10th Cir. 1991).

defendant's severed fingers, to testify about the action of the saw and its location at the time of the injury. The trial court seemed troubled that neither expert simply turned on the saw to see how it operated, and excluded their testimony for lack of an adequate factual basis for the opinion. The court of appeals reversed, holding that there was certainly no *per se* rule requiring an accident reconstructionist to actually test the instrumentalities involved. The court also held that technical kinetic principles formed a sufficient scientific basis to support the experts' opinions and would have been helpful to the jury.[86]

One area in which expert testimony probably would assist the trier of fact is a criminal defendant's state of mind, but Rule 704(b) expressly excludes this type of testimony for policy reasons.[87] Because of this proscription, a defendant charged with aggravated sexual abuse, assault with a deadly weapon with intent to do bodily harm, assault resulting in serious bodily injury and burglary is not permitted to present the testimony of a psychiatrist that a person with borderline personality disorder (like the defendant) who consumes drugs and alcohol (as the defendant did) is incapable of forming specific intent.[88]

Finally, the case of *Polys v. Trans-Colorado Airlines*[89] serves as a reminder that the imperatives of Rule 103 can be used as a rigid barrier to appellate relief. In that case the plaintiff asserted he suffered head injuries in a plane crash that produced disabling psychological and psychiatric effects. The trial court excluded the depositions of two of the plaintiff's experts who apparently would have bolstered the plaintiff's evidence on damages. The problem was that the plaintiff made no offer of proof as to what the deposition testimony would have been, although bits and pieces came out during the trial. The Tenth Circuit, faced with an incomplete record, used all the appellate deference it could muster in affirming the trial court, stating that "absent offers of proof, we cannot review the district court's ruling [which excludes the deposition testimonies] for abuse of discretion. . . . [The] ruling was not plain error. It was not error and, even if it was, it did not affect a substantial right of the [plaintiffs]. Therefore, we will not reverse the district court."[90]

## IV. HEARSAY

The rule against hearsay often presents interesting and complex problems. The rule does not, however, actually exclude much hearsay because of the many exceptions available. A review of the Tenth Circuit

86. *Id.* at 654.

87. FED. R. EVID. 704(b) provides:

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or a defense thereto. Such ultimate issues are matters for the trier of fact alone.

88. United States v. Dennison, 937 F.2d 559 (10th Cir. 1991).

89. 941 F.2d 1404 (10th Cir. 1991).

90. *Id.* at 1411.

cases addressing hearsay reveals that the contested evidence was considered admissible in five out of six cases.

Two cases addressed whether the out-of-court statements were offered for the truth of the matter asserted, the fundamental attribute of hearsay. In *Denison v. Swaco Geolograph Co.*,[91] the plaintiff in an age discrimination case introduced a document outlining the cost savings obtainable by terminating older, rather than younger employees. The document was not written by the employer, so it was not a party admission, but it appeared that the employer had access to the conclusions contained in the document. The dispositive point, however, was that the document was not offered to prove the truth of its contents, but to show that the employer might have been influenced by its contents and was motivated to fire senior employees first.[92]

*United States v. Bowser*[93] also determined that an out-of-court statement was offered for a purpose other than the truth of the matter asserted, but with more troubling results. In that case, the defendant was convicted of selling drugs to an undercover agent. The agent was permitted to testify that an out-of-court declarant told the agent that the defendant carried a gun and wanted to kill the agent. The defendant challenged this evidence on both relevance and hearsay grounds, but the Tenth Circuit opinion conflated the two issues, concluding that the evidence was not hearsay because it was not offered to prove the truth of the matter asserted, i.e., that defendant carried a gun and intended to kill the agent. The statements were introduced, the court stated, "merely to explain the officer's aggressive conduct toward the defendant. In that context, the statements were relevant."[94] The opinion gave no hint as to why the officer's aggressive conduct was relevant, nor did the court discuss whether the probative value of the evidence was more probative than prejudicial under Rule 403. Merely suggesting a non-hearsay use for an out-of-court statement did not render the statement admissible; the non-hearsay use must meet all other requirements of admissibility. Additionally, evidence of weapon possession or threats to kill can be characterized as other crimes, wrongs or acts barred by Rule 404(b). This type of evidence required a much more thorough inquiry to justify admission for a proper purpose.[95] Although the error may not have seriously affected the entire record, the court's treatment of the issue left all of these questions unresolved.

Two cases addressed hearsay issues that were relatively easy given the facts provided. In those cases the rules were mechanically applied, and the counter-arguments had little merit. In *United States v. Esparsen*,[96] a witness was permitted to testify to the out-of-court statements of a co-conspirator. Such statements were admissible under Rule

91. 941 F.2d 1416 (10th Cir. 1991).
92. *Id.* at 1423.
93. 941 F.2d 1019 (10th Cir. 1991).
94. *Id.* at 1021.
95. *See supra* notes 16-20 and accompanying text.
96. 930 F.2d 1461 (10th Cir. 1991).

801(d)(2)(e),[97] and were admissible against all parties so long as the conspiracy was established by a preponderance of the evidence, which can include the statements themselves as well as independent evidence.[98] Once the court concluded that sufficient evidence of the conspiracy existed, the statements were deemed admissible.

The application of another hearsay exception was examined in *In re Lynde*,[99] a case in which the petitioners sought release of grand jury testimony for use in a state court civil proceeding. The petitioners were sued on a promissory note executed in favor of one Rienks and his wife. Rienks had given grand jury testimony that may have revealed facts about fraud in connection with the transaction. Rienks then died. The petitioners sought the disclosure of the transcript to defend against the suit on the note.

The release of grand jury testimony was permitted only upon a showing of particularized need, and the petitioners' need could be shown only if the testimony were admissible in their trial. The court cited Colorado Rule of Evidence 804 (b)(1),[100] which is identical to the federal rule, and concluded that the grand jury testimony could not qualify under the former testimony hearsay exception because the party against whom it would be offered (Mrs. Rienks) did not have an opportunity or similar motive to develop the testimony by direct, cross, or redirect examination. The court would not disclose the grand jury testimony because (among other reasons) it did not appear that petitioners could have obtained its admission into evidence.[101]

The relationship between Rules 803(6)[102] (the business records exception) and 803(8)[103] (the governmental records exception) was left

97. FED. R. EVID. 801(d)(2)(E) provides: "(d) *Statements which are not hearsay.* A statement is not hearsay if— . . .(2) *Admission by party-opponent.* The statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

98. Bourjaily v. United States, 483 U.S. 171 (1987).

99. 922 F.2d 1448 (10th Cir. 1991).

100. COLO. R. EVID. 804(b)(1) provides:
*Former Testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

101. *In re Lynde*, 922 F.2d at 1455.

102. FED. R. EVID. 803(6) provides:
*Records of regularly conducted activity.* A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course or a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

103. FED. R. EVID. 803(8) provides:
*Public records and reports.* Records, reports, statements or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or

unclear in *Haskell v. United States Dept. of Agric.*[104] In that case, an investigative aide visited defendant's grocery store on several occasions and wrote immediate reports documenting violations of the rules governing food stamps, such as the exchange of food stamps for ineligible items. These "transaction" reports were made whether a violation was detected or not, and were signed by the special agent assigned to the investigation. The investigative aide was killed in an automobile collision. The Department of Agriculture, nonetheless, brought an action to disqualify the defendant's store from the food stamp program, using the transaction reports. The Tenth Circuit upheld the admission of the reports under the business records exception, relying on *Abdel v. United States,*[105] an almost identical Seventh Circuit case. The Tenth Circuit stated, "This conclusion is consistent with numerous cases holding that records and reports, prepared in the regular course of federal agency law enforcement investigations, are admissible *under hearsay exceptions.*"[106] The opinion then cited several cases, without indicating whether the basis for admission was Rule 803(6) or Rule 803(8).

Both sections allow the admission of reports of regularly conducted activity and both give the trial court discretion to exclude reports where the sources of information or other circumstances indicate lack of trustworthiness. It may make little difference which rule is invoked. However, there is no explanation in the opinion why the business records exception was chosen instead of the governmental records exception when the report in question was of the latter type.

Finally, an appropriate and useful deployment of the residual exception[107] to the rule against hearsay occurred in *United States v. Treff.*[108] In that case, the defendant, a former IRS employee, allegedly killed his wife, took his children to a motel, then drove to the home of his former supervisor at the IRS and threw a molotov cocktail on the roof. Defendant was convicted of an attempt to kill the supervisor, among other charges. Defendant and his wife had marital difficulties, and on advice

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agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases, matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation make pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

104. 930 F.2d 816 (10th Cir. 1991).

105. 670 F.2d 73 (7th Cir. 1982).

106. *Haskell,* 930 F.2d at 819 (emphasis added).

107. FED. R. EVID. 803(24) and FED. R. EVID. 804(b)(5). These rules allow the admission of evidence of otherwise admissible if the court finds:

(A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

108. 924 F.2d 975 (10th Cir. 1991).

of her lawyer, she had been keeping a diary of her husband's conduct. Investigators found the diary with an entry made the day before she was killed: "Robert . . . still angry and upset mood. Finally asked if state would pay medical bills if he committed himself because he wanted to kill self and Fay."[109] (Fay was defendant's supervisor.) The wife's handwriting was identified by her sister, and the prosecution sought its admission to prove intent to kill the supervisor.

After eliminating the possibility that marital privilege might exclude the evidence,[110] the trial court found that the diary had circumstantial guarantees of trustworthiness and that the prosecution provided adequate notice to defense counsel of his intent to use the diary entry at trial. The Tenth Circuit opinion agreed with the trial court's conclusions without much comment and the conviction was affirmed.

## CONCLUSION

The Tenth Circuit's evidence jurisprudence consistently utilizes all the mechanisms available to avoid reversing trial court rulings on evidentiary matters. These mechanisms serve the interests of efficiency and also the interests of justice when the case as a whole is not affected by the erroneous admission or exclusion of evidence. However, care must be taken lest the easy litanies of the plain and harmless error rules result in the sacrifice of meaningful appellate enforcement of the rules of evidence. Without appellate guidance, the trial courts' exercises of discretion are effectively insulated from review altogether. Then the Rules of Evidence themselves will matter very little.

109. *Id.* at 982.
110. *Id.*