3. Government introduced certificate in ***Neff*** case -- BUT government also had custodial witness testify that search made of National Computer Center where all tax information is recorded "for every individual in the nation."

4. *Held*: Certificate admissible under Rule 803(10) -- no violation of confrontation clause

   See also ***United States v. Bowers***, 920 F.2d 220, 223 (4th Cir. 1990)
   United States v. Spine, 945 F.2d 143, 148-49 (6th Cir. 1991);

NOTARIZED AFFIDAVIT ADMITTED
Rules 803(10), 902(8)

1. ***United States v. M'Biye***, 655 F.2d 1240, 1241-42 (D.C. Cir. 1981) (Per Curiam) -- excellent example of what you can do beyond a simple "No".

2. Charged 18 U.S.C. § 1014 -- making false statement on bank loan application -- defendant said he worked for the United Nations.

3. Affidavit by personnel officer of United Nations Secretariat that defendant did not work for United Nations

4. *TAKE A LOOK AT AFFIDAVIT* -- ***M'Biye***, 655 F.2d at 1242 -- it will make you think.

5. *Note*: affidavit sworn to before a notary therefore self-authenticating under Rule 902(8)

EXAMPLES -- PROOF OF
NEGATIVE IN CRIMINAL TAX CASES
Rules 803(7), 803(10)

1. No record of incorporation or filing of corporate report.

2. No record of property owned or of property taxes paid.

3. No probate record.

4. No record of savings bonds.

5. No record of birth, marriage, death, *see* Rule 803(12).

6. No record of earnings -- government worker (Rule 803(10)); private employee (Rule 803(7)).

7. No record of insurance policy.

8. No record of stock purchased or sold.

9. No record of fire, theft, or police complaint.

10. No record of earnings -- Social Security.

11. No record of purchase, sale, or cancellation of an order.
12. No record of car being rented, or purchased, or repaired.
13. No record of bank account, deposit, check issued, or loan.
14. No record of staying at hotel, being on a plane, church pledge, membership in union and similar items.
15. No record of filing an income tax return, an S.E.C. registration statement, an oil and gas report

PUBLIC RECORDS AND REPORTS
RECORDED DOCUMENTS

APPLICABLE RULES

1.	Admissibility of public records	Rule 803(8)
2.	Proof of negative - discussed previously	Rule 803(10)
3.	Admissibility of records of documents affecting property	Rule 803(14)
4.	Authenticity -- recorded, filed or from a public office	Rule 901(7)
5.	Self-authenticated copies	Rule 902(1)-(5)
6.	Authenticity -- statutory methods	Rule 901(10)
7.	Evidence of contents -- original not required	Rule 1005

ADMISSIBILITY AND CERTIFICATION OF PUBLIC -- OFFICIAL RECORDS

1. The Federal Rules of Evidence and numerous statutes provide for the *admission of public records as an exception to the hearsay rule*.
2. Custody establishes authenticity.
3. Public records must still meet tests of admissibility, *e.g.*, relevancy, hearsay, privilege, etc.
4. Rules provide for certification of copies of public records by the appropriate officer.
5. *Point*: certification "establishes" authenticity without calling a witness; it does not confer *admissibility upon a public record*.

PUBLIC -- RECORDED RECORDS -- MEANING

1. Governmental documents -- federal and state.

2. Activities of public office -- documents containing factual matter to which public official could testify if called as a witness:

   A. Rule 803(8), Fed. R. Evid.

   B. Cases:

      United States v. Ream, 491 F.2d 1243, 1246-47 (5th Cir. 1974)

      Yaich v. United States, 283 F.2d 613, 618 (9th Cir. 1960)

      Johnson v. United States, 285 F.2d 700, 701-02 (9th Cir. 1961)

      Williamson v. Union Oil Co., 125 F. Supp 570, 572 (D. Colo, 1954)

3. Records of vital statistics, IF public record made under requirements of law -- Rule 803(9), Fed. R. Evid.:

   A. Can establish birth, death, marriage, etc.

   B. Easy way to establish -- certify document

4. *Recorded documents* -- documents customarily recorded or authorized by law to be kept in a public office or agency of the United States and any state, territory or possession:

   A. Rule 803(14), Fed. R. Evid. -- documents affecting an interest in property

   B. Rule 1005, Fed. R. Evid. -- contents of public records

5. *Official records*:

   A. Often used interchangeably with "public document"

   B. Entitled to presumptions of regularity and validity:

      United States v. Rogers, 454 F.2d 601, 604 (7th Cir. 1971)

   C. An official document is one executed by a government employee in the course of performing his duties:

      United States v. Aluminum Co. of America 1 F.R.D. 71 (1939)

6. *Official publications* -- books, pamphlets, or other publications *purporting* to be issued by public authority -- Rule 902(5), Fed. R. Evid.

7. *Foreign records* can be public records and come under public records exception rules:

A. *See* ***United States v. Regner***, 677 F.2d 754, 762 (9th Cir. 1982) (dissent), "courts regularly admit foreign documents pursuant to these exceptions [Rules 803(6), 803(7), 803(8) and 803(10)]", and cases cited

B. United Nations Secretariat -- United Nations is a "public office or agency" within the meaning of Rule 803(10)

United States v. M'Biye, 655 F.2d 1240, 1242 (D.C. Cir. 1981) (Per Curiam)

EXAMPLES
PUBLIC/OFFICIAL RECORDS

-Recorded deeds and mortgages -- ownership and liability

-Books, pamphlets, etc., published by government printing office

-Probate records -- ownership, financial position

-Bankruptcy records -- financial position

-Income tax returns -- state and federal

-Water and light payments -- IF maintained by public entity

-Motor vehicle titles and personal property -- ownership (liens)

-Records of convictions

-Birth, marriage, and death records

-Articles of incorporation filed in recorder's office

HEARSAY EXCEPTION --
ADMISSIBLE -- PUBLIC RECORDS
IN ANY FORM REFLECTING
Rule 803(8), Fed. R. Evid.

1. Records, reports, statements, or data compilations, in any form, of public offices or agencies, are *not excluded by the hearsay rule* which set forth:

A. the activities of the office or agency, or

B. a matter 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 made pursuant to authority granted by law,

unless the sources of information or other circumstances indicate lack of trustworthiness

GENERAL COMMENT
Rule 803(8), Fed. R. Evid.

1. *Exception to hearsay rule* -- admits records of public offices and agencies; equivalent for private business records is Rule 803(6).

2. Not necessary to lay business records foundation -- merely establish document is a public record, *e.g.*, from public office or agency and reflects the activities of the office or agency:

   United States v. Farris, 517 F.2d 226, 229, n.2 (7th Cir.), *cert. denied*, 423 U.S. 892 (1975)

   United States v. Regner, 677 F.2d 754, 761 (9th Cir. 1982) (dissent)

3. But must still show document is authentic, relevant, etc., and otherwise admissible:

   United States v. Jones, 958 F.2d 520, 521 (2d Cir. 1992)

ACTIVITIES OF OFFICE OR AGENCY
Rule 803(8)(A), Fed. R. Evid.

1. "Admissibility" of records of activities of office or agency.

2. *Examples*:

   A. Treasury records of receipts and disbursements:

      Chesapeake & Delaware Canal Co. v. United States, 250 U.S. 123 (1919)

   B. Selective Service records:

      United States v. Ream, 491 F.2d 1243, 1246-47 (5th Cir. 1974)

      United States v. Hudson, 479 F.2d 251, 253 (9th Cir. 1972)

   C. *Checks* issued by Ohio Bureau of Workmen's Compensation in tax evasion case -- - admissible under either Rule 803(6) or 803(8):

      United States v. Hans, 684 F.2d 343, 346 (6th Cir. 1982)

   D. *Judgement and commitment order* relating to criminal conviction and *receipt for a prisoner* from the marshal:

      United States v. Wilson, 666 F.2d 1241, 1248 n.2 (9th Cir. 1982)

3. Records of public schools and hospitals also included -- fall under Rule 803(6):

A. Conference Report No. 93-1597, 93d Cong., 2d Sess., United States Code Congressional and Administrative News (1974), p. 7104

4. *Criminal failure to file case*: Service Center records, technically not necessary to lay a business records foundation -- they are government public records and admissible under Rules 803(8) and 803(10):

United States v. Farris, 517 F.2d 226, 229 n.2 (7th Cir.), *cert. denied*, 423 U.S. 892 (1975)

PUBLIC RECORDS AND REPORTS
OF FOREIGN GOVERNMENTS
Rule 803(8)(a), Fed. R. Evid.

1. Rule 803(8)(a) is not limited to domestic records -- applies to foreign records also.

2. *See* for example:

United States v. Grady, 544 F.2d 598, 604 (2d Cir. 1976) (records of Royal Ulster Constabulary)

United States v. Rodriguez Serrate, 534 F.2d 7, 10 (1st Cir. 1976) (Dominican identification card, birth certificate, military records, death certificate, passport records and demographic registry)

MATTERS OBSERVED -- DUTY TO REPORT
Rule 803(8)(b), Fed. R. Evid.

1. Does *not* include random observations of public official; relates to matters observed pursuant to general duties of official.

2. *Examples* of matters included:

A. Weather Bureau records of rainfall

Minnehaha County v. Kelley, 150 F.2d 356, 360 (8th Cir. 1945)

Flythe v. United States, 405 F.2d 1324, 1325-26 (C.A. D.C., 1968)

B. Letter from induction officer to District Attorney pursuant to regulations
United States v. Van Hook, 284 F.2d 489, 491 (7th Cir. 1960), *remanded for resentencing*, 365 U.S. 609 (1961)

BUT NOT ADMISSIBLE IN CRIMINAL CASES:
Rule 803(8)(b), Fed. R. Evid.

1. "*Matters observed by police officers and other law enforcement personnel*."
2. FBI reports, special agent's report in tax cases, and the like, NOT admissible -- usually at the instance of the government.
3. *Adversarial nature of criminal cases* -- police observations at scene of crime not as reliable as observations by public officials in other cases because of adversarial nature of confrontation between the police and defendant in criminal case:

   S.Rep. No. 93-1277 on HR 5463, United States Code Congressional and Administrative News (1974), p. 7064
4. *Point*: reports are deemed partisan, lack inherent trustworthiness.
5. Report of government chemist -- *see* ***United States v. Oates***, 560 F.2d 45, 66 (2d Cir. 1977) (case contains an interesting discussion of Rule 803(8) and congressional intent, BUT reaches a strained result; report of government chemist excluded) -- compare to cases ahead

RECORDS OF
NON-ADVERSARIAL MATTERS -- NOT EXCLUDED
Rule 803(8)(b), Fed. R. Evid.

1. Marshal's return of service admissible under Rule 803(8)(b):

   United States v. Union National de Trabajadores, 576 F.2d 388, 391 (1st Cir. 1978)
2. Irish police records reflecting serial numbers and receipt of weapons found in Northern Ireland not excluded by Rule 803(8)(b) -- these were not observations by police of commission of crimes

   United States v. Grady, 544 F.2d 598, 604 (2nd Cir. 1976)
3. Serial number report of Bureau of Alcohol, Tobacco and Firearms to establish that firearm travelled in interstate commerce was admissible -- kept in a ministerial fashion, pursuant to legal authority and not in anticipation of trial

   United States v. Johnson, 722 F.2d 407, 410 (8th Cir. 1983)
4. "Congress did not intend to exclude records of routine, non-adversarial matters" -- customs records of license plates of cars crossing border made by law enforcement personnel, admissible

   United States v. Orozco, 590 F.2d 789, 793 (9th Cir. 1979)

FACTUAL FINDINGS OF INVESTIGATION MADE PURSUANT TO LAW
Rule 803 (8)(c), Fed. R. Evid.

1. *ADMISSIBLE*: *IN CIVIL CASES AND ONLY AGAINST THE GOVERNMENT IN CRIMINAL CASES*.

2. Refers to so-called investigative or evaluative reports -- a controversial section.

3. Rule only applies to investigations made *pursuant to authority granted by law*:

   A. Private investigations are not included

   B. Official state investigations could be admissible

4. *ADMISSIBILITY LIMITED TO FACTUAL FINDINGS* -- Rule 803(8)(c):

   A. *House*: "The Committee intends that the phrase, 'factual findings,' be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this rule."

      House Rep. No. 93-650 on H.R. 5463, U.S.C. Congressional and Administrative News (1974), p. 7088

   B. *Senate*: The Committee takes strong exception to the House limiting the application of the rule. Types of reports recognized by Congress (*e.g.*, 7 USC 78, Finding of Sec. of Agriculture prima facie evidence of true grade of grain) indicates type of reports intended to be admissible -- can always exclude if found not trustworthy

      Senate Rep. No. 93-1277 on H.R. 5463, U.S.C. Congressional and Administrative News (1974), p. 7064

   C. *Conference Report* -- Silent on this point:

      Conference Rep. No. 93-1597 on H.R. 5463, U.S.C. Congressional and Administrative News (1974), p. 7098

5. IRS computer printout with coded notation that defendant told unidentified IRS official he was not required to file a corporate return -- error to admit against the defendant. *See* ***United States v. Ruffin***, 575 F.2d 346, 355 (2d Cir. 1978):

   A. Rule 1005, Fed. R. Evid. admits copies, BUT only if the contents of the original record are otherwise admissible

   B. *Hearsay* -- not admissible under Rule 803(8) -- matter observed by law enforcement personnel

   C. *Note*: better reason would seem to be lack of identity of person who took report, *i.e.*, how can it be said it was the defendant who spoke, etc.

6. Admissible on behalf of defense -- police report and transcript of police broadcast"

United States v. Smith, 521 F.2d 957, 963-64 (D.C. Cir. 1975)

FACTUAL FINDINGS --
UNLESS CIRCUMSTANCES
INDICATE LACK OF
TRUSTWORTHINESS
Rule 803(8)(c)

1. IF *sources* of information or other circumstances indicate lack of trustworthiness, then factual finding is *NOT* admissible against government.
2. This is the escape clause -- always consider in criminal case whether a factual finding in a report is "trustworthy."
3. Trustworthiness is tested by factors such as:

   A. Timeliness of investigation
   B. Special skill or experience of official
   C. Whether a hearing was held and level at which conducted
   D. Possible problem of motive or bias

      Adv. Comm. Note to Rule 803(8), 51 F.R.D. 315, 431

   E. Finding not supported by sufficient data

4. Judge "must" exclude report unless she can find sources of information and other circumstances indicate report is trustworthy.
5. S.E.C. release concerning stock controlled by one of defendants excluded as hearsay -- "not a determination of facts obtained after administrative proceedings":

   United States v. Corr, 543 F.2d 1042, 1050-51 (2d Cir. 1976)

RECORDED DOCUMENTS
AFFECTING AN INTEREST
IN PROPERTY
Rule 803(14), Fed. R. Evid.

1. Authorized recorded document affecting an interest in property is "admissible" as:

   A. Proof of contents of original document

   B. Proof of execution and delivery by each person executing the document

2. Covers records such as deeds, mortgages, leases, land contracts.
3. Eliminates objections such as: signature not proved; delivery of instrument not established, etc.

4. *Confined to recorded documents* from public office authorized for recording.

5. Mortgage recorded in land office falls within Rule 803(14), Fed. R. Evid.

   United States v. Ruffin, 575 F.2d 346, 357 (2d Cir. 1978)

6. *Proof of marriage*: evidence included recitals in two warranty deeds executed as husband and wife, ***Compton v. Davis Oil Co.***, 607 F. Supp. 1221, 1228 (D. Wyo. 1985):

   > Recitals contained in ancient documents, and in documents and records affecting interests in property are admissible as proof of the matters asserted, and constitute strong evidence concerning such matters. *See* Fed. R. Evid. 803(14), (15), and (16)

7. *Tax evasion case*: Government expert's testimony as to what various records in county clerk's office said held improper -- documents were not introduced:

   United States v. Ruffin, 575 F.2d 346, 357 (2d Cir. 1978) (can't merely have a witness testify (hearsay) as to contents of document -- Rule 803(14) applies to recorded documents)

8. DISTINGUISH: Witness can testify that copy is a true copy of an official record or recorded document -- But document "testifies" as to contents, *not* witness -- Rule 1005, Fed. R. Evid.

STATEMENTS IN DOCUMENTS
AFFECTING AN INTEREST IN PROPERTY
Rule 803(15), Fed. R. Evid.

1. Statements in documents affecting an interest in property if relevant to purpose of documents and subsequent dealings with property are not inconsistent with documents:

   Compton v. Davis Oil Co., 607 F. Supp. 1221, 1229 (D. Wyo. 1985) (acted as if title in heirs for thirty-seven years)

2. Rule applies to document itself.

3. Not necessary that document be recorded.

4. Do not have to produce witnesses to transaction -- merely authenticate document.

RESIDUAL HEARSAY EXCEPTION
Rule 803(24), Fed. R. Evid.

1. Creates a general exception to the inadmissibility of hearsay when there are adequate "circumstantial guarantees of trustworthiness."

2. Requires that the proponent give notice of its intention to specifically rely on 803(24) as grounds for admissibility.

3. *Examples*:

   Bank Records -- provides circumstantial guarantees of trustworthiness because the banks and their customers rely on their accuracy in the course of their business

4. ***United States v. Pelullo***, 964 F.2d 193, 202 (3d Cir. 1992)

AUTHENTICITY

REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION Rule 901(a), Fed. R. Evid.

1. Must establish that evidence is genuine and it is what you claim it is, *i.e.*, that it is authentic.

2. Authentication is "(a) . . . satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims":

   A. Rule 901(a), Fed. R. Evid.

   B. Rule 104(b), Fed. R. Evid.

3. Sufficiency of the authentication of a document rests in the sound discretion of the trial court and will not be revised absent an abuse of discretion

   United States v. Spetz, 721 F.2d 1457, 1476 (9th Cir. 1983)

4. Judge makes preliminary determination as to whether jury could find evidence authentic.

5. IF "yes," then evidence goes to jury and jury ultimately decides authenticity -- not the court:

   United States v. Jardina, 747 F.2d 945, 951 (5th Cir. 1984)

METHODS OF AUTHENTICATING Rule 901(b), Fed. R. Evid.

1. Rule 901(b) sets forth ten (10) ways to authenticate, including:

   Rule 901(b)(1) -- Testimony of witness with knowledge

   Rule 901(b)(2) -- Nonexpert opinion on handwriting -- layperson can give opinion on handwriting if proper foundation laid

   Rule 901(b)(4) -- Distinctive characteristics and the like

   Rule 901(b)(7) -- Public records or reports

   Rule 901(b)(10) -- Methods provided by statute or rule

PRIMA FACIE SHOWING
Rule 901(b), Fed. R. Evid.

1. Not limited to ten methods listed in Rule 901.
2. Point -- any admissible evidence that will prove a document, a voice, a writing, etc. is what you claim it is -- prima facie showing of authenticity.
3. *Repeat*: once prima facie showing of a document's authenticity is made then it goes to jury, not the court, for a factual determination of whether the documentis authentic:

   United States v. Goichman, 547 F.2d 778, 784 (3d Cir. 1976)

   United States v. Jardina, 747 F.2d 945, 951 (5th Cir. 1984)

CHAIN OF CUSTODY

1. Documentary evidence -- general rule, not necessary to show chain of custody.
2. *Example*: makes no difference whether contract held or transferred to A, B, or C -- question is whether signatures are genuine or not.
3. *Example -- exceptions*: Place from where search warrant material taken, or whether records obtained from defendant or his bookkeeper, or where counterfeit bills obtained -- chain of custody or location of evidence can be helpful in establishing authenticity.
4. "[P]roof of private custody together with other circumstances is frequently strong circumstantial evidence of authenticity."

   United States v. Bruner, 657 F.2d 1278, 1284 (D.C. Cir. 1981) (testimony of D.E.A. agent as to prescriptions obtained from office of doctor via subpoena plus other testimony as to nature of records)
5. *Tax case*: records often obtained from office of defendant.

AUTHENTICATION:
DISTINCTIVE CHARACTERISTICS AND THE LIKE
Rule 901(b)(4)

1. This section says you can use circumstances to show an item is genuine.
2. The it-walks-like-a-duck, quacks-like-a-duck, looks-like-a-duck, then-it is-a-duck approach.
3. Two notebooks detailing heroin transactions -- contents and circumstances used to support inference that apartment was scene of drug sales:

A. Not hearsay -- not offered for truth of contents but only to show apartment was scene of drug operation

United States v. Wilson, 532 F.2d 641, 646 (8th Cir. 1976)

B. *Contents* -- only person familiar with deals could have written entries

C. Notebooks found in apartment frequented by two alleged conspirators

D. Unusual hole in door of apartment described by informant

E. Known co-conspirator in apartment during drug raid

F. Notebooks in code and informant testified defendant's drug transactions recorded in code in notebooks

G. Writer obviously familiar with the procedures used in drug operation

4. Income tax returns used as exemplars of handwriting and as basis for expert testimony on handwriting:

United States v. Mangan, 575 F.2d 32, 37, 41-42 (2d. Cir. 1978)

5. Ledger seized in defendant's residence and writer of entries unknown held authenticated on basis of contents, use of gambling terms, found in defendant's home, had fingerprints of two codefendants on it and names in ledger corresponded to the participants in the enterprise:

United States v. Helmel, 769 F.2d 1306, 1312 (8th Cir. 1985)

6. Writing on letterhead paper sufficient to authenticate under Rule 901(4) absent suspicious circumstances or counterproof:

California Ass'n of Bioanalysts v. Rank, 577 F. Supp. 1342, 1355 n.23 (C.D. Cal. 1983)

7. *Point*: Look to appearance, contents, and surrounding circumstances.

8. *Mail fraud case*: no chain of custody as to letters in exclusive possession of government for five years does not raise issues as to authenticity; original and copies held authentic on basis of appearance, contents and circumstances:

United States v. Georgalis, 631 F.2d 1199, 1205 (5th Cir. 1980)

AUTHENTICATION
PUBLIC RECORDS OR REPORTS
Rule 901(b)(7). Fed. R. Evid.

1. Evidence that a writing authorized by law to be recorded is in fact recorded; or that a purported public record is from a public office.
2. *One procedure*: call witness, *e.g.* recorder of deeds testifies as to nature of his office, records authorized to be filed, and that he is producing a true copy of deed, mortgage, etc.
3. *NOTE*: Usual procedure is to go via certification rather then witness -- *see ahead*.
4. BUT witness procedure is available and may be best where speed required and no time to certify; or witness can add color.

AUTHENTICITY VIA STATUTE

AUTHENTICATION MAY BE
BY STATUTORY METHODS
Rule 901(b)(10), Fed. R. Evid.

1. Any method of self-authentication provided by statute or other rules prescribed by Supreme Court pursuant to statutory authority.
2. *Example*: procedure for authenticating under Rule 44(a), Fed. R. Civ. P., made applicable to criminal cases by Rule 27, F. R. Crim. P., remains in effect.
3. Numerous statutes provide for authenticating procedures.

STATUTORY AUTHENTICATION
Rule 901(b)(10)

1. Type and procedure is set forth in statutes:

26 U.S.C. § 6103(p):	Internal Revenue Service documents
28 U.S.C. § 753(b):	Proceedings by official court reporter -- transcript certified by official reporter deemed *prima facie* correct
28 U.S.C. § 1733:	Government records
28 U.S.C. § 1734:	Court records -- lost or destroyed
28 U.S.C. § 1735:	Court records lost or destroyed where United States is a party

28 U.S.C. § 1738:	State statutes and judicial proceedings, *i.e.*, records and judicial proceedings of any court of any state
28 U.S.C. § 1739:	State -- non-judicial records or books kept in any public office of a state, territory or possession
42 U.S.C. § 3505:	Social Security record
44 U.S.C. § 3104:	Certification of transferred documents
47 U.S.C. § 412:	Records and reports of F.C.C.

2. Statutes remain in effect and public records properly certified are self-authenticating:

   Rule 902(4), Fed. R. Evid.

3. Number of departments and agencies have specific statutes for use of records and documents in litigation.

4. Each department and agency will usually have forms and a certification procedure.

5. *Example*: Certified Social Security record:

   42 U.S.C § 3505 -- authenticated by seal, copies admissible

6. For a list of over fifty statutes authorizing judicial notice of the seals of various United States Departments and agencies, *see* ***Weinstein's Evidence***, ¶ 90l(b)(10)[01] n.6

7. *Example* -- Tax Division, Department of Justice: Administrative officer of division will furnish certified copies of documents in Tax Division files:

   28 U.S.C. § 502 -- seal of Department of Justice

   Rule 902(1) -- seal purporting to be seal of United States, no extrinsic evidence required

8. *Allow plenty of time -- stress certification needed for litigation purposes.*

INCOME TAX RETURNS -- CERTIFICATION

1. Reproductions of returns and return information properly authenticated are admissible same as original -- 26 U.S.C. § 6103(p)(2)(C).

2. Authentication by certification -- District Director and Directors of Service Centers have seals of office and can certify returns and other documents in their custody for any purpose where certification is required:

   A. 26 U.S.C. § 7514 -- seal of office

   B. Treas. Reg. § 301.7514(c) (26 C.F.R.)

3. *See* prior discussion re introduction of tax returns at trial and statutory presumption re signature on return.

SELF-AUTHENTICATION
Rule 902, Fed. R. Evid.

1. Document is accepted as prima facie genuine -- witness is not needed.
2. No further evidence of authenticity is needed.
3. Document proves itself.
4. But still up to jury to decide if document is genuine:

   United States v. Jardina, 747 F.2d 945, 951 (5th Cir. 1984)

TEN TYPES OF DOCUMENTS
MADE SELF-AUTHENTICATING
Rule 902, Fed. R. Evid.

Rule 902(1)	Domestic public documents under seal
Rule 902(2)	Domestic public documents not under seal
Rule 902(3)	Foreign public documents
Rule 902(4)	Certified copies of public records
Rule 902(5)	Official publication
Rule 902(6)	Newspapers and periodicals
Rule 902(7)	Trade inscriptions and the like
Rule 902(8)	Acknowledged documents
Rule 902(9)	Commercial paper and related documents
Rule 902(10)	Presumptions under Acts of Congress

AUTHENTICATION OF PUBLIC RECORDS
BY CERTIFICATION

1. CANNOT BE USED *FOR PRIVATE DOCUMENTS* -- only available for governmental records, *i.e.*, public records, official records, and recorded instruments.
2. Provides method for certifying as to authenticity.
3. *Self-authenticating*: document treated as prima facie genuine.

4. *certified*: self-authenticating, not necessary to produce a witness -- the certificate is the witness.

5. Eliminates need for a witness where document speaks for itself, *e.g.*, deed, mortgage, judgment.

6. Moves trial faster.

7. Can move admission when logically, chronologically, or tactically appropriate.

8. *CERTIFICATION -- VOLUNTARY PROCEDURE -- CAN ALWAYS CALL A WITNESS*

DISTINGUISH:
AUTHENTICITY vs. ADMISSIBILITY

1. Authentication of a document does not mean it is admissible -- may be barred by hearsay rule, privileges, prejudice outweighs probative value, irrelevant, etc.

2. Rules only provide a method of authenticating a document, a telephone conversation, etc.

   See ***United States v. Verville***, 355 F.2d 527, 530 n.5 (7th Cir. 1965) (Rule 27 Fed. R. Crim. P., BUT principle applies to authentication versus admissibility)

3. Must still lay a foundation for admissibility.

4. Certification is merely evidence that document is genuine.

SELF-AUTHENTICATING
CERTIFIED PUBLIC DOCUMENTS AND RECORDS
Rules 902(1) thru 902(4), Fed. R. Evid.

1. No further evidence of authenticity required.

2. *Domestic public documents bearing a public seal and signature*
   Rule 902(1):

   A. Includes seals of United States, states and public offices having a seal, *i.e.*, political subdivisions, departments, officers and agencies

   B. Numerous sections of United States Code provide for judicial notice of official seals

   C. Signature with seal of office is enough

      United States v. Moore, 555 F.2d 658, 661 (8th Cir. 1977)

      United States v. Trotter, 538 F.2d 217, 218 (8th Cir.), *cert. denied*, 429 U.S. 943 (1976) (motor vehicle registration record)

3. *Domestic public documents not under seal* -- Rule 902(2):

   A. Applies to documents signed in person's official capacity where public officer or employee has no seal of office

   B. Public officer with seal and duties in district must then certify under seal that signer has official capacity (is custodian) and that the signature is genuine

      Hunt v. Liberty Lobby, 720 F.2d 631, 651 (11th Cir. 1983) (CIA affidavits by custodian of records and certification of general counsel with CIA seal that affiants occupied the position stated in the affidavits)

4. *Foreign public documents* -- Rule 902(3):

   A. Procedure set forth for certifying foreign documents

   B. Procedure is time-consuming and cumbersome

   C. Procedure modeled on Rule 44(a)(2) of Federal Rules of Civil Procedure

   D. *Conviction reversed*: Record of convictions in Israel not properly certified -- aura of authenticity is not enough -- testimony of INS Agent did not establish that certificate was signed by one acting in official capacity who was authorized to sign

      United States v. Perlmuter, 693 F.2d 1290, 1292 (9th Cir. 1982)

      Compare, ***United States v. Regner***, 677 F.2d 754, 757-59 (9th Cir. 1982)

5. *Certified copies of public records* -- Rule 902(4):

   A. Provides for authentication of copies of public records when properly certified

   B. Applies to documents authorized to be recorded and filed and actually recorded or filed in public offices, *e.g.*, deeds, mortgages, etc.

   C. Certification may be via Rule 902(1), (2) or (3); OR BY ANY ACT OF CONGRESS or rule adopted by the Supreme Court

   D. *If custodian has a seal of office*, then her certification under seal that she has custody and the copy is correct is enough -- BUT

   E. *If custodian has no seal*, then in addition to certification of custodian, a public officer must certify under her seal that the signor is the custodian and the signature of the custodian is genuine

   F. This is basically the procedure of Rule 44(a) of the Federal Rules of Civil Procedure made applicable to criminal cases by Rule 27, Fed. R. Crim. P.

CASE EXAMPLES
Rule 902, Fed. R. Evid.

1. Registration record of stolen vehicle admitted to show it was not registered in the name of the defendant:

   United States v. Trotter, 538 F.2d 217, 218 (8th Cir.), *cert. denied*, 429 U.S. 943 (1976) (Rule 902(1) and 28 U.S.C. § 1739)

2. Federal Deposit Insurance Corporation certificate admitted in bank robbery case -- F.D.I.C. is an agency of the United States and testimony that F.D.I.C. certificate bearing purported seal of F.D.I.C. was hanging on the wall of the bank was enough:

   United States v. Wingard, 522 F.2d 796, 797 (4th Cir. 1975), *cert. denied*, 423 U.S. 1058 (1976)

3. Certified transcript of testimony of one of defendants at a prior hearing -- certified court transcript read at trial:

   Anderson v. United States, 417 U.S. 211, 220 n.11 (1974)

4. IRS Certificate of Assessments and Payments -- no tax returns filed:

   United States v. Neff, 615 F.2d 1235, 1241 (9th Cir. 1980), *cert. denied*, 447 U.S. 925 (1980) (document showing no filing was made and preserved by the IRS, "a public office or agency," and was evidence in the form of a certification in accordance with Rule 902(4) and (1))

SELF-AUTHENTICATING
ACKNOWLEDGED -- NOTARIZED DOCUMENTS
Rule 902(8), Fed. R. Evid.

1. In almost every state, acknowledged title documents are receivable in evidence *without further proof*:

   See 5 Wigmore 1676

2. Self-authenticating -- any document with a certificate of acknowledgement executed by a notary or other officer as provided by law.

3. *Note*: not limited to title documents.

4. *A very important rule*: means you may not need a witness if document speaks for itself.

EXAMPLE
NOTARIZED DOCUMENT ADMITTED
Rules 803(10) and 902(8), Fed. R. Evid.

1. Criminal charge of making false statements to a Federally insured bank, *i.e.*, defendant said he worked for United Nations.
2. Affidavit of U.N. official stating defendant did not work for United Nations was admissible as public record -- proof of a negative under Rule 803(10).
3. BUT problem was how could affidavit be authenticated -- Rules 902(1) and 901(2) are limited to *domestic* entities.
4. *Solution By Court*: affidavit was notarized in New York by a notary public and was self-authenticating:

   See ***United States v. M'Biye***, 655 F.2d 1240, 1241-42 (C.A. D.C., 1981)

SELF-AUTHENTICATING
COMMERCIAL PAPER AND RELATED DOCUMENTS
Rule 902(9), Fed. R. Evid.

1. Self-authentication, Rule 902(9): Commercial paper and related documents. -- Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.
2. A very important rule.
3. Makes promissory notes, checks, bills of exchange and other commercial documents self-authenticating.
4. *Note* rule also applies to signatures on commercial documents.
5. No witness needed to establish authenticity.

GENERAL COMMERCIAL LAW
UNIFORM COMMERCIAL CODE
Rule 902(9), Fed. R. Evid.

1. "General commercial law" -- Committee intends that the Uniform Commercial Code (UCC) will be followed generally:

   A. House Report No. 93-650, Rule 902(a), 28 U.S.C.A. Fed. R. Evid., Legislative History, p. 652

   B. Advisory Committee Note to Rule 902(9)

2. Uniform Commercial Code has been adopted by all states except Louisiana, which has adopted only Articles 1, 3, 4 and 5:

   See ***Weinstein's Evidence*** ¶ 902(9)[01] n.1

PERTINENT PROVISIONS OF
UNIFORM COMMERCIAL CODE (UCC)
Rule 902(9), Fed. R. Evid.

1. *Section 1-202. Prima Facie Evidence by Third Documents*

   A document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party shall be prima facie evidence of its own authenticity and genuineness and of the facts stated in the document by the third party.

2. *Section 3-307. Burden of Establishing Signatures Defenses and Due Course.*

   (1) Unless specifically denied in the pleadings each signature on an instrument is admitted. When the effectiveness of a signature is put in issue,

   (a) the burden of establishing it is on the party claiming under the signature; but

   (b) the signature is presumed to be genuine or authorized except where the action is to enforce the obligation of a purported signer who has died or become incompetent before proof is required.

3. *Section 3-510. Evidence of Dishonor and Notice of Dishonor*

   The following are admissible as evidence and create a presumption of dishonor and of any notice of dishonor therein shown:

   (a) a document regular in form as provided in the preceding section which purports to be a protest;

   (b) the purported stamp or writing of the drawee, payor bank or presenting bank on the instrument or accompanying it stating that acceptance or payment has been refused for reasons consistent with dishonor;

   (c) any book or record of the drawee, payor bank, or any collecting bank kept in the usual course of business which shows dishonor, even though there is no evidence of who made the entry.

4. *Section 8-105. Securities Negotiable; Presumptions*

   (2) In any action on a security

> (a) Unless specifically denied in the pleadings, each signature on the security or in a necessary endorsement is admitted;
>
> (b) when the effectiveness of a signature is put in issue the burden of establishing it is on the party claiming under signature but the signature is presumed to be genuine or authorized; . . . .

CASE EXAMPLE -- Rule 902(9)
PROMISSORY NOTE
Rule 902(9), Fed. R. Evid.

1. ***United States v. Carriger***, 592 F.2d 312, 316 (6th Cir. 1979):

   A. *Tax evasion case* -- net worth method proof and defendant attacked opening net worth on grounds it was error to exclude promissory note to show defendant made loans and thus had non-income funds in prosecution year

   B. *Held*: Conviction reversed, notes were self-authenticating, and relevant and signatures on notes are presumed genuine

2. Relevant because the government's opening net worth contained no indebtedness from Vernon Carriger to the defendant and "the notes at least had a tendency to make more probable the fact so claimed by the defendant that the defendant's opening net worth was inaccurate." Rule 402, Fed. R. Evid.

3. Authentic because "the notes were sufficiently identified as promissory notes by their production and no further authentication was required by reason of an applicable provision for self-authentication in Rule 902(9), Fed. R. Evid.":

   United States v. Carriger, 592 F.2d at 316

4. "No testimony required to establish genuineness of the signatures on the notes. . . UCC § 3-307 creates a presumption that commercial paper offered in evidence is authentic ...."

   United States v. Carriger, 592 F.2d at 316

CASE EXAMPLE -- Rule 902(9)
CHECKS SELF-AUTHENTICATING

1. ***United States v. Little***, 567 F.2d 346, 349 n.1 (8th Cir. 1977), *cert. denied*, 435 U.S. 969 (1978):

   A. Mail fraud conviction - check kiting scheme

   B. Checks drawn on corporate accounts admitted into evidence

C. "The court also did not err in admitting the corporate checks into evidence. The checks were relevant, admissible under Federal Rule of Evidence 902(9) as commercial paper or as an exception to the hearsay rule under Rule 803, and did not unfairly prejudice the defendant (567 F.2d at 349 n.l)

2. ***Matter of Richter & Phillips Jewelers & Dist.***, 31 B.R. 512, 514 n.l (Bkrtcy., S.D. Ohio 1983):

A. Federal Rules of Evidence apply to bankruptcy proceedings

B. Check is self-authenticating under Rule 902(9) -- extrinsic evidence not necessary

CASE EXAMPLE -- Rule 902(9)
COLLEGE TRANSCRIPTS SELF-AUTHENTICATING

1. ***United States v. Hitsman***, 604 F.2d 443, 447 (5th Cir. 1979):

A. Drug case and court extended itself

B. College transcript not admissible as a business record since no foundation witness testified

C. Court admitted transcript under Rule 803(24)

D. Found transcript to be self-authenticating under Rules 901 and 902:

i. Took judicial notice of existence of college
ii. Found it was normal for college to make such a record in the course of its operations
iii. Transcript had indicia of being an authentic copy since it bore seal of registrar and signature
iv. Personal information in transcript was corroborated by a witness

ALSO SELF-AUTHENTICATING
Rules 902(5) and 902(6), Fed. R. Evid.

1. "*Official publications. -- Books, pamphlets, or other publications purporting to be issued by public authority*."
Rule 902(5)

A. *Example*: Book issued by Government Printing office, State Agency, etc.

B. *Reminder*: Does not provide for admissibility; merely for authenticity

C. Bureau of Labor statistics would come under this rule

2. *Newspapers and periodicals*: printed materials *purporting* to be newspapers or periodicals -- Rule 902(6):

A. Magazine article was self-authenticating, ***Application of Consumers Union of U.S., Inc.***, 495 F. Supp. 582, 587 n.2 (S.D.N.Y. 1980)

B. *Example*: Copy of Washington *Post* is self-authenticating

WITNESS NEEDED -- EXAMPLE
IRS CERTIFICATE OF ASSESSMENT AND PAYMENTS -- FORM 4340
COMPUTER TRANSCRIPT -- FORM 4303

1. IRS maintains a bookkeeping record of each taxpayer.
2. Transcript or Certificate of Assessments and Payments reflects information as to a given taxpayer such as date returns filed, absence of filing, payment made, penalties paid, estimated tax payments, and the like.
3. Transcript can be useful at trial -- *examples*:
   A. Net worth case -- reflects taxes paid, a non-deductible item
   B. Tax history -- delinquent returns, penalties paid, audit results, date return filed
   C. Returns destroyed -- can still establish tax history
4. Certificate of Assessment used to prove contents of return when fire destroyed file copy and only copy available was penciled retained copy of taxpayer
   A. ***Moore v. United States***, 254 F.2d 213, 215 (5th Cir.), *cert. denied*, 357 U.S. 926 (1958)
5. Transcript can be certified under statutory procedure, Rule 44 procedure, or Rule 902(1), (4), Fed. R. Evid.; also admissible under Rule 803(8) and Rule 1005, Fed. R. Evid.
6. Admissibility of certified transcript:
   A. Fed. R. Evid. 803(8), 1005
   B. ***Vloutis v. United States*** 219 F.2d 782, 789 (5th Cir. 1955)
   C. ***Holland v. United States***, 209 F.2d 516, 520 (10th Cir.), *aff'd*, 348 U.S. 121 (1954)
   D. ***Moore v. United States***, 254 F.2d 213, 216 (5th Cir.), *cert. denied*, 357 U.S. 926 (1958)
7. Witness needed:
   A. Documents does not speak for itself -- explanation needed
   B. BUT -- have Certificate of Assessments and Payments certified under Rule 902(1) and have witness explain terms, codes, etc.

8. Contact Service Center well in advance of trial -- takes time to obtain certified documents.

9. Obtain proper witness and arrange for interview.

MISCELLANEOUS RULES

RULE OF COMPLETENESS
Rule 106, Fed. R. Evid.

1. "When a writing or recorded statement or part thereof is introduced by a party, an *ADVERSE PARTY* may require the introduction at that time of any *other part* or any other writing or recorded statement *which ought in fairness to be considered contemporaneously with it*." (emphasis supplied)

2. *Scope of Rule 106*:

   A. *LIMITED TO WRITING OR RECORDED STATEMENTS*

   B. Testimony as to conversations is not covered by Rule 106

   C. *Practical matter*: case law applies the rule of completeness to conversations -- *see below*

   D. *Rule provides for*:

      i. Admission of any other part of offered document, or

      ii. any other document,

      iii. which ought in fairness to be considered contemporaneously with document to be admitted

APPLICABLE PRINCIPLES -- PRE-RULES

1. *Part of a document, a correspondence, or a conversation* admitted -- then opponent may put in balance to rebut adverse inferences of incomplete evidence:

   United States v. Corrigan, 168 F.2d 641, 645 (2d Cir. 1948)

   United States v. Paquet, 484 F.2d 208, 212 (5th Cir. 1973)

2. BUT, *only relevant parts* of document or conversation may be admitted on rule of completeness theory:

   United States v. Dennis, 183 F.2d 201, 229-30 (2d Cir. 1950), *aff'd on other grounds*, 341 U.S. 494 (1951)

United States v. Littwin, 338 F.2d 141, 145 (6th Cir. 1964)

United States v. Smith, 328 F.2d 848, 850 (6th Cir. 1964)

3. *NO RULE THAT ONCE PART OF A DOCUMENT OR CONVERSATION IS ADMITTED, THE ENTIRE DOCUMENT MUST BE RECEIVED*:

   Dennis, 183 F.2d 201, 229-30 (2d Cir. 1950)

   Camps v. New York City Transit Authority, 261 F.2d 320, 322 (2d Cir. 1958)

   Littwin, 338 F.2d 141, 145 (6th Cir. 1964)

   United States v. McCorkle, 511 F.2d 482, 486 (7th Cir. 1975)

4. Rule 106 deviates from the common law only in respect to time of admission:

   United States v. Walker, 652 F.2d 708, 710 n.2 (7th Cir. 1981)

5. BUT note that case law applies to conversations, doctrine of verbal completeness -- Rule 106 applies only to writing or recorded statement.

ADMISSIBLE AT THAT TIME
Rule 106, Fed. R. Evid.

1. *Portion of document admitted* then adverse party can insist on admission *AT THAT TIME* of any other part of document or any other document that "ought in fairness" be considered at the same time.

2. Party seeking admission of evidence under Rule 106 is "entitled to compel the admission at the time the opposing party offers the partial evidence or waiting until a later stage of trial":

   United States v. Walker, 652 F.2d 708, 710 n.2 (7th Cir. 1981) (conviction reversed, defendant entitled to have contemporaneous admission when government introduced portion of transcript)

3. Rule 106 requires "that a statement be admitted in its entirety when this is necessary to explain the admitted portion, to place it in context, or to avoid misleading the trier of fact":

   United States v. Marin, 669 F.2d 73, 84 (2d Cir. 1982)

   United States v. Rubin, 609 F.2d 51, 63-64 (2d Cir. 1979)

4. Rule is to prevent admission in evidence of truncated statements giving an out of context picture to the jury -- judge makes a "determination of fairness":

   United States v. Jones, 663 F.2d 567, 571 (5th Cir. 1981)

LIMITATIONS OF RULE

Rule 106, Fed. R. Evid.

1. Rule 106 does *not* require [authorize] introduction of portions of a statement that are neither explanatory of nor relevant to the admitted passages:

   United States v. Marin, 669 F.2d 73, 84 (2d Cir. 1982)

   United States v. Soures, 736 F.2d 87, 91 (3d Cir. 1984)

   United States v. McCorkle, 511 F.2d 482 (7th Cir.), *cert. denied*, 423 U.S. 826 (1975)

2. "This rule is circumscribed by two qualifications. The portions sought to be admitted (1) must be relevant to the issues and (2) only those parts which qualify or explain the subject matter of the portion offered by the opponent need be admitted":

   United States v. Walker, 652 F.2d 708, 710 (7th Cir. 1981)

   United States v. Crosby, 713 F.2d 1066, 1074 (5th Cir.), *cert. denied*, 104 S. Ct. 506 (1983)

EXAMPLES
Rule 106, Fed. R. Evid.

1. *Depositions*: can insist on admission of "related" portions of deposition at same time party offers a different portion.
2. *Letter Introduced*: admission at same time of reply to letter, or letter causing reply, if "ought in fairness," etc.
3. *Document with attachments and only document offered*: can require admission of attachments.
4. *NOTE*: Not limited to document offered -- may be "any other document" if it should in fairness be considered contemporaneously with the admitted document.

TIME OF ADMISSION
ADVERSE PARTY CHOICE
Rule 106 Fed. R. Evid.

1. Adverse party can develop matter on cross-examination or as part of the case if he so chooses.
2. Tactics and nature of document offered will determine course to follow.
3. *Consider*: Delay until cross-exam -- make witness and opponent look bad -- Immediate correction -- friendly witness being badgered.

REFRESHING MEMORY
Rule 612, Fed. R. Evid.

WRITING USED TO REFRESH MEMORY

1. Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code:

   A. If a witness uses a writing to refresh his memory for the purpose of testifying, either --

      i. while testifying, or

      ii. *before testifying*, if the court in its *discretion* determines it is necessary in the interests of justice,

   B. an adverse party is entitled to have the writing produced at the hearing, to *inspect* it, to *cross-examine* the witness thereon, and to *introduce in evidence* those portions which relate to the testimony of the witness . . . ."

STEPS IN REFRESHING RECOLLECTION
Rule 612, Fed. R. Evid.

1. Exhaust memory of witness -- can't recall fact or event.
2. Leading questions to a limited extent only -- to revive memory (if Court permits).
3. Have document marked for identification (not required in all courts).
4. Show document to witness.
5. Witness silently reads document and then puts it aside.
6. Testifies as to recollection revived -- not from document.

CAN USE ANYTHING TO REFRESH RECOLLECTION?

1. Can refresh recollection with "a song, a scent, a photograph, an allusion, even a past statement known to be false":

   United States v. Rappy, 157 F.2d 964, 967 (2d Cir. 1946), *cert. denied*, 67 S. Ct. 591 (1947)

2. BUT compare -- agents memorandum of interview can be used to refresh recollection of witness only if foundation laid that memorandum on its face reflects the witness's statement,

or acknowledged that it does by the witness, and *court is satisfied it may be of help in refreshing recollection*.

United States v. Shoupe, 548 F.2d 636, 640 (6th Cir. 1977)

3. "When there is careful supervision by the court, the testimony elicited through refreshing recollection may be proper, even though the document used to refresh the witnesses' memory is inadmissible."

   United States v. Scott, 701 F.2d 1340, 1346 (11th Cir. 1983) (credit card applications held inadmissible because government had failed to disclose them to defense counsel pursuant to Rule 16, Fed. R. Crim. P., but applications could be used by government to refresh recollection of witness)

4. "The fact that a government agent instead of the witness prepared the statement is inconsequential." BUT: the trial judge has a duty to prevent a witness from putting into the record the contents of an otherwise inadmissible writing under the guise of refreshing recollection:

   Thompson v. United States, 342 F.2d 137, 140 (5th Cir.), *cert. denied*, 85 S. Ct. 1560 (1965)

5. Use discretion in selecting material used to refresh recollection.

MECHANICS -- REFRESHING RECOLLECTION
Rule 612, Fed. R. Evid.

Q. How much did you pay for the boat?
A. I can't remember, at this time.
Q. Do you know of anything that will help refresh your recollection?
A. Yes, I made some notes when I bought the boat.
Q. Do you have the notes with you.
A. Yes.
   [Obtain notes and mark for Identification as Gov. Ex. ____]
Q. Let me show you Gov. Ex. ____. Read it to yourself and then put the document aside . . .
Q. Do you now remember what you paid for the boat?
A. Yes.
Q. How much did you pay?

PARTY REFRESHING RECOLLECTION
CAN'T READ STATEMENT TO JURY
Rule 612, Fed. R. Evid.

1. Can't read statement to witness under guise of refreshing recollection.

2. Witness must testify from revived memory, not from statement.

3. Witness *must* read document to herself:

   Goings v. United States, 377 F.2d 753, 761 (8th Cir. 1967) ("but to read the statement aloud for refreshing recollection to the witness, hostile or not, is patent error")

   United States v. Hicks, 420 F.2d 814, 816 (5th Cir. 1970)

   Gaines v. United States, 349 F.2d 190, 192 (D.C. Cir. 1965)

4. Lengthy matter, accounting matters, etc., then court has discretion to permit witness to consult the writing as she testifies:

   Goings v. United States, 377 F.2d 753, 761 n. 11 (8th Cir. 1967), appeal after remand, 393 F.2d 884 (1968) -- "The trial court in many instances should liberally allow a witness to refer to records, accounting sheets, and reports in testifying. Generally, doctors, lawyers, accountants and other lay witnesses testifying should be allowed continuously to refer to data on their reports, etc."

OBJECTION TO IMPROPER PROCEDURE
Rule 103(c), Fed. R. Evid.

1. Procedure used in refreshing recollection should be conducted as provided in Rule 103(c), Fed. R. Evid.:

   > (c) Hearing of Jury. -- In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

2. Use Rule 103(c) any time opponent seeks to suggest inadmissible evidence to jury via improper remarks, questions, etc.

3. BUT note: leading questions can be used on preliminary or unsupported matters.

ADVERSE PARTY CAN EXAMINE
AND INTRODUCE MEMORY AID
Rule 612, Fed. R. Evid.

1. Absolute right to *examine document*.
2. Right to *cross-examine witness* on document.
3. *INTRODUCE in evidence* "those portions which relate to the testimony of the witness."
4. ONLY opposing party can put document in evidence:

   Markel Service, Inc. v. National Farm Lines, 426 F.2d 1123, 1128 (10th Cir. 1970)

5. *Mechanics*: IF opposing party offers document, it should be marked as an exhibit of the opposing party.
6. NOTE: *COURT IN DISCRETION* can order material produced that was used to refresh recollection *BEFORE TESTIFYING*.

CAVEAT -- JURY INSTRUCTION
Rule 612, Fed. R. Evid.

1. Should have limiting instruction that memory aid can be used by jury only to judge credibility of witness -- to see what witness relied on.

HEARSAY EXCEPTIONS
Past Recollection Recorded
Rule 803(5), Fed. R. Evid.

1. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

   803(5) *Recorded recollection* -- A memorandum or record concerning a matter about which a witness once had knowledge but now has ***INSUFFICIENT RECOLLECTION TO ENABLE HIM TO TESTIFY FULLY AND ACCURATELY***, shown to have been made or adopted by the witness when the *matter was fresh in his memory* and to reflect that knowledge correctly. If admitted, the memorandum or record *may be read into evidence* but may not itself be received as an exhibit unless offered by an adverse party. [Emphasis supplied]

DISTINGUISH

1. *REFRESHING COLLECTION* -- Rule 612 -- *Witness testifies*.

2. *PAST RECOLLECTION RECORDED* -- Rule 803(5) -- *Document Testifies*.

WITNESS FORGETS ON STAND -- "INSUFFICIENT RECOLLECTION"
Rule 803(5), Fed. R. Evid.

1. Previously had to pretty much show a complete failure of memory.
2. Now it is enough to show: "*INSUFFICIENT [PRESENT] RECOLLECTION TO ENABLE THE WITNESS TO TESTIFY FULLY AND ACCURATELY*."
3. More liberal but foundation must still be laid that witness is unable to remember essential matter -- *that he knew at the time*:

   United States v. Edwards, 539 F.2d 689, 691-92 (9th Cir.), *cert. denied*, 429 U.S. 984 (1976)

4. *Note*: witness might remember part but not all of a matter, then would seem only forgotten part of memorandum could be read to jury.
5. Refreshing recollection can be preliminary step to reaching past recollection doctrine -- BUT subject to Rule 103(c) limitations.

MEMORANDUM OR RECORD OF MATTER
Rule 803(5), Fed. R. Evid.

1. Must lay foundation that witness had knowledge of matter at one time -- personal firsthand knowledge.
2. Memorandum is a *substitute for present memory*.
3. Memorandum or record must be *made* or *adopted* by the witness -- one with personal firsthand knowledge:

   A. *Made by witness* -- no problem

   B. *Adopted memo* -- must show that witness examined memo and found it to be accurate:

      United States v. Williams, 571 F.2d 344, 348 (6th Cir. 1978) (statement written by agent and signed by witness)

   C. *Multiple participants* -- employer dictating to secretary or secretary making memorandum at direction of employer -- covered by rule

      S. Report 93-1277, 12 U.S. Code Congressional & Administrative News, p. 63

      H. Report 93-650, 12 U.S. Code Congressional & Administrative News, p. 77

4. *Contemporaneous memo* -- made when matter was fresh in memory:

   A. Requirement that memorandum be contemporaneous in the sense that it was made or *adopted* while matter was fresh in memory of witness

   B. Less strict than requirement that memo be made "at or near the time of the recorded event"

   C. But necessary part of foundation is to show that memo was made when witness would still have reason to remember

5. *Reflects knowledge correctly*:

   A. Rule does not change case law

   B. Witness must recognize memo as being true and accurate

   C. Sufficient if witness testifies he remembers correctly recording the facts, or

   D. Belief that witness would not have signed or written memo if it was not true

   E. Habit and practice to record event as part of a business duty -- but not necessary to lay shop book rule foundation.

      Ettelson v. Metropolitan Life Ins. Co., 164 F.2d 660, 667 (3d Cir. 1947)

6. *Grand jury testimony* -- proper foundation then pertinent portions of grand jury testimony can be read to jury as a past-recorded recollection exception to the hearsay rule:

   United States v. Patterson, 678 F.2d 774, 777 (9th Cir. 1982)

MEMORANDUM -- AS EVIDENCE
Rule 803(5), Fed. R. Evid.

1. Proponent -- memorandum can be read to the jury.

2. *BUT ONLY ADVERSE PARTY CAN MOVE ADMISSION OF MEMORANDUM INTO EVIDENCE*:

   See confusing and incomplete discussion in ***United States v. Civella***, 666 F.2d 1122 (6th Cir. 1981) -- seems to overlook admission only by adverse party or else court relied on wrong rule

3. Practical point -- jury does not see memorandum unless adverse party wants it in evidence

4. Case law is to the contrary so this is a change:

   Papalia v. United States, 243 F.2d 437 (5th Cir. 1957)

SUMMARIES AND SCHEDULES

SUMMARIES -- GENERALLY

1. Summaries constantly used in tax cases.
2. Distinguish -- although courts sometimes do not:

   A. Summary based on documents in evidence

   B. Summary of documents *NOT* produced in court -- Rule 1006, Fed. R. Evid.:

      United States v. Bakker, 925 F.2d 728, 736 (4th Cir. 1991)

      United States v. Wood, 943 F.2d 1048, 1053 (9th Cir. 1991)

SUMMARY OF EVIDENCE

1. Situation -- numerous deposit slips, checks, invoices, receipts *admitted into evidence*.
2. Summaries of evidence already admitted into evidence are merely pedagogical devices, which should be used only as a testimonial aid, and should not be admitted into evidence:

   United States v. Wood, 943 F.2d 1048, 1053 (9th Cir. 1991)

3. However, several circuits allow a summary of evidence to be put before the jury with proper limiting instructions:

   United States v. Mohney, 949 F.2d 1397, 1405 (6th Cir. 1991)

4. Case law -- extensive records in evidence can be summarized in a chart, schedule, etc., based on the evidence:

   United States v. Prevatt, 526 F.2d 400, 404 (5th Cir.), *reh. denied*, 531 F.2d 575 (1976)

   United States v. Pollack, 417 F.2d 240, 241 (5th Cir. 1969), *cert. denied*, 397 U.S. 917 (1970) (summaries prepared by an accountant of various complex transactions were admissible)

   United States v. Bartone, 400 F.2d 459, 461 (6th Cir.), *cert. denied*, 393 U.S. 1027 (1969) (Court should examine proposed summaries and charts prior to admission and advise jury that a summary is not evidence)

   United States v. Cooper, 464 F.2d 648, 656 (10th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973) (summary of extensive bank records, accounting machine tapes, debt and audit slips and loan papers by F.B.I. agent)

United States v. Kaatz, 705 F.2d 1237, 1245 (10th Cir. 1983) (specific items case and charts introduced summarizing 2,300 governmental exhibits; "summaries may properly be put before a jury with limiting instructions")

United States v. Evans, 910 F.2d 790, 801 (11th Cir. 1990) (admitted chart summarizing sixty $100 payments per month that defendant received over a five year period)

BUT compare, ***United States v. Collins***, 596 F.2d 166, 169 (6th Cir. 1979) (summaries straightforward and clearly based on evidence then not required that judge conduct a hearing outside presence of jury before admitting summaries)

5. Summary charts must be based on evidence and fairly represent and summarize the evidence upon which they are based:

United States v. Sorrentino, 726 F.2d 876, 884 (1st Cir. 1984) ("well established that summary exhibits such as net worth schedules" are admissible for the convenience of the jury but purported summaries not supported by the evidence are not admissible)

United States v. Oshatz, 912 F.2d 534, 543 (2d Cir. 1990)

United States v. O'Connor, 237 F.2d 466, 475 (2d Cir. 1956)

United States v. Bakker, 925 F.2d 728, 737 (4th Cir. 1991)

United States v. Keltner, 675 F.2d 602, 606 (4th Cir.), *cert. denied*, 459 U.S. 832 (1982)

United States v. Price, 722 F.2d 88, 91 (5th Cir. 1983)

Gordon v. United States, 438 F.2d 858, 876-77 (5th Cir.), *cert. denied*, 404 U.S. 828 (1971)

United States v. Wood, 943 F.2d 1048, 1054 (9th Cir. 1991)

Oertle v. United States, 370 F.2d 719, 727-28 (10th Cir. 1966), *cert. denied*, 387 U.S. 943 (1967)

6. *Principle*: Aids jury in understanding, *e.g.*, summary of deposits reflecting monthly total of bank deposits, summary of loans made, properties sold, etc.

SUMMARY TESTIMONY

1. The admission of testimony summarizing evidence has been held to be admissible in income tax prosecutions:

United States v. Moore, 923 F.2d 910 (1st Cir. 1991)

United States v. Sutherland, 929 F.2d 765 (1st Cir. 1991)

United States v. Sturman, 951 F.2d 1466, 1480 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 2964 (1992)

2. Summary testimony in criminal trials is allowed when:

   A. The Court charges the jury as to all the elements necessary for conviction

   B. The summary is intended to aid the jury in organizing proof

   C. The summary is not inflammatory or prejudicially worded

   United States v. Sturman, 951 F.2d 1466, 1480 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 2964 (1992)

   United States v. Benson, 941 F.2d 598, 605 (7th Cir. 1991)

NET WORTH/EXPENDITURE CASES
GOVERNMENT CONTENTIONS

1. Distinguish net worth and expenditure computations -- must be based on evidence BUT computation reflects only government contentions -- a summary of evidence tending to prove guilt; a summary of government contentions:

   United States v. Diez, 515 F.2d 892, 905 (5th Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976)

   United States v. Lawhon, 499 F.2d 352, 357 (5th Cir. 1974), *cert. denied*, 419 U.S. 1121 (1975)

   Barsky v. United States, 339 F.2d 180, 181 (9th Cir. 1964)

2. "The nature of a summary witness' testimony requires that he draw conclusions from the evidence presented at trial":

   United States v. Esser, 520 F.2d 213, 218 (7th Cir. 1975), *cert. denied*, 426 U.S. 947 (1976)

SUMMARY OF RECORDS
NOT IN EVIDENCE
Rule 1006, Fed. R. Evid.

1. *Case law*: voluminous records, summary admissible, not always necessary to produce records where available to defense:

   Hecht v. United States, 393 U.S. 1082 (1969)

   United States v. Oshatz, 912 F.2d 534, 543 (2d Cir. 1990)

United States v. Paxton, 403 F.2d 631, 632 (3d Cir. 1968), *cert. denied sub nom.* ***Hecht v. United States***, 393 U.S. 1052 (1969)

United States v. Bakker, 925 F.2d 728, 736 (4th Cir. 1991)

Stevens v. United States, 206 F.2d 64, 67 (6th Cir. 1953)

United States v. Cummings, 468 F.2d 274, 279 (9th Cir. 1972)

2. Now expressly provided for in Rule 1006.

3. ***Rule 1006 Summaries, Fed. R. Evid.***:

   A. "[V]oluminous writings, recordings or photographs which cannot conveniently be examined in Court."

   B. "[M]ay be presented in the form of a chart, summary or calculation."

   C. "*The originals or duplicates shall be available* for examination or copying, or both, by other parties at reasonable time and place."

   D. Court "*may* order" production in court of documents summarized

   E. *Practical point*: may be necessary *for government* to obtain agreement or court order providing for examination of records by defense

4. *Rule of reason* -- cannot use rule as an excuse for not producing records where records are not voluminous and could be conveniently examined in court:

   Javelin Investment, S.A. v. Municipality of Ponce, 645 F.2d 92, 96 (1st Cir. 1981) (ten pages of records not the type of voluminous writings which cannot be conveniently examined in court)

   United States v. Scales, 594 F.2d 558 (6th Cir.), *cert. denied*, 441 U.S. 946 (1979) (BUT note that court at one point confuses rule that summaries of voluminous documents in evidence are admissible with Rule 1006 pertaining to documents not in evidence)

SUMMARY OF DOCUMENTS ONLY --
NOT TESTIMONY
Rule 1006, Fed. R. Evid.

1. Rule 1006 applies only to admission of summaries of voluminous documentary evidence.

2. Rule 1006 does *not* provide for the admission of summaries of the testimony of out-of-court witnesses:

   United States v. Pelullo, 964 F.2d 193, 205 (3d Cir. 1992)

United States v. Goss, 650 F.2d 1336, 1344 n.4 (5th Cir. 1981) (agent's testimony that checks mailed based on out-of-court interviews, prior testimony of witnesses, and information on face of checks, was hearsay)

ADMISSIBLE EVIDENCE ONLY
Rule 1006, Fed. R. Evid.

1. Summary must be based on evidence; or on evidence that is otherwise admissible -- must lay foundation for authenticity and admissibility of records being summarized that are not produced:

   United States v. Pelullo, 964 F.2d 193, 205 (3d Cir. 1992)

   Ford Motor Co. v. Auto Supply Co., Inc., 661 F.2d 1171, 1175 (8th Cir. 1981) (summary drawn from inadmissible data is not admissible)

   United States v. Johnson, 594 F.2d 1253 (9th Cir. 1979) (mail fraud conviction reversed -- no showing that underlying records were admissible -- not enough that defense given notice that records would be used)

2. *Recording of telephone calls* -- Government expert's calculations of gross revenue of a gambling operation admitted in lieu of playing to jury tapes of 3,000 phone calls:

   United States v. Clements, 588 F.2d 1030, 1038 (5th Cir. 1979) (unnecessarily time - consuming to play the tapes of all 3000 calls, calculation admissible under Rule 1006)

PREPARATION OF SUMMARY
Rule 1006, Fed. R. Evid.

1. Summary prepared under direction and control of witness is enough, not necessary for everyone who worked on summary to testify:

   United States v. Mortimer, 118 F.2d 266, 269 (2d Cir.), *cert. denied*, 314 U.S. 616 (1941)

   United States v. Scales, 594 F.2d 558, 563 (6th Cir.), *cert. denied*, 441 U.S. 946 (1979)

   Diamond Shamrock Corp. v. Lumbermans Mutual Casualty Co., 466 F.2d 722, 727 (7th Cir. 1972) (not necessary that every person who assisted in the preparation of the original records or the summaries be brought to the witness stand)

2. Agent will testify that summary prepared under his/her direction and control; that agent reviewed and adopted the work

RULE 1006 SUMMARIES
ARE EVIDENCE

1. Summaries of evidence introduced in court then judge will instruct jury that the underlying exhibits are the evidence -- *not* the summary.

2. BUT under Rule 1006 there are no exhibits in evidence and the summary itself is evidence:

   United States v. Bakker, 925 F.2d 728, 737 (4th Cir. 1991)

   United States v. Smyth, 556 F.2d 1179, 1184 (5th Cir. 1977)

   Federal Judicial Center Committee to Study Criminal Jury Instructions, ***Pattern Criminal Jury Instructions*** (Federal Judicial Center 1982), 8. Summaries of Records as Evidence, p. 13

POINTS TO NOTE

PRIOR INCONSISTENT
STATEMENT AT PRIOR PROCEEDING
Rule 801(d)(1)(A)

1. Witness on stand subject to cross-examination then prior inconsistent statement under oath at a trial hearing or other proceeding, or in a deposition, is NOT HEARSAY and is substantive evidence of guilt:

   A. Rule 801(d)(1)(A)

   B. ***United States v. Woods***, 613 F.2d 629, 637 (6th Cir. 1980), and cases cited

2. N.B. Substantive evidence -- *not* merely impeaching:

   United States v. Plum, 558 F.2d 568, 575-76 (10th Cir. 1977)

GRAND JURY TESTIMONY
Rule 801(d)(1)(A)

1. "It is well established that testimony before a grand jury constitutes 'other proceedings' within the rule [801(d)(l)(A)]":

   A. ***United States v. Long Soldier***, 562 F.2d 601, 605 (8th Cir. 1977)

   B. Conference Report No. 93-1597, 1974 U.S. Code & Admin. News, p. 7104

2. Testimony at trial inconsistent with grand jury testimony -- grand jury testimony can be introduced as substantive evidence:

   United States v. Coran, 589 F.2d 70, 76 (1st Cir. 1978)

   United States v. Blitz, 533 F.2d 1329, 1344-45 (2d Cir. 1976)

United States v. Gerry, 515 F.2d 130, 141 (2d Cir. 1975)

United States v. Dennis, 625 F.2d 782 (8th Cir. 1980) -- that statements elicited by means of leading questions does not affect eligibility under Rule 801(d)(1)(A)

United States v. Mosley, 555 F.2d 191, 193 (8th Cir. 1977) (statement before a grand jury is a statement given at a trial, hearing or other proceeding within the meaning of Rule 801(d)(1)(A))

United States v. Morgan, 555 F.2d 238, 242 (9th Cir. 1977)

3. Extracts of grand jury transcript itself can be made an exhibit and introduced into evidence -- discretionary with trial judge:

United States v. Coran, 589 F.2d 70, 76 (1st Cir. 1978)

PRIOR INCONSISTENT STATEMENT
NOT IN PRIOR PROCEEDING/UNDER OATH
Rules 607 and 613, Fed. R. Evid.

1. Does not come under Rule 801(d)(1)(A).
2. Prior inconsistent statement not at a prior proceeding and not under oath still can be admissible to attack credibility -- Rules 607, 613.
3. BUT impeaching only -- *not substantive evidence*:

United States v. Harris, 523 F.2d 172, 175 (6th Cir. 1975)

United States v. Ragghianti, 560 F.2d 1376, 1379-81 (9th Cir. 1977) (failure to instruct jury that testimony was impeaching only was reversible error)

IMPEACHING YOUR OWN WITNESS
Rule 607, Fed. R. Evid.

1. "The credibility of a witness may be attacked by any party, including the party calling him." Rule 607, Fed. R. Evid.
2. Eliminates the old voucher rule.
3. No showing of surprise necessary:

United States v. Palacios, 556 F.2d 1359, 1363 (5th Cir. 1977) (under Rule 607 impeachment is proper without a showing of surprise)

United States v. Long Soldier, 562 F.2d 601, 605 n.3 (8th Cir. 1977)

4. BUT surprise can still be a factor in supporting introduction of impeaching evidence.

5. You can't call a witness just so you can impeach him and then call impeaching witness so as to get in testimony otherwise inadmissible.

6. *See* discussion in ***United States v. Morlang***, 531 F.2d 183, 188 (4th Cir. 1975) ("never been the rule that a party may call a witness where his testimony is known to be adverse for the purpose of impeaching him.")

EVIDENCE THAT A WITNESS IS NOT TO BE BELIEVED
Rule 608(a), Fed. R. Evid.

1. Credibility of a witness may be attacked by evidence in the form of either: (1) opinion or (2) reputation -- Rule 608(a), Fed. R. Evid.

2. Defense calls witness who testifies that he loaned defendant money, or he gave the defendant money as a gift, or that the defendant was not a partner, or any testimony to exculpate the defendant.

3. You have a witness who knows the defense witness well and/or knows her reputation for truth and veracity. Your witness tells you that the defense witness is a liar.

4. You can call your witness and develop testimony that:

   A. In her *opinion* the defense witness (the defendant if he was the witness) is not truthful and she would not believe him under oath, or

   B. The *reputation* of the defense witness (or the defendant if he has introduced character evidence) for truthfulness or untruthfulness is bad

5. *See* the following cases:

   United States v. Lollar, 606 F.2d 587, 588-89 (5th Cir. 1979) (defendant testified and his employer testified that he would not believe him under oath)

   United States v. Walker, 313 F.2d 236, 239 (6th Cir. 1963) (defendant testified, government called two police officers on rebuttal who testified that the defendant's reputation for truth and veracity was bad)

   United States v. Bambulas, 471 F.2d 501, 504 (7th Cir. 1972) (Would you believe the witness under oath? is a proper question)

   Hodge v. United States, 414 F.2d 1040, 1044 (9th Cir. 1969) (testimony as to defendant's veracity is admissible once the defendant takes the stand)

   United States v. Thomas, 676 F.2d 531, 535 (11th Cir. 1982) (impeachment is "not dependent upon the defendant's introduction of good character evidence")

6. *See* discussion in ***United States v. Watson***, 669 F.2d 1374, 1381 (11th Cir. 1982) -- note difference in foundation depending on whether reputation or opinion testimony is to be offered.

7. *Caution*: general rule is prosecution may *not* introduce evidence of the bad character of the defendant unless and until the defendant presents evidence of good character, Rule 404(a), Fed. R. Evid.

   United States v. Hewitt, 634 F.2d 277, 278 (5th Cir. 1981)

8. *Conversely*: defendant may always present evidence of pertinent traits of character but the door is then open to cross-examination and rebuttal on those traits whether the defendant takes the stand or not, ***Hewitt***, 634 F.2d at 278

BAD ACTS -- NO CONVICTION
Rule 608(b), Fed. R. Evid.

1. Can attack credibility of a witness (or defendant) by cross-examining as to specific instances of misconduct going to truthfulness or untruthfulness.

2. Not necessary that conduct led to a conviction -- only requirement is that conduct be probative of truthfulness, *i.e.*, that conduct involved dishonesty or false statement, Rules 608(b), 609(a)(2), Fed. R. Evid.:

   United States v. Sperling, 726 F.2d 69, 75 (2d Cir. 1984) (proper for government to cross-examine defendant regarding his false credit card applications to show a general lack of credibility)

   United States v. Reed, 700 F.2d 638, 643-44 (11th Cir. 1983) (embezzlement and unlawful possession and obstruction of mails conviction reversed, question and testimony as to use and possession of marijuana not admissible and highly prejudicial, does not shed any light on character for untruthfulness)

GOOD FAITH BASIS

1. Must have good basis for question -- may be required to disclose good faith basis to the court outside the jury's presence:

   Michelson v. United States, 335 U.S. 469, 472, 481 (1948)

   United States v. Bright, 588 F.2d 504, 511 (5th Cir. 1979) (must have good faith factual basis for incidents inquired about and incidents must be relevant to the character tracts involved at the trial)

2. This is true of any question asked -- may explore area without full knowledge of answer but on demand must provide good faith basis for question alleging adverse facts:

   United States v. Katsougrakis, 715 F.2d 769 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 704 (1984)

COLLATERAL MATTER

1. STUCK with answer of witness on a collateral matter -- extrinsic evidence is not admissible -- Rule 608(b).
2. *Collateral*: Matter generally is collateral if matter is relevant *only* to contradict the in-court testimony of the witness, a matter far afield from the main controversy.
3. *Not Collateral*: Matters that directly concern the general credibility of the witness such as bias, corruption, coercion, etc., and may be contradicted by other evidence.

DEFENDANT'S STATEMENTS
Rule 801(d)(2)(A), Fed. R. Evid.

1. *Admission*: statement of the defendant offered by the government to prove the truth of the matter asserted is *not* hearsay:

   Rule 801(d)(2)(A), Fed. R. Evid.

2. Statement of the defendant offered by the government to show it was made and not to prove the truth of what the defendant said is *not* hearsay, *e.g.*, offered to show defendant made false statement to special agent from which jury could infer consciousness of guilt:

   Anderson v. United States, 417 U.S. 211, 219-20 (1974) (point of prosecution in introducing statements was simply to prove they were made so as to establish a foundation for later showing that they were false)

   Rule 801(c), Fed. R. Evid.

3. If defendant offers his own statement for the truth of the matter asserted, it is hearsay and it is not admissible:

   United States v. Marin, 669 F.2d 73, 84 (2nd Cir. 1982)

4. BUT if defendant offers his own statement simply to show it was made rather than to establish the truth of the matter asserted, then it is not hearsay -- but the fact that the statement was made must be relevant to an issue in the case or else it is not admissible, ***United States v. Marin***, 669 F.2d at 84.

5. *Note*: always consider the application of Rule 106 (Rule of Completeness) before you offer a defendant's statement.

IMMUNITY AGREEMENT
BROUGHT OUT ON DIRECT
Rule 607, Fed. R. Evid.

1. Chicago building inspection supervisors convicted of extortion through use of official positions and filing false income tax returns -- section 7206(1) -- extortion income not reported.

2. Government brought out on direct examination of three witnesses that the witnesses had been granted immunity.

3. Defendants objected that testimony was inadmissible because it was used to enhance the credibility of these witnesses rather than to impeach it.

4. *Held*: procedure approved -- Government introduced testimony for purposes of impeachment because it anticipated defense counsel would cross-examine on issue of immunity:

   United States v. Hedman, 630 F.2d 1184, 1198 (7th Cir.), *cert. denied*, 450 U.S. 965 (1978)

5. "Nothing improper" if government questions witness about his understanding of the terms of the immunity order

   United States v. Hedman, 630 F.2d at 1198

   United States v. Winter, 663 F.2d 1120, 1133 (1st Cir. 1981) (non-statutory immunity, witness asked to describe immunity agreement)

   United States v. Craig, 573 F.2d 513, 519 (7th Cir. 1978), *cert. denied*, 439 U.S. 820 (1981)

6. *Compare*: agreement by witness to cooperate with government is not admissible on direct; only admissible on re-direct following cross-examination attacking credibility of witness:

   United States v. Barnes, 604 F.2d 121, 150 (2d Cir. 1979)

IMPEACHMENT BY
CONVICTION ON NOLO PLEA
Rule 609(a), Fed. R. Evid.

1. Conviction complying with provisions of Rule 609(a) can be used for impeachment.

2. Conviction on nolo plea of crime that comes within Rule 609 is admissible as impeachment:

   United States v. Williams, 642 F.2d 136, 138 (5th Cir. 1981) -- "admitting a nolo conviction under Rule 609 is well founded"

3. BUT you cannot prove that defendant admitted his guilt by a *nolo* plea even if there is a judgment of conviction -- plea is not admissible, Rule 410, Fed. R. Evid.

> "Rule 609(a) permits proof of the conviction. Were it pertinent, however, the prosecutor could *not* prove that appellant had admitted his guilt by his plea. He did for the purpose of the case in which it was entered, but for all other purposes he preserved his denial." ***Williams***, 642 F.2d at 139 (underscoring supplied)

ARGUMENT

ARGUMENT -- GENERALLY

1. Argument folder:

   A. Set up at outset of trial

   B. During trial collect notes for argument -- yours, agents, audience, reporter, anyone who has an idea

2. Advise jury that what you say or what defense counsel says is not evidence.

3. *Never*, *never*, *never* say "I believe." Most you can say is: "I submit that the evidence is clear that" or "I suggest that . . . ."

4. Tell jury a story -- chronologically where possible.

5. Avoid or eliminate entirely -- Smith testified, Jones testified, etc.

6. Blend documents and testimony into your story.

   A. Prepare chart of key documents and testimony in chronological order for your use

   B. Will highlight the defendant's financial life

   C. List will suggest approach to take

   D. Often will show up dramatic contrasts

   E. Points up "real life of defendant" for the jury

EXAMPLE
CHART FOR PREPARING
ARGUMENT

DATE	***DOCUMENT***	***EXHIBIT***
12/22/89	Suit for Husband - $800	6
12/24/89	Deposit on 1990 Cadillac -- $16,000	19
1/10/90	Monthly Payment on Swimming Pool -- $1,125	27
2/15/90	Country Club Birthday Party - $2,500 - 25 Guests	8
3/17/90	9:45 a.m. - $9,500 Deposited in Bank - cash	14
3/31/90	Trip to Disneyland - $3,000	32, 44
4/15/90	Trip to Switzerland - Passport	42
4/15/90	1989 Tax Return - Tax Due $900	1

STYLE

1. Personalize argument, *e.g.*, instructions referred to in argument:

   Suggest: His Honor will tell you

   NOT: You will be instructed by the Court

2. Charts:

   A. Useful in final argument

   B. Keep as simple as possible -- less detail the better

   C. Clear use of charts with judge ahead of time

3. Round off figures and use totals rather than figures for individual years whenever possible:

   A. *Case*: Defendant did not report $20,512.00 in 1988, $28,752.00 in 1989 and $15,300 in 1990

   B. *Convert to*: Defendant did not report over $64,000; or for three years in a row the defendant signed her name to false returns -- false by over $64,000

4. Ask for a guilty verdict

CONCLUSION

WE DO WIN WHEN JUSTICE IS DONE