

**EVIDENCE: TEACHING
MATERIALS FOR AN AGE
OF SCIENCE AND
STATUTES**

Seventh Edition

2016 Supplement

RONALD L. CARLSON

*Fuller E. Callaway Chair of Law Emeritus
University of Georgia Law*

EDWARD J. IMWINKELRIED

*Edward L. Barrett, Jr. Professor of Law
University of California, Davis*

JULIE SEAMAN

*Associate Professor of Law
Emory University School of Law*

ERICA BEECHER-MONAS

*Professor of Law
Wayne State University Law*

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Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
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www.cap-press.com

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Chapter 1

THE PHILOSOPHY AND HISTORY OF AMERICAN EVIDENCE LAW

C. THE USE OF LAY JURORS

Page 8. Substitute the following for Note 2:

2. Attempts to improve the adversary process are ongoing. The Federal Rules were revised in 2011 to clarify the rules. Numerous state jury reform projects have been undertaken. *See* Randall T. Shepard, *State Court Reform of the American Jury*, 117 YALE L. J Pocket Part 166 (2008) (reporting that more than half the states have jury reform initiatives). The American Bar Association also recommended a number of ways to improve the jury process, including permitting jurors to take notes, ask questions, and discuss evidence. *See* AMERICAN BAR ASSOCIATION, PRINCIPLES RELATING TO JURIES AND JURY TRIALS (2005).

Chapter 2

EVIDENCE: TYPES, SOURCES AND SUBSTITUTES

A. THE TYPES OF INFORMATION TO WHICH THE EVIDENCIARY RULES ARE APPLIED

Page 19. Add new Note 3:

3. California Evidence Code § 140 is significant for another reason. Its language is so broad that the information a juror gains during a jury view (discussed in Chapter 13) can constitute evidence useable to support a finding of fact.

B. THE SOURCES OF EVIDENCE LAW

3. Statutes and Statutory Interpretation

Page 29. Add at the end of Note 4:

The text of constitutional provisions tends to be more open-textured than that of statutes. It is also much more difficult to amend the Constitution. Therefore, theoretically, it would be justifiable to adopt an originalist approach to statutory interpretation while taking a dynamic approach to constitutional interpretation.

4. The Common Law

Page 30. Replace Note 3 with the following:

Consider Federal Rules of Evidence 101(b)(5) and 402. What light do these rules shed on the proper approach to interpreting the Federal Rules? *See Imwinkelried, A Brief Defense of the Supreme Court's Approach to the Interpretation of the Federal Rules of Evidence*, 27 IND. L. REV. 267 (1993).

C. SUBSTITUTES FOR EVIDENCE: OTHER METHODS OF ESTABLISHING FACTS

1. Judicial Notice

a. Judicial Notice of Facts

Page 32. Add at the beginning of Note 3:

3. Taking judicial notice of internet evidence has become increasingly common. Trusted websites--those highly likely to be accurate, as distinguished from social media sites--are an important source of factual information in this internet age. *See Bellin & Ferguson, Trial by Google: Judicial Notice in the Internet Age*, 108 NORTHWESTERN L. REV. 1137 (2014) (raising concerns about "the ease of accessing factual data on the Internet [which] allows judges and litigants to expand the use of judicial notice").

4. Judicial notice is applied more broadly in administrative proceedings. *See Singh v. Ashcroft*, 393 F.3d 903, 9055–06 (9th Cir. 2004).

2. Other Methods of Establishing Facts

Page 38. *In the final paragraph, insert “res judicata,” before “issue preclusion.”*

Chapter 3

THE CHRONOLOGY OF A TRIAL

B. THE ORGANIZATION OF THE TRIAL AS A WHOLE

3. The Plaintiff's or Prosecutor's Case-in-Chief

Page 41. Insert at the end of the second paragraph in the section:

Although the traditional practice is to call one witness at a time, some courts are now experimenting with concurrent testimony by experts. Sonenshein & Fitzpatrick, *The Problem of Partisan Experts and the Potential for Reform Through Concurrent Evidence*, 32 REV. LITIGATION, Wint. 2013, at 1. After the opposing witnesses make preliminary statements, the judge questions both; and the witnesses can respond to each other's testimony. Concurrent evidence—sometimes referred to as “hot tubbing”—is an established practice in Australia. Calling the opposing experts simultaneously better enables the trier of fact to identify the real points of disagreement between the experts, and the witnesses' concurrent appearance makes it less likely that either expert will make exaggerated claims.

10. The Judge's Instruction (or “Charge”) to the Jury

Page 48. Insert a new paragraph after the first full paragraph on the page:

As we shall see in Chapter 12, today there is a new skepticism about expert testimony. One of the manifestations of that skepticism is that a growing number of courts are giving jurors novel cautionary instructions about various types of scientific evidence. Courts have long given jurors a general instruction that they are not required to accept an expert's opinion. Now some courts are also giving cautionary instructions about pathologist's opinions about time of death, statistical analysis, questioned document examination, and fingerprint testimony.

Page 49. Insert at the end of the second full paragraph on the page:

Until recently, there appeared to be a consensus among academic commentators that the judge's jury instructions are of relatively limited effectiveness. However, Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN.L.REV. 407 (2013) challenges the consensus. The article surveys 33 published studies of the efficacy of instructions. In the author's view, the generalizations about the ineffectiveness of instructions are “at best greatly exaggerated. Evidentiary instructions probably do work although imperfectly and better under some circumstances than others. The conventional wisdom about evidentiary instructions—‘of course they don't work’” is “unduly pessimistic.”

Chapter 4

THE EXAMINATION OF A WITNESS

A. THE ORDER OF THE EXAMINATION OF A WITNESS

3. Questions by the Trial Judge

Page 58. Insert new Note 3:

3. The above cases deal with fact situations in which the judge questions a witness in the presence of a jury. In that setting, the question is whether a reasonable juror would have concluded that the trial judge was apparently biased against the defendant. There is a different standard when the judge questions at a bench trial. In *United States v. Modjewski*, 783 F.3d 645 (7th Cir. 2015), *cert.denied*, 193 L.Ed.2d 146 (2015), the judge actively questioned a defense expert in a sentencing hearing without a jury. The court stated that to obtain a reversal after a bench proceeding, the defendant must show that the judge’s questions manifested “such a high degree of favoritism or antagonism as to make fair judgment impossible. *Liteky v. United States*, 510 U.S. 540, 555 . . . (1994).” Thus, here the question is whether the judge’s conduct supports the inference that the judge was actually biased against the defendant.

4. Questions by the Jurors

Page 59. Insert at the end of the carryover paragraph on the top of the page:

Today only “a small minority of jurisdictions” forbid jury questioning. “The Supreme Court has never ruled on this procedure, having denied certiorari four times on cases where juror questioning was an issue on appeal . . .” Frank, *The Jury Wants to Take the Podium—But Even with the Authority to Do So, Can It? An Interdisciplinary Examination of Jurors’ Questions of Witnesses at Trial*, 38 AM.J. TRIAL ADVOC. 1 (2014).

B. THE SCOPE OF THE EXAMINATION OF A WITNESS

2. Cross-Examination

b. The Consequences of Undue Restriction of the Scope of Cross-Examination

Page 62. Insert after the first sentence in the last full paragraph on the page:

Of course, the threshold question is whether the witness’s responses on cross-examination constituted a refusal to answer. If the witness suffers a genuine memory loss, many courts refuse to characterize the witness’s response as a refusal warranting striking the witness’s testimony. *People v. Noriega*, 237 Cal.App.4th 991, 188 Cal.Rptr.3d 527, 535-36 (2015). However, it can be argued that if the witness untruthfully claims a memory loss, the witness is impliedly refusing to testify. Nevertheless, there is authority that even if the witness is feigning memory loss, the

witness is still deemed available for cross-examination.

5. The Rule of Completeness

Page 67. Insert at the end of Problem 4-8:

In Chapter 18, we shall discuss the concept of nonhearsay uses of evidence. Many courts hold that when an audio recording includes statements by both an accused and a confidential informant, the informant's statements on the tape are admissible for the nonhearsay purpose of providing necessary context for the interpretation of the accused's statements. Could a similar argument be made here?

C. THE FORM OF THE EXAMINATION OF A WITNESS

2. Leading Questions

Page 69. Insert a new paragraph before NOTES AND PROBLEMS:

The preceding discussion assumes that the wording of the questioner's verbal statement supplies the suggestion to the witness. However, the suggestion can also take nonverbal form. According to *United States v. Greene*, 704 F.3d 298, 311 (4th Cir. 2012), *cert.denied*, 134 S.Ct. 419, 187 L.Ed.2d 279 (2013), "a prosecutor cannot . . . physically point to a defendant and ask a witness if the defendant is the person who committed the crime. [I]t is clearly . . . inappropriate to point to the defense table while asking a witness if the perpetrator . . . was in the courtroom." A similar problem can arise if the questioner points while asking a witness to identify certain locations on a map, chart, or diagram.

Page 71. Insert after the second sentence in Note 2:

See CAPRA & GREENBERG, THE FORM OF THE QUESTION 67, 69, 72 (2014) (a witness's actual hostility can be manifested in several ways; before trial, the witness might refuse to meet with the attorney; at trial, the witness's "surly" demeanor in the form of gestures, "facial expressions, and voice inflection" can evidence hostility; likewise, evasive and argumentative answers can provide a basis for the judge finding that the witness is hostile).

4. Argumentative Questions

Page 73. Insert before the last sentence in the carryover paragraph on the top of the page:

When the questioner engages in such conduct, the objectionable conduct is often characterized as "badgering the witness." See CAPRA & GREENBERG, THE FORM OF THE QUESTION 193 (2014)(the questioner might adopt insulting or mocking demeanor, shout at the witness, attempt to intimidate the witness by drawing too close, point a finger at the witness's face, or employ facial expressions such as rolling his or her eyes to convey disbelief).

Chapter 5

THE ROLES OF JUDGE, JURY AND ATTORNEYS

A. THE ROLE OF THE ATTORNEYS IN THE ADMISSION AND EXCLUSION OF EVIDENCE

1. Pretrial Motions to Admit or Exclude Evidence

Page 76. Insert after the CARLSON citation on the top of the page:

The Federal Rules of Evidence do not explicitly authorize such motions, but the federal courts have held that they have inherent procedural authority to entertain and rule on *in limine* motions.

Page 77. Insert after “revisiting its decision when the evidence is offered”:

McConnell v. Wal-Mart Stores, Inc., 995 F.Supp.2d 1164, 1168 (D.Nev. 2014), citing *Ohler v. United States*, 529 U.S. 753, 758 n. 3 (2000).

2. Offering Evidence at Trial

Page 77. Insert after Q1:

(Many judges prefer that exhibits are pre-marked before trial. If the exhibit has been pre-marked, Q1 is unnecessary.)

Page 77. Insert after Q2:

(If the exhibit has been pre-marked, Q2 would read: “Please let the record reflect that I am showing the opposing counsel what has previously been marked as plaintiff’s exhibit number one for identification.”)

The offer of proof

Page 80. Insert before “3. Objections to Evidence at Trial”:

In the above example, the proponent makes an oral offer of proof. However, there are alternative methods. Graham, *Preserving Error for Appeal; Objections and Offers of Proof*, 44 CRIM.L.BULL. 609, 621 (July-Aug. 2008). For example, the proponent could submit the offer in writing. For that matter, if the judge believes that the proponent’s description of the testimony is almost too good to be true, the judge might insist that the witness testify outside the jury’s hearing.

3. Objections to Evidence at Trial

3. How should the objection or motion be phrased?

Page 82. Insert a new paragraph at the end of the section:

It is true that *Findley* is not the prevailing view for the phrasing of objections at trial. However, think back to the preceding discussion of pretrial *in limine* motions. In that setting, it is both feasible and fair to insist on greater specificity. To begin with, while at trial objections can arise on the spur of the moment, the opponent often has days to prepare for a hearing on an *in limine* motion. In that context, it is feasible to demand that the opponent be more specific. Moreover, at trial after an objection is sustained, the proponent can rephrase on the spot. In contrast, at the hearing on an *in limine* motion the submissions are usually written, often in the form of declarations or affidavits by the witness. Hence, the proponent does not have the same flexibility to adapt to an unfavorable ruling.

B. THE ROLE OF THE TRIAL JUDGE

2. Preliminary Facts Conditioning the Admissibility of Evidence

Page 86. Insert at the end of Note 2:

In the case of the preliminary fact of a witness's personal knowledge (F.R.E. 602), the jury might decide that the witness "doesn't know what he's talking about." In the case of the preliminary fact of the authenticity of a letter (F.R.E. 901), the jury might decide that the exhibit "isn't worth the paper it's written on." In all these cases, even lay jurors without any legal training will realize that they should disregard the evidence during the balance of their deliberations.

Page 86. Insert at the end of the second paragraph in Note 4:

Grandoe Corp. v. Gander Mountain Co., 761 F.3d 876, 883 (8th Cir. 2014)("the court submits the preliminary question to the jury as long as a reasonable jury could find that the preliminary fact exists").

D. PROOF OF FOUNDATIONAL FACTS

Page 94. Insert after the first sentence in Note 1:

In re Int'l Management Associates, LLC, 781 F.3d 12621268 (11th Cir. 2015)(when Rule 104(a) applies, "the court may consider any unprivileged evidence—even hearsay").

Chapter 7

WITNESS COMPETENCY

C. THE PREVAILING MODERN DOCTRINE

Page 118. Replace text of Rule 601 with the following:

Rule 601. Competency to Testify in General

Every person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision.

Page 118. After the final sentence in the introductory section, insert:

Today, the two most common types of persons encountered in the competency cases are children and people suffering from moral disorders.

1. General Competency Requirements

c. Mental Capacity to Remember

Page 127. At the end of the final sentence in Note 2:

Replace "later" with "in Chapter 8."

Page 128. At the end of the first sentence of Note 5, insert:

on the admissibility of testimony that is a product of hypnotic induction.

D. THE FEDERAL RULES

Page 130. Before the final sentence before the Notes, insert:

These courts apparently treat Rule 601 as merely erecting a presumption of competency.

Page 131. At the start of the quotation in Note 2, insert:

"as a matter of law"

E. SPECIALIZED ASPECTS OF COMPETENCY

2. Judges, Jurors and Attorneys

a. Judges

Page 138. In the middle of the page, replace the text of Rule 605 with the following:

The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.

Page 138: At the end of Problem 7-7, insert:

Can a judge violate Rule 605 even without taking the witness stand?

b. Jurors

Page 139. Replace text of (a) with:

- (a) At the trial. A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence.

Replace text of (b) with:

- (b) During an inquiry into the validity of a verdict or indictment.
- (1) Prohibited Testimony or Other Evidence
During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.
- (2) Exceptions.
A juror may testify about whether:
- (A) extraneous prejudicial information was improperly brought to the jury's attention;
(B) an outside influence was improperly brought to bear on any juror; or
(C) a mistake was made in entering the verdict on the verdict form.

Page 140. Delete 3rd and 4th full ¶¶ starting "Section b(3)"

Page 142. Before the Problem, add the following:

The issue of whether the "no impeachment" rule of FRE 606(b) runs afoul of the Sixth Amendment's guarantee of a fair and impartial jury has been roiling the courts for some time. In *Tanner v. United States*, 483 U.S. 107, 120 (1987), the Supreme Court addressed the question whether juror testimony about drug and alcohol use in the jury room was barred by FRE 606(b), and held that "no impeachment" rules like FRE 606(b) were valuable because they promoted "full and frank discussion in the jury room." *Tanner*, 482 U.S. at 120. Moreover, the Court explained, "allegations of juror misconduct, incompetency or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process." *Id.* The Court further observed that the Sixth Amendment was protected despite FRE 606(b)'s "no impeachment" rule by the processes of voir dire, pre-verdict observations by the judge, counsel, and other court personnel, and the availability of non-juror testimony about conduct outside the jury room. *Id.*

The Court again took up the issue of juror post-verdict testimony in *Warger v. Shauer*, 135 S. Ct. 521 (2014). There it held inadmissible a juror's proffered testimony about statements that the jury foreperson had made during deliberations in a personal injury trial to the effect that her daughter had been at fault in a car accident and that if she had been sued, it would have

ruined her life. *Id.* at 524. The Court held that the “no impeachment” rule (of FRE 606(b) and its state equivalents) did not violate the Sixth Amendment’s right to a fair and impartial jury.

The Supreme Court has recently granted certiorari in another case presenting the question of whether the “no impeachment” rule violates the Sixth Amendment in a case involving statements of racial bias made by a juror during jury deliberations. *Pena-Rodriguez v. Colorado*, 136 S. Ct. 1513 (April 4, 2016) (memorandum opinion). The Colorado Supreme Court had upheld the lower court holding that excluded evidence of juror racial bias under the Colorado equivalent to FRE 606(b). Specifically, there was evidence that a juror had stated during deliberations that the jury should convict the defendant in a sexual contact and harassment case because “he’s a Mexican and Mexican men take what they want” and because, as a former law enforcement officer, he had observed that nine times out of ten, Mexican men were guilty of aggression to women. In addition, the same juror had urged the other jurors to disregard the defendant’s alibi witness because he was an illegal Hispanic immigrant. The trial court declined to permit post-verdict juror testimony (in the form of affidavits) about the statements of racial bias nor did it find Colorado’s version of 606(b) unconstitutional as applied because the defendant had failed to conduct specific voir dire about racial bias. Although the juror had been asked on voir dire whether he had any feelings for or against the defendant, he was not asked whether he harbored racial, national origin or illegal status bias. The appellate court affirmed, as did the Colorado Supreme Court.

In Problem 7-8(i), delete case citations and add the following:

See Warger v. Shauers, 135 S. Ct. 521, 528 n. 3 (2014) (declining to admit testimony of juror bias during deliberations, but commenting that cases involving racial bias might be “so extreme that almost by definition, the jury trial right has been abridged.”). *See also* Comment, *What Happens in the Jury Room Stays in the Jury Room. . . But Should It? A Conflict Between the Sixth Amendment and Federal Rule of Evidence 606(b)*, 60 U.C.L.A. L. REV. 262 (2012) (discussing cases); Comment, *Fleshner v. Pepose Vision Institute: Eviscerating the Mansfield Rule*, 46 NEW ENGL. L. REV. 649 (2012) (discussing case).

Chapter 8

LOGICAL RELEVANCE: PROBATIVE VALUE

B. THE DISTINCTION BETWEEN PURE LOGICAL RELEVANCE AND MATERIALITY

1. Logical Relevance

Page 150. In Problem 8-7:

Change “42% of the world’s population” to “40% of the world’s population”

Change citation to 1 P. GIANELLI, E. IMWINKELRIED, A. ROTH & J. CAMPBELL MORIARTY, SCIENTIFIC EVIDENCE § 17.10[a] at 1103(5th ed. 2012)

2. Materiality

a. Introduction

Page 151. In Problem 8-11, Add the following parenthetical to Rose v. Brown & Williamson:

(holding defendant manufacturer’s wealth relevant in a personal injury case claiming punitive damages).

b. Curative Admissibility

Page 153. In the third full paragraph:

Change “mounting confession” to “mounting confusion.”

D. THE DISTINCTION BETWEEN FACIAL AND UNDERLYING LOGICAL RELEVANCE

2. Underlying Logical Relevance

a. Underlying Logical Relevance – Personal Knowledge

Page 165. In Problem 8-18, add at the end of the next to last sentence:

in Chapter 23, when we discuss Rule 701.

At the end of the last sentence insert:

so long as the mechanic makes it clear that the opinion is based on Roe’s demeanor.

b. Underlying Logical Relevance – Authentication

Page 169. In Note 1:

Change 901 to 901(b)

Page 170. Change:

“6th ed. 2006” to “7th ed.”

Chapter 9

SPECIALIZED ASPECTS OF LOGICAL RELEVANCE: AUTHENTICATION OF WRITINGS

B. PRIVATE WRITINGS

2. Comparison by the Trier of Fact

Page 176. Insert a new paragraph at the end of the section:

Interestingly enough, Rule 901(b)(3) permits testimony based on a comparison with “an authenticated specimen” – in the singular. It is doubtful whether any reputable expert questioned document examiner would be willing to rely on a comparison based on only a single exemplar of the claimed author’s handwriting style. 2 GIANNELLI, IMWINKELRIED, ROTH & MORIARTY, SCIENTIFIC EVIDENCE § 21.02[a], at 390-91 (5th ed. 2012). When the testimony has such a meager basis, there is good reason to question its reliability. Understandably, in the real world, the proponent usually offers the jury or expert multiple authenticated exemplars.

3. Non-Expert Opinion

Page 176. Insert after the first sentence in the first paragraph:

This is an example of the sort of skilled lay observer opinion discussed in Chapter 23.

Page 180. Insert new Note 5 at the end of the section:

5. At first blush, the application of the authentication doctrine to emails, text messages, and social media postings may seem intimidating. However, do not lose sight of the fundamental question: Has the proponent presented sufficient foundational testimony to prove that the item is what he or she claims that it is? Consider a variation of *Rodrguez*, another text message problem. When the proponent offers a printout or screen capture at trial, the proponent is probably making three claims: At one time a text message was sent; the exhibit is an accurate copy of the message; and a certain person sent the message. The witness testifies that: Ten minutes before receiving a text message she had a face-to-face conversation with the plaintiff; she remembers the text message; the exhibit the attorney has just handed her is an accurate copy of the message; and the message disclosed information that she had disclosed only to the plaintiff in the earlier conversation. As short as that testimony is, it is sufficient to prove all three claims and, hence, to satisfy Federal Rule 901.

C. BUSINESS WRITINGS

3. Simplified Procedures for Introducing Business Records

Page 186. Insert at the end of the section:

On May 7, 2015 the Advisory Committee on the Federal Rules released a proposed amendment to Federal Rule 902 for public comment. The amendment would add the following provisions to Rule 902:

(13) Certified Records Generated by an Electronic Process or System. A record generated by an electronic process or system that produces an accurate result, as shown by a certification by a qualified person that complies with the certification requirements of Rule 902(11) or 902(12). The proponent must meet the notice requirements of rule 902(11).

(14). Certified Data Copies from an Electronic Device, Storage Media or File. Data copied from an electronic device, storage media, or electronic file, if certified by a process of digital identification, as shown by a certification by a qualified person that complies with the certification requirements of Rule 902(11) or Rule 902(12). The proponent must meet the notice requirements of Rule 902(11).

In the case of proposed Rule 902(13), suppose that the question is whether a particular USB device, belonging to the defendant, was connected to a particular computer, belonging to the plaintiff. The computer uses a Windows operating system. That system automatically records information about every USB device ever connected to it in a database known as the Windows registry. The data recorded includes the manufacturer, model, and serial number of the device connected. A technician might submit a certification that: He or she has certain qualifications as a computer technician; on a particular date, they searched the Windows registry of a certain computer (the computer owned by the plaintiff); the registry indicated that on a certain date, a USB thumb drive with a particular manufacturer, model, and serial number (the device owned by the defendant) was connected to the computer; and the attached document is an accurate printout of the information stored in the Windows registry. Without any live testimony, that certificate would render the exhibit self-authenticating.

In the case of proposed Rule 902(14), assume that the question is whether the exhibit is an accurate printout of the text messages on the plaintiff's Samsung Galaxy phone. A computer technician could submit a certification that: He or she has certain qualifications as a computer technician; on a particular date, they received a particular Samsung Galaxy phone (belonging to the plaintiff); at that time, they went to the phone's text log; they used a generally accepted method to copy the contents of the log; after they had made the copy, they used software to hash the original log and the copy; a hash value is a 30-character unique alpha-numeric sequence for the contents of an electronic file; if the hash values for two files match, the match establishes that the contents of the two files are identical; when they hashed the original log and the copy, the two hash values matched; and the attached document is a printout of the copy of the text messages. Again, without any live, sponsoring testimony, the certificate would render the exhibit self-authenticating.

Chapter 10

SPECIALIZED ASPECTS OF LOGICAL RELEVANCE: IDENTIFICATION OF PHYSICAL EVIDENCE

A. INTRODUCTION

Page 192. Insert a new paragraph after the diagram:

In a courtroom with modern computer technology, an exhibit can be loaded onto the proponent's laptop computer which has been connected to the courtroom's technology. The exhibit can be displayed on screen to a witness, opposing counsel and the judge. After foundation proof and a favorable ruling by the court, the exhibit can be shown to the jury. Steps are outlined, with suggested Q. and A., in R. Carlson and E. Imwinkelried, *Dynamics of Trial Practice* § 7.2 (4th ed. 2012).

B. REAL OR ORIGINAL PHYSICAL EVIDENCE

2. Chain of Custody

Page 201. Add to Note 5:

Chain of custody and authentication requirements were complied with in connection with DNA evidence in *Walker v. State*, 757 S.E.2d 64, 66-67 (Ga. 2014).

C. DEMONSTRATIVE PHYSICAL EVIDENCE

Page 202. Add the following just prior to the last sentence in the first paragraph:

Attorney Belli was often called the "King of Torts." He authored an entire treatise, *MODERN TRIALS*, devoted to the imaginative use of demonstrative aids at trial.

Page 204. Insert as paragraph two of note 4:

In accord with the view that purely illustrative aids do not go back to the jury room for deliberations is *Baugh v. Cuprum*, 730 F.3d 701 (7th Cir. 2013). This case provides a comprehensive explanation of which items accompany the jury and those which do not. An exemplar ladder was used by a defense expert to illustrate his testimony in an injury case emanating from collapse of a ladder. When the judge kept the ladder out of the jury room because it was purely a demonstrative aid, the jury sent a note asking if they could step on the ladder. Plaintiff's counsel objected. Ultimately, the court allowed the ladder to go into the jury room. This was reversible error. The court explained.

The general rule is that materials not admitted into evidence simply should not be sent to the jury for use in its deliberations. *Bankcard America, Inc. v. Universal*

Bancard Systems, Inc., 203 F.3d 477, 483 (7th Cir.2000) (sending three unadmitted documents to jury was "sloppy" and an error, but harmless); *Artis v. Hitachi Zosen Clearing, Inc.*, 967 F.2d 1132, 1142-43 (7th Cir.1992) (error to send unadmitted damages summary to jury room for deliberation, but also harmless); see also *United States v. Holton*, 116 F.3d 1536, 1542 (D.C.Cir.1997) ("To protect jury deliberations from improper influence, we ordinarily restrict the jury's access only to exhibits that have been accepted into evidence...."). The district court failed to adhere to this limit when, despite plaintiff's objection, the court deliberately submitted the unadmitted ladder to the jury during deliberations as if it were admitted, substantive evidence. We conclude that the court's action was an abuse of discretion and was not harmless.

Some courts adopt a looser, less careful view when it comes to policing what goes into the jury room. See, e. g., *Moss v. State*, 559 S.E.2d 433 (Ga. 2002) (mannequin head used by medical examiner to illustrate testimony was allowed to be taken back with the jury).

Page 206. Add the following to the Note:

In another case the trial court did not abuse its discretion in allowing the prosecution to use a rope to demonstrate an act of strangulation. The evidence suggested a rope may have been used to strangle the victim. During closing argument the rope demonstration was followed by four minutes of timed silence representing the amount of time it took the victim to die. The rope was tied around a bannister in the courtroom followed by tugging on it to illustrate the act of strangulation. *Crawford v. State*, 777 S.E.2d 463, 465 (Ga. 2015).

A personal injury dispute provided another illustration of demonstrative evidence. In *Baugh v. Cuprum*, 730 F.3d 701, 708 (7th Cir.2013), plaintiff suffered a severe brain injury when a ladder he was using to clean his gutters buckled and collapsed. The defense called an expert who used an exemplar ladder to illustrate his testimony. "That is a classic and proper use of a demonstrative exhibit." Later in the case a mistake was made when this demonstrative aid was allowed to go to the jury room during deliberations. This was after it had been treated during trial as a demonstrative exhibit, and not as evidence. A verdict in favor of the manufacturer was reversed on appeal due to this error. This element of the *Baugh* case is explored in detail earlier in this section of Chapter 10, note 4 *supra*.

Chapter 11

SPECIALIZED ASPECTS OF LOGICAL RELEVANCE: IDENTIFICATION OF SPEAKERS AND VERIFICATION OF PHOTOGRAPHS AND CHARTS

A. THE IDENTIFICATION OF A SPEAKER

3. Lay Observer Testimony

Page 209. Change the citation in Problem 11-2:

The official citation to *Williams* is 262 Fed. Appx. 165 (11th Cir. 2008).

4. Expert Testimony Based on Sound Spectrography

Page 213. Change cite in first paragraph:

The Imwinkelried citation should be to 10-6[C], at 10-17 (5th ed. 2014).

Page 213. Add citation to last paragraph:

In the line of opinions which favor voiceprint evidence, add after the last *Williams* decision the case of *State v. Coon*, 974 P.2d 386 (Alaska 1999).

5. Audio Recordings

Page 216. Add just prior to Notes:

2015 litigation underlines the point that the *McMillan* factors identified in the *McAlinney* case continue to be applied. A drug trafficker was overheard on a wiretap about moving cocaine to distributors in St. Louis. At his trial a DEA special agent identified the speakers on the recordings. The district court properly allowed them into evidence, said *United States v. Haire*, 806 F.3d 991 (8th Cir. 2015):

Admission of wiretap recordings is likely proper if the government establishes that: (1) the device was capable of recording the statements; (2) the operator was competent to operate the device; (3) the recordings are authentic and correct; (4) changes have not been made; (5) the recordings have been preserved; (6) the speakers are identified; and (7) the conversation was voluntary. *Id.* (citing *United States v. McMillan*, 508 F.2d 101, 104 (8th Cir. 1974)). We have explained that these *McMillan* factors are merely helpful guidelines and must be viewed in light of the circumstances rather than rigidly applied. *Id.*

B. PHOTOGRAPHS

1. Still Photographs

Page 222. At end of Notes and Problems, add the following:

In another case, photography showed rib injuries to a child and were admissible even though the pictures were post-autopsy photos. *Churchill v. State*, 782 S.E.2d 5 (Ga. 2016).

2. X-Rays

Page 224. Insert the following after the first full paragraph.

In keeping with the above trend is *Clark v. State*, 769 S.E.2d 376, 381 (Ga. 2015). In this homicide case the defense argued the autopsy X-rays were prejudicial and should have been excluded because the authenticating doctor did not perform the autopsy nor administer the x-rays. The appellate court approved admission of the x-rays and photos taken during the autopsy because the doctor had reviewed them as well as the autopsy report. This qualified the witness to authenticate the exhibits.

3. Automated Photographic Systems

Page 226. Add to Notes:

3. Surveillance video was used to convict a defendant of a robbery which occurred in the management office of an apartment. The video revealed the defendant's culpability, and the Government established that the video introduced from a thumb drive was an unaltered copy of the video of the robbery recorded on the apartment complex's surveillance system. The appellate court rejected the defendant's argument that it was error to receive a copy, rather than the original. A duplicate is admissible to the same extent as an original, said the court. *United States v. Pasley*, 629 Fed. Appx. 378, 381 (3d Cir. 2015). Best evidence rule objections are treated in detail in Chapter 24, *infra*.

4. Motion Pictures, Videotapes and Electronic Imagery

Page 228. Add after the reference to Successful Techniques:

There has even been extension of the "day-in-the-life" approach to criminal cases. In *Goulding v. State*, 780 S.E.2d 1, 7-8 (Ga. Ct. App. 2015), such a film was used to prove the extent and nature of injuries to a child in connection with a crime involving cruelty to a child.

Videotape Evidence

Page 230. Add after end of first paragraph at top of page:

In *United States v. Hodges*, 616 Fed. Appx. 961, 966 (11th Cir. 2015), the accused was charged with possession of marijuana with intent to distribute. The jury saw videos found on the computer of Cortez Hodges, a.k.a. Gator, showing Hodges sitting beside "what appears to be marijuana displayed alongside cash." The district court correctly admitted "videos retrieved from the seized computer or external hard drive found in Hodges' house and photographs produced from the videos."

Possession of child pornography was established by videos obtained from the defendant's computer in *United States v. Dudley*, 804 F.3d 506, 515 (1st Cir. 2015). The defense objected to display of the video because of its likely prejudicial impact, but the objection was unsuccessful:

B. The Video Excerpts

Prior to trial on the possession matter, Dudley filed a motion *in limine* offering to stipulate that the CD's found in his home contained child pornography as defined by federal law, and thus, sought to preclude the government from showing the jury any images of child pornography. Alternatively, Dudley sought to limit publication to one image and/or to limit the image, or images, to those that were "less inflammatory," such as "those depicting children in sexually suggestive poses" rather than, for example, an image of "adults sexually abusing children." Dudley also sought to limit the images to show only the bodies of the children because "[t]he expressions on the faces of the children who are being abused are heartbreaking and [would] most certainly inflame the passions of the jury."

In the end, the government played a 30-second clip from two videos. This shortened the view of each measurably from their original twelve to fifteen minute length. Both videos depicted sex acts between adults and children. Dudley argued his willingness to stipulate lessened the probative value of the videos to such an extent that it was reversible error for the trier of fact to see them, no matter how brief the excerpt. The court held that a defendant's Rule 403 objection generally cannot prevail over the Government's choice to prove guilt in its own way. For more on stipulations to block evidence and the *Old Chief* case, see Chapter 13 *infra* at section C. 1.

Page 230. Change citation in last full paragraph:

Update the Objections at Trial reference to page 54 and to (7th ed. 2015).

Page 230. Add at end of last full paragraph:

A simulation of a rollover crash was approved in *Key Safety Systems, Inc. v. Bruner*, 780 S.E.2d 389 (Ga. Ct. App. 2015) (use of videotaped simulation by an expert to illustrate expert's testimony was permissible).

Page 231. Add after first full paragraph:

Failure to establish a reliable foundation for the animation can result in its rejection. *Michael v. State*, 782 S.E.2d 479, 486 (Ga. Ct. App. 2016) (expert's computer animation excluded because party offering it failed to show a sufficient basis for the depiction of the accident).

Page 231. Add at end of second full paragraph:

Citing *People v. Duenas*, 281 P.3d 887, 903 (Cal. 2012) on the role of jury instructions is J. Vaughn, *Animations*, Trial 46, 47 (Dec. 2015). The author explains the nature of those instructions.

When a computer animation is admitted as demonstrative evidence, expect the court to instruct the jury not to give more weight to the animation or simulation than to any other evidence, and to tell the jury that the animation is only meant to be a representation of the witness's testimony.

Attorney Vaughn adds that "if your animation is admitted for demonstrative purposes only, the court will not give it to the jury for deliberations," citing, *Cox v. State*, 849 So. 2d 1257, 1274 (Miss. 2003) (en banc). This approach is in keeping with traditional case law regarding what goes back with the jury. That case law is detailed in Chapter 10, Section C, note 4 supra.

Page 238. Add the following to Notes:

3. Charts or summaries may be used to illustrate witness testimony as an illustrative aid, or they may be offered as substantive evidence. The counsel employing them should carefully distinguish between charts as evidence versus charts or summaries as pedagogical devices. *Baugh v. Cuprum*, 730 F.3d 701, 707 (7th Cir. 2013). The court explains why this distinction needs to be clear.

Offering and admitting charts, summaries, models, maps, replicas, and so on as substantive evidence rather than as "demonstrative" exhibits sends an important signal. It alerts parties to the fact that the exhibit will become part of the actual evidence and therefore may well be available to the jury during deliberation.

Chapter 12

SPECIALIZED ASPECTS OF LOGICAL RELEVANCE: ASSESSING THE VALIDITY OF SCIENTIFIC EVIDENCE

A. INTRODUCTION

Page 239. Add at the beginning of the paragraph:

Logical relevance presents some particularly thorny issues when it comes to expert testimony.

At the end of the paragraph, add:

We will further explore expert opinion testimony in Chapter 23.

B. ADMISSIBILITY STANDARDS

1. General Acceptance

Page 240: In the final sentence of Note 3, insert “adequate” before “solid.”

Following State v. York, add the following parenthetical:

(holding that to be admissible, expert testimony must assist the trier of fact, and that requires a demonstration of sufficient reliability).

In Note 4, Insert the following parenthetical after Shirley:

(hypnotically induced testimony is so widely regarded as unreliable that it is inadmissible under the *Frye* test)

Insert the following parenthetical after McDonald:

(expert testimony on eyewitness identification could be helpful to the trier of fact).

Page 241. In Problem 12-1, in the first paragraph add the following parenthetical after Palmer:

(finding testimony regarding scanning electron microscope for GFR particles admissible).

2. The Threshold of Helpfulness to the Jury

Page 244. At the beginning of Note 2, insert:

A great deal of

In Note 3, add the following parenthetical to Chapple:

(finding error in exclusion of eyewitness expert testimony)

Page 245. Insert immediately before Daubert:

In the following case, the Supreme Court explicitly tied the admissibility of scientific evidence to relevance, and relevance to validity and reliability.

3. Validity and Reliability as Relevance Concerns

Pages 246-47. Replace paragraphs 1-5 with the following:

[Minor children born with serious birth defects and their parents alleged that the birth defects had been caused by the mothers' ingestion of Bendectin. No published study had found Bendectin to be a human teratogen, but plaintiffs' eight experts concluded, on the basis of in vitro (test tube) and in vivo (live) animal studies, as well as chemical structure studies, and re-analyses of previously done human studies, that there was a link between Bendectin and malformations. The District Court granted summary judgment for the defense on the basis of the general consensus test. The Ninth Circuit affirmed.]

Page 254. In Note 8, replace the third sentence with the following:

In 2012, the California Supreme Court embraced *Daubert* in *Sargon Enterprises v. University of Southern California*, 55 Cal. 4th 747 (2012) (upholding exclusion of lost profits testimony). However, in footnote 6, the court remarked that it was not abandoning *Frye*. That remark leaves open the possibility that expert testimony in California will have to meet both *Frye* and *Daubert* standards. In 2013 Florida shifted to *Daubert* by statute. At this point, the federal courts and approximately 70% of the states have adopted some variation of the *Daubert* validity standard.

D. STATISTICAL TESTIMONY AND ITS EMPIRICAL BASIS

2. The Validity of the Underlying Theory and the Reliability of the Instrument Implementing the Theory

Page 270. In Note 8, replace citation in first sentence with the following:

2 P. GIANELLI, E. IMWINKELRIED, A. ROTH & J. CAMPBELL MORIARTY, *SCIENTIFIC EVIDENCE* § 18.05[C](5TH ED. 2012).

Chapter 13

THE DISCRETION OF THE COURT TO EXCLUDE LOGICALLY RELEVANT EVIDENCE

C. APPLYING RULE 403

2. Step Two: Identifying the Countervailing Probative Dangers

Page 278. Insert at the end of the third full paragraph on the page:

Likewise, evidence of a party's immigration status might excludable under Rule 403. *Lucas v. Jerusalem Café, LLC*, 721 F.3d 927, 939 (8th Cir. 2013), *cert.denied*, 134 S.Ct. 1515, 188 L.Ed.2d 450 (2014).

3. Step Three: Striking the Balance Between Probative Value and Probative Dangers

Page 280. Insert after the first sentence in the first paragraph in the section:

“The amount of prejudice that is acceptable varies according to the amount of probative value the evidence possesses.” *Thompson v. City of Chicago*, 722 F.3d 963, 971 (7th Cir. 2013).

Page 281. Insert at the end of Note 5:

United States v. Sampson, 335 F.Supp.2d 166 (D.Mass. 2004)(on the one hand, the judge admitted several photographs of the decedent's wounds even though they showed putrefaction discoloration and insect activity; on the other hand, a crucifix had to be redacted from one photograph). A judge can order that a photograph be digitally enhanced to delete especially revolting details. *Hart v. County of Los Angeles*, 197 Cal.App.4th 1391, 132 Cal.Rptr.3d 27 (2011). See *United States v. Blevins*, 614 Fed.Appx. 609, 611 (3d Cir. 2015)(“all nudity was redacted”).

D. RECURRING ISSUES UNDER RULE 403

1. Tangible Objects, Photographs, and Other Visual Evidence

Page 285. Add new Notes 5, 6, and 7 at the end of the section:

5. When the exhibit is an autopsy photograph of the murder victim, the courts are more likely to exclude the photograph under Rule 403 if the photograph shows incisions made during the autopsy. MOENSSENS, HENDERSON & PORTWOOD, *SCIENTIFIC EVIDENCE IN CIVIL AND CRIMINAL CASES* § 2.13, at 165 (5th ed. 2007). The jury may mistake an incision for an injury inflicted by the murderer.

6. As the above materials indicate, in the past the battleground has usually been the admission of autopsy photographs. However, more recently the battleground has shifted to

images of child pornography. *United States v. Dodds*, 347 F.3d 893 (11th Cir. 2003)(the trial judge admitted only 66 of the 3,400 child pornography images found in the defendant's possession); *United States v. Pabon-Cruz*, 255 F.Supp.2d 200, 213-14 (S.D.N.Y. 2003)(although the defendant was willing to stipulate that certain photographs constituted child pornography, the photographs were admissible to show that the defendant knew that the children shown in the photographs were real), *aff'd in part, vacated in part*, 391 F.3d 86 (2d Cir. 2004).

5. Before ruling on a 403 objection to a photograph, the trial judge should personally view the photograph. *United States v. Cunningham*, 694 F.3d 372 (3d Cir. 2012). The judge should not rely on one side's written description of the contents of the photograph.

2. Experiments and Tests

Page 285. Insert at the end of the second full paragraph in the section:

See also Nunez v. BNSF Ry. Co., 936 F.Supp.2d 969, 978 (C.D.Ill. 2012)(the issue was the timing of a warning system at a railroad crossing; the experiment was on a different day with an unknown train traveling at unknown speed, and the experiment was not only unplanned but also conducted by inexperienced, grieving family members), *aff'd*, 730 F.3d 680 (7th Cir.2013).

Chapter 14

EVIDENCE OF CHARACTER, HABIT, AND OTHER ACTS AND TRANSACTIONS

A. CHARACTER EVIDENCE

2. Character as Circumstantial Evidence of the Conduct of a Party

Page 297. Insert at the end of the first full paragraph in Note 2:

However, even interactionists balk at predicting conduct when the character inference is based on a single other instance of conduct. Fleeson, *Toward a Structure and Process-Integrated View of Personality: Traits as Density Distributions of States*, 80 J.PERSON. 7 SOC. PSYCH. 1011, 1013 (2011)(in a survey of the published studies, the author found that the level of predictability was “at best .30”—worse than flipping a coin).

The FRE Approach: Rules 413-14—The Abolition of the Defendant’s Veto

Page 299. Insert after the second sentence in the first paragraph after the heading:

This type of legislation is sometimes referred to as a “rape sword” statute—to contrast it with “rape shield” statutes such as Rule 412 discussed later in this chapter.

Page 300. Insert after the first sentence in Note 2:

To begin with, it had become clear that the United States was the last country in the common-law world that still adhered to a rigid character evidence prohibition.

Page 301. Insert after the Burns citation in Note 3:

Graham, *Other Crime, Wrong, or Act Evidence: The Waning Penchant Toward Admissibility as the Wars Against Crime Stagger on; Part II. Sexual Battery and Child Molestation*, 49 CRIM.L.BULL. 1159, 1173-74 (2012)(“The Supreme Courts of five states, Delaware, Indiana, Iowa, Missouri, and Washington, have ruled propensity statutes to be unconstitutional”).

Page 301. Insert new Note 4:

4. If construed literally, Rules 413 and 414 permit the prosecution to invoke the statutes and invite the jury to engage in character reasoning even when there is only one other instance of the defendant’s conduct. Consider the supplement material for page 297 of this chapter. Even if the statutes are not facially unconstitutional, are they unconstitutional as applied when there is only one other instance of the defendant’s conduct? In those situations, it is arguably indefensible to draw the inference of the existence of a character trait. Turn back to the diagram on the top of page 294. If it is unwarranted to draw the first inference, it certainly seems unsound to draw the second inference.

3. Character as Circumstantial Evidence of the Conduct of a Non-Party

a. The Victims of Violent Crime

Page 307. Insert after the Martinez citation:

This concept sometimes dubbed “communicated” character. *Ex parte Miller*, 330 S.W.3d 610, 618 (Tex.Crim.App. 2009).

b. Victims of Sex Crimes

Page 309. Insert after the first sentence in the first full paragraph on the page:

In part, the feminist critique was that sexual relationships depend so heavily on the personal chemistry between the persons engaging in intercourse that a woman’s willingness to have sex with one partner sheds little light on whether she would be willing to have sex with another man.

Page 311. Insert a new paragraph after the carryover paragraph on the top of the page:

Rule 412(b)(1)(A) is especially important. That part of the statute is sometimes referred to as the “Scottsboro rebuttal” provision. It “takes its name from the Depression era cause celebre in which a group of Afro-American men were charged with raping two white women on a freight train.” 23 WRIGHT & GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5388, at 590-91 (1980). In that case, the prosecution offered medical testimony that semen had been found in the women’s vaginas, but the trial judge excluded evidence that the women had engaged in intercourse with other men the night before. The ruling was so shocking that it violated due process and denied the accused a fair trial. If the prosecution offers expert evidence of the presence of sperm or semen, that evidence can powerfully corroborate the alleged victim’s testimony that there was intercourse. Likewise, an ER physician’s testimony about the alleged victim’s injuries would corroborate her testimony that the defendant resorted to force to compel her to engage in sex.

Page 311. Insert “seemingly precocious” before “familiarity with sexual matters” in the first full paragraph on the page.

C. OTHER ACTS AND TRANSACTIONS

3. Other Acts Evidence in Civil Actions

a. Other Contracts

Page 328. Insert at the end of Problem 14-15:

Faigin v. Signature Group Holdings, Inc., 211 Cal.App.4th 726, 150 Cal.Rptr.3d 123, 141 (2012)(“Evidence of a party’s contract with a third party may be relevant to show customary contract terms”).

Chapter 15

CREDIBILITY EVIDENCE: BOLSTERING AND IMPEACHING

C. BOLSTERING BEFORE IMPEACHMENT

Page 337. Add a new paragraph after the paragraph which ends near top of page:

Other courts have adjudicated the question of introduction during direct testimony of a prosecution witness that the witness entered into a plea agreement. Such agreements commonly carry a promise by the witness to testify truthfully, and that is the part which the prosecutor wishes to emphasize. Elicitation of this promise does not constitute impermissible bolstering on direct says *Woods v. United States*, 947 A.2d 451 (D.C. 2010). Consistent with the *Woods* holding that bolstering proscriptions are not abridged by this approach is *United States v. Harlow*, 444 F.3d 1255 (10th Cir. 2006). There is not total agreement with this view, however. See *United States v. Ramos*, 314 Fed. Appx. 344 (2d Cir. 2008).

Page 338. Add at end of Problem 15-4:

Other decisions agree with *Maniego* when they rule that verbal assaults on the credibility of a witness during opening remarks opens the door to supportive bolstering proof. *Renda v. King*, 347 F.3d 550 (3d Cir. 2003).

D. IMPEACHMENT

2. Who Can Be Impeached

Page 343. Add a paragraph at bottom of page:

Additional cases authorize the right of a party to impeach the party's own witness under Rule 607. *Ellis v. United States*, 673 F.3d 367 (5th Cir. 2012). A party's right to impeach its own witness includes the right to confront the witness with his prior inconsistent statement. *United States v. Durham*, 470 F.3d 727 (8th Cir. 2006).

Chapter 16

CREDIBILITY: IMPEACHMENT TECHNIQUES

B. PRIOR INCONSISTENT STATEMENTS AND SPECIFIC CONTRADICTION

1. Prior Inconsistent Statements and Acts

Page 363. Add paragraph at bottom of page:

6. The prevalence of inconsistent statements as a form of impeachment is remarked upon in *Behler v. Hanlon*, 199 F.R.D. 553 (D. Md. 2001). The opinion in this diversity personal injury action comments as follows: "The final method of impeachment recognized by the rules of evidence is also the most frequent and popular method, impeachment by prior inconsistent statement...[Rule 613 (a)] allows the impeaching attorney immediately to confront the witness with the prior statement, without first showing it to him or her, or describing its contents, or the circumstances under which it was made."

b. Extrinsic Evidence of a Prior Inconsistent Statement of Act

Page 371. Add a new paragraph to Note 4:

While the issue of whether prior inconsistent statements constitute substantive evidence has been settled in federal courts, states remain divided. In accord with the federal approach that such statements are not admissible as substantive evidence is *State v. Gettys*, 777 S.E.2d 351 (N.C. App. 2015) (not admissible as substantive evidence but may be used to undermine the credibility of a witness). This is the majority rule. Aligned with the minority approach is *Hurt v. State*, 779 S.E.2d 313 (Ga. 2015) (prior inconsistent statements are admissible both to impeach as well as substantive evidence).

2. Specific Contradiction

Page 372. Add to last paragraph in Note:

A 2016 decision supports impeachment by contradiction. See *Nelson v. City of Chicago*, 810 F.3d 1061 (7th Cir. 2016) (impeachment of a witness can be effected in a number of ways, including contradiction, which involves presenting evidence that the substance of a witness's testimony is not to be believed).

3. The Collateral Fact Rule

Page 375. In note 3, delete "rejected" after the Higa case and insert "is discussed."

Page 375. Add at end of Note 3:

A case from the Seventh Circuit Court of Appeals underscores the position that impeachment by contradiction regarding collateral matters elicited during cross-examination is generally not allowed. *Barber v. City of Chicago*, 725 F.3d 702 (7th Cir. 2013).

Page 394. Add just before Notes:

Is the rule against extrinsic evidence unconstitutional? Recent United States Supreme Court jurisprudence suggests a negative answer to this question. A defendant in a rape case cross-examined the complaining witness about her prior reports of sexual attacks, many of which the police were unable to corroborate. In a further effort to attack the credibility of the complainant, the defendant sought to introduce extrinsic evidence supporting his claim of prior false allegations. The trial court refused to admit extrinsic proof of prior bad acts consisting of incidents of alleged false swearing. This approach violated his federal constitutional right to present a defense, the accused argued. The Supreme Court rejected the argument, citing "the widely accepted rule of evidence law that generally precludes the admission of evidence of specific instances of a witness' conduct to prove the witness' character for untruthfulness." The Court concluded: "The constitutional propriety of this rule cannot be seriously disputed." *Nevada v. Jackson*, 133 S. Ct. 1990, 1993 (2013).

E. CONVICTION OF A CRIME

1. An Overview of Impeachment By Proof of a Conviction

b. Prejudice

Page 399. Add to note:

Courts weigh the prejudice factor prior to allowing prior conviction evidence. In *State v. Joyner*, 777 S.E.2d 332 (N.C. App. 2015) the court determined the probative value of defendant's prior conviction outweighed its prejudicial effect.

An empirical study is mentioned at page 398. Studies of prejudicial impact continue. See Stanchi and Bowen. *This Is Your Sword: How Damaging are Prior Convictions to Plaintiffs in Civil Trials?*, 89 Wash. L. Rev. 901 (2014) (questioning whether claimed prejudicial effect has been exaggerated).

3. Extrinsic Evidence of a Prior Conviction

Page 412. Add to Note 1 at end:

Federal law makes clear that an attorney can ask about a prior conviction on cross-examination without presenting a certified copy to the witness. *United States v. Graham*, 317 F.3d 262, 268 (D.C. Cir. 2003); *Wilson v. Attaway*, 757 F.2d 1227 (11th Cir. 1985).

Page 413. Add at end of Note 4:

In accord with the exclusionary cases is *United States v. Hairston*, 627 Fed. Appx. 857 (11th Cir. 2015) (excluding evidence of a 32-year-old conviction). Standards for trial courts to use when measuring admissibility of old convictions are contained in *State v. Joyner*, 777 S.E. 2d 332 (N.C. App. 2015):

"[T]he following considerations [are] factors to be addressed by the trial court when determining if conviction evidence more than ten years old should be admitted: (a) the impeachment value of the prior crime, (b) the remoteness of the prior crime, and (c) the centrality of the defendant's credibility." [*State v. Shelly*, 176 N.C. App. 575] at 582-83, 627 S.E.2d at 294 (citing *State v. Holston*, 134 N.C. App. 599, 606, 518 S.E.2d 216, 222 (1999)). In addition, the trial court's findings "should address (a) whether the old convictions involved crimes of dishonesty, (b) whether the old convictions demonstrated a 'continuous pattern of behavior,' and (c) whether the crimes that were the subject of the old convictions were 'of a different type from that for which defendant was being tried.'" *Id.* at 583, 627 S.E.2d at 295 (quoting *Hensley*, 77 N.C. App. at 195, 334 S.E.2d at 785).

The *Joyner* court emphasized that a trial judge faced with an old conviction should make findings on the record as to the specific facts and circumstances which demonstrate that the probative value of the evidence outweighs its prejudicial effect. "This requirement enables the reviewing court to determine whether the admission of old conviction evidence was properly allowed."

Chapter 17

CREDIBILITY: REHABILITATION

B. THE USE OF REDIRECT EXAMINATION FOR REHABILITATION

Page 417. Add after the Fluellen citation near the top of the page:

See *United States v. Mahon*, 620 Fed. Appx. 571 (9th Cir. 2015), holding that "[t]here is no error where an attorney seeks to clarify on redirect issues raised during cross-examination. *United States v. Chu*, 5 F.3d 1244, 1251 (9th Cir. 1993); see *United States v. Sarkisian*, 197 F.3d 966, 989 (9th Cir. 1999) ("Because the prosecutor's question addressed an issue raised by the cross-examination, there was no misconduct.").

C. PRIOR CONSISTENT STATEMENTS

1. What Triggers Admissibility of Prior Consistent Statements

Page 421. Add to Note 4:

As a result of 2014 amendments, the federal rule triggering the admission of prior consistent statements has been expanded. The rule now provides that such statements may be offered "to rehabilitate the declarant's credibility as a witness when attacked on [grounds additional to charges of fabrication]." Rule 801(d)(1)(B)(ii), Federal Rules of Evidence. Discussing the 2014 change is *United States v. Kubini*, 96 Fed. R. Evid. Serv. 766 (W.D.Pa. Feb. 2, 2015). The *Kubini* decision notes that the intent of the 2014 amendment is to extend substantive effect to consistent statements that rebut credibility attacks on a witness, like charges of inconsistency or faulty memory. Attacks which trigger rehabilitation are no longer limited to charges of fabrication or evil motive.

The intent of the amendment was further discussed in *Walters v. State*, 780 S.E.2d 720 (Ga. App. 2015). The opinion in *Walters* points out that judges must apply what the law says, not what the people who drafted the law intended. However, in this case there is consistency. The Federal Rules of Evidence Advisory Committee Notes indicate that prior consistent statements "may now come in to rebut a broad range of attacks on a testifying witness's credibility."

2. Timing Requirements for Prior Consistent Statements

Page 421. Add after the first paragraph in this section:

In *Silvey v. State*, 780 S.E.2d 708 (Ga. App. 2015), there was cross-examination of a prosecution witness regarding his credibility as well as issues of improper motive for giving his trial testimony. Where such an attack occurs, introduction of a prior consistent statement on redirect examination is proper to demonstrate the witness told the same story on direct examination that he told before the time the motive of falsify came into existence.

Chapter 18

THE RULE AGAINST HEARSAY: THE ADMISSIBILITY OF OUT-OF-COURT STATEMENTS

B. THE DEFINITION OF HEARSAY

1. “An Assertion”—The Types of Statements Testable by Cross-Examination

Page 431. In the last paragraph insert before “, or a newspaper article”:

postings on Internet websites (*Southco, Inc. v. Fivetech Technology, Inc.*, 982 F.Supp.2d 507, 515 (E.D.Pa. 2013), *aff’d*, 611 Fed.Appx. 681 (Fed.Cir. 2015)), oral statements by a judge during a hearing (*Foley v. Town of Lee*, 871 F.Supp.2d 39, 46 (D.N.H. 2012)), a judge’s factual findings (*Estate of Botvin v. Islamic Republic of Iran*, 873 F.Supp.2d 232 (D.D.C. 2012))

2. “Offered to Prove the Truth of the Assertion”

a. Verbal Act or Legally Operative Language

Page 437. Insert at the end of the third paragraph:

The typical final contract contains numerous declarative, assertive sentences. However, at trial the entire writing is admissible as nonhearsay to prove the existence of the contract. Under the objective theory of mutual assent, the statements in the writing are legally operative and have independent legal significance. *Nordwall v. PHC-Las Cruces, Inc.*, 960 F.Supp.2d 1200, 1214 n. 16 (D.N.M. 2013); *Indiana ex rel. Naylor v. ISTA*, 950 F.Supp.2d 993, 1007 (S.D.Ind. 2013).

b. Effect on the State of Mind of the Hearer or Reader

Page 439. Insert a new paragraph after the first full paragraph on the page:

Alternatively, assume that at trial the prosecution offers an audio recording of a conversation between a defendant and an informant. As we shall see in Chapter 19, the defendant’s own statements on the tape are admissible under Rule 801(d)(2)(A) as admissions or statements of a party-opponent. However, what about the informant’s statements on the tape? The courts routinely admit those statements as nonhearsay on the theory that they supply necessary context for interpreting the defendant’s statements. *United States v. Foster*, 701 F.3d 1142 (7th Cir. 2012). It would be difficult or impossible to make sense of the defendant’s responses to the informant’s statements without knowing the informant’s statements. Without that knowledge, the defendant’s responses might be “[un]intelligible as admissions.” *United States v. Fowler*, 55 Fed.Appx. 125, 126-27 (4th Cir. 2003), *cert.denied sub nom. Tabor v. United States*, 540 U.S. 1139 (2004).

4. “By an Out-of-Court Declarant”—Satisfying the Need for Cross-Examination

Page 444. Insert a new paragraph on the bottom of the page:

In 2014, Rule 801(d)(1)(B) was amended. It now reads:

- (B) is consistent with the declarant’s testimony and is offered:
 - (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
 - (ii) to rehabilitate the declarant’s credibility as a witness when attacked on another ground.

The Advisory Committee Note accompanying the amendment states that “[t]he intent of the amendment is to extend substantive effect to consistent statements that rebut other attacks on a witness—such as charges of inconsistency or faulty memory.”

D. HEARSAY DRILL

Page 449. Add at the end of (m):

See also Alvarez v. Ercole, 763 F.3d 223 (2d Cir. 2014)(the defense offered testimony about reports that the police had received; the reports suggested that a third party had committed the charged crime; the defense contended that the testimony was nonhearsay, since the police’s receipt of the reports should have motivated them to investigate the third party’s possible guilt more diligently; the defense argued that there was reasonable doubt because the police had failed to pursue the investigative lead; the appellate court held both that the trial judge erred in excluding the testimony and that the ruling amounted to constitutional error).

Chapter 19

HEARSAY: THE EXEMPTION FOR A PARTY’S OWN STATEMENTS OFFERED AGAINST THE PARTY

A. INTRODUCTION

Page 453. Insert after the McCormick citation in the third paragraph:

; *Jordan v. Binns*, 712 F.3d 1123, 1128 (7th Cir. 2013)(“trustworthiness is not a requirement for admission” of statements of a party-opponent).

B. PERSONAL ADMISSIONS

Page 455. Insert at the end of the second paragraph:

Johnson v. Village of Dolton, 962 F.Supp.2d 1026, 1032 (N.D.Ill. 2013)(“the Rule does not require, as a condition of admissibility, that [the] statement be inconsistent with [the party-opponent’s] trial position”).

C. ADOPTIVE ADMISSIONS

Page 456. Insert at the end of the first paragraph in the section:

So long as the facts support that inference, there is no need to show that the party-opponent had personal knowledge of the subject-matter. *United States v. Stabl, Inc.*, 800 F.3d 476, 484 (8th Cir. 2015).

1. Affirmative Adoption

Page 456. Insert after the Jinadu citation:

or a document’s contents. *F.T.C. v. Ross*, 743 F.3d 886 (4th Cir.)(“Ross [had] expressly adopted Jain’s affidavit; she swore in her own affidavit . . . that she had read Jain’s affidavit and was ‘in agreement with [its] contents’”), *cert.denied*, 135 S.Ct. 92, 190 L.Ed.2d 38 (2014).

Page 457. Insert at the end of the carryover paragraph on the top of the page:

Han v. Whole Foods Market Group, Inc., 44 F.Supp.3d 769, 781 n. 15 (N.D.Ill. 2014)(the jury decides whether “the defendant did actually hear, understand and accede to the statement”).

3. Negative Adoption—Tacit Admissions

Page 461. Insert a second paragraph in Note 1:

Several courts have pointed out that in the above cases, the Supreme Court did not have occasion to address the question of whether the prosecution may use a defendant's pre-arrest silence even for the limited purpose of impeachment. *State v. Burke*, 163 Wn.2d 204, 181 P.3d 1 (2008). There is a split of authority among the lower courts. Macchiaroli, *To Speak or Not to Speak: Can Pre-Miranda Silence Be Used as Substantive Evidence of Guilt*, 33 THE CHAMPION, Mar. 2009, at 14, 15. Some courts permit the prosecution to question the defendant about pre-arrest silence. *State v. Lopez*, 230 Ariz. 15, 279 P.3d 640 (2012). In *Salinas v. Texas*, 133 S.Ct. 2174, 186 L.Ed.2d 376 (2013), the defendant was questioned while he was not in custody and has not yet been Mirandized. When the police asked the defendant whether the shell casings found at the crime scene would match casings from his shotgun, he looked down, clenched his hands, bit his lip, and fell silent. The Court upheld the admission of testimony about the defendant's conduct as evidence of consciousness of guilt. The *Salinas* decision has been criticized. Totten, *Salinas v. Texas: Guilt by Silence and the Disappearing Fifth Amendment Privilege Against Self-Incrimination*, 49 CRIM.L.BULL. 1501 (2013).

D. VICARIOUS ADMISSIONS

1. Civil Cases

Page 464. Insert after the Kirk citation on the top of the page:

But see Franks, An Expert's Expertise: Is Expert Deposition Testimony Impermissible Hearsay or an Admission by a Party-Opponent at Trial?, 36 AM.J.TRIAL ADVOC. 263 (2012)(there is a split of authority).

Page 465. Insert after the Riley citation in Note 7:

The declarant need not be directly involved in the adverse employment action. *Back v. Nestle USA, Inc.*, 694 F.3d 571, 577 (6th Cir. 2012).

Page 465. Insert at the end of Note 7:

E.E.O.C. v. Staffmark Investment LLC, 67 F.Supp.3d 885 (N.D.Ill. 2014)(the "declarant was an advisor to the decision-maker, participated in interviews, discussed employees' performance, and communicated news of termination").

2. Criminal Cases

Page 472. Insert before the Zizzo citation:

United States v. Mallay, 712 F.3d 79 (2d Cir. 2013)(a defendant may introduced a prosecutor's

statement from a prior trial if (1) the prosecution offered an inconsistent factual assertion at the prior trial and (2) the prosecution does not offer an adequate explanation for the contradiction), *cert.denied*, 134 S.Ct. 2660, 189 L.Ed.2d 208 (2014); *Garland v. State*, 834 So.2d 265 (Fla.Dist.Ct.App. 2002)(the defendant was entitled to introduce a gunshot residence report prepared by a state Department of Law Enforcement technician as the admission of a party-opponent).

Chapter 20

HEARSAY: EXCEPTIONS THAT DO NOT REQUIRE PROOF OF UNAVAILABILITY

B. EXCEPTIONS DERIVED FROM THE COMMON LAW “RES GESTAE” THEORY

2. Excited or Startled Utterances

Page 477. At the end of the first paragraph of Note 1, add the following:

For a narrower interpretation of the “relating to” requirement, see *United States v. Vargas*, 689 F.3d 867 (7th Cir. 2012) (stating that even if defendant’s arrest qualified as a startling event, his statement to police that he had come to parking lot with large amount of cash for the purpose of buying a truck did not related to the event).

Page 478. At the end of Note 5, add the following:

See *United States v. Clifford*, 791 F.3d 884 (8th Cir. 2015) (statement by victim’s three-year-old son, to a trusted adult, that the defendant “hurt mama” was admissible as an excited utterance).

Page 479. In the carry-over paragraph from the prior page, for the factors courts consider, replace citations to Merrill and Jones with:

United States v. Graves, 756 F.3d 602 (8th Cir. 2014); *United States v. Frost*, 684 F.3d 963 (10th Cir. 2012); *Estate of Thompson v. Kawasaki Heavy Ind.*, 933 F. Supp. 1111 (N.D. Iowa 2013).

Page 482. At the end of the first paragraph in Note 1, add the following:

See also Julie A. Seaman, *Cognitive Dissonance in the Classroom, Rationale and Rationalization in the Law of Evidence*, 50 ST. LOUIS U. L. J. 1097 (2006) (discussing criticism of the empirical basis of this and other hearsay exceptions). In a concurring opinion in a recent case, Judge Richard Posner wondered, “if a person is so excited by something that he loses the capacity for reflection (which doubtless does happen), how can there be any confidence that his unreflective utterance, provoked by excitement, is reliable?” He went on to argue that “the exception for excited utterances rests on no firmer ground than judicial habit, in turn reflecting judicial incuriosity and reluctance to reconsider ancient dogmas” and that it should therefore be discarded as empirically unsupportable. *United States v. Boyce*, 742 F.3d 792 (7th Cir. 2014) (Posner, J., concurring).

3. Present Sense Impressions

Page 483. At the end of the last full paragraph on the page, add:

Despite its inclusion in the Federal Rules of Evidence and state rules, there remains some skepticism, about the basis for the exception. In his concurrence in *Boyce*, mentioned in the

previous section, Judge Posner also criticized the Present Sense Impression exception: ““The “present sense impression” exception never had any grounding in psychology. It entered American law in the nineteenth century, . . . it has neither a theoretical nor an empirical basis; and it’s not even common sense—it’s not even good folk psychology.”

4. Declarations of Bodily Condition

b. Past Bodily Condition

Page 490. Add a second paragraph to Problem 20-11, as follows:

What about statements to a social worker who is involved in the declarant’s medical treatment? *See United States v. DeLeon*, 678 F.3d 317 (4th Cir. 2012) (Statements the victim had made five months before his death to a social worker for the Family Advocacy Program regarding corporal punishment inflicted by the defendant admitted under FRE 803(4)); *United States v. Lukashov*, 694 F.3d 1107 (9th Cir. 2012) (where child victim of abuse was interviewed by a social worker at a medical clinic for the purpose of, and reasonably pertinent to, medical treatment, and victim understood it as part of a medical process, statements admissible under FRE 803(4)).

c. Statements Describing the Cause of the Declarant’s Physical Condition

Page 491. At the end of Note 1, add:

See also United States v. JDT, 762 F.3d 984, 1003 (9th Cir. 2014) (although statements of fault are not ordinarily admissible under medical treatment exception, statements of victim identifying sexual abuser may be admissible where, e.g., they are pertinent to diagnosis and treatment of sexually transmitted disease).

5. Declarations of State of Mind

a. Declarations of Present State of Mind Used to Prove State of Mind

Page 493. At the end of the second paragraph, add:

On the other hand, if the declarant’s then-existing state of mind is not relevant, her statement describing that state of mind is not admissible under FRE 803(3). *See Meyers v. Eastern Okla. Co. Tech. Center*, 776 F.3d 1201 (10th Cir. 2015) (“: The rigging was allegedly done by the superintendent, not Mr. O’Boyle. Thus, the state of mind exception would not support the admissibility of Mr. O’Boyle’s alleged remark.”)

C. EXCEPTIONS FOR WRITTEN STATEMENTS

1. Business Entries

Page 502. Change FRE 803(6)(E) to:

- (E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Change FRE 803(7)(C) to:

- (C) the opponent does not show that the possible source of information or other circumstances indicate a lack of trustworthiness.

Page 503. Add the following at the end of the Note:

Iowa Pacific Holdings, LLC v. National R.R. Passenger Corp., 853 F. Supp. 2d 1094 (D. Colo. 2012) (computerized records admissible if they otherwise satisfy the requirements of Rule 803(6)).

More generally, the increasing digitization of data storage and communication has presented courts with a host of questions under the rules of evidence and in particular the application of hearsay doctrine. For example, one issue that has arisen under Rule 803(6) is whether emails may be admissible as business records. Courts have generally avoided bright line rules and have instead asked whether the emails in question otherwise meet the requirements of the evidence rules. *See United States v. Cone*, 714 F.3d 197, 220 (4th Cir. 2013) (emails could be admissible as business records if they meet the requirements of regularity, routineness, and contemporaneity that all records must meet); *Ira Green, Inc. v. Military Sales & Service Co.*, 775 F.3d 12 (1st Cir. 2014) (same).

Page 511. Add at the end of Problem 20-23:

See also United States v. Isgar, 739 F.3d 829 (5th Cir. 2014) (third party records admissible under business records exception if properly authenticated).

2. Official Records

Page 512. Replace FRE 803(8)(B) with:

- (B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

Page 514. At the end of the carry-over paragraph at the top of the page, add the following:

Olsen v. Stark Homes, Inc., 759 F.3d 140, 158 (2d Cir. 2014) (Rule 803(8) “renders presumptively admissible not merely ... factual determinations in the narrow sense, but also ... conclusions or opinions that are based upon a factual investigation”).

3. Learned Treatises

Page 531. At the end of Note 1, add the following paragraph:

Note that, under the terms of the rule, statements in learned treatises are admissible in connection with the testimony of an expert witness. Thus, if the expert’s testimony is inadmissible, there is no independent basis for admitting the statements under Rule 803(18). In *Lebron v. Secretary of Fla. Dep’t of Children & Families*, 772 F.3d 1352 (11th Cir. 2014), the court explained, “The State now argues that the underlying articles relied upon by Dr. Mack were separately admissible and provided independent support for the State’s argument . . . [b]ut with Dr. Mack excluded, the State did not put forward a qualified expert to present them.”

Chapter 21

HEARSAY: EXCEPTIONS THAT REQUIRE PROOF OF UNAVAILABILITY

B. PROOF OF THE DECLARANT’S UNAVAILABILITY

Page 536. Insert at the end of the last full paragraph:

Yet, the wording of the provision requires only that the witness “testif[y]” to not remembering; the wording does not expressly require a finding by the judge that the witness in fact cannot remember. In the Confrontation Clause setting, some cases hold that despite a feigned memory loss, a witness’s appearance satisfies the Sixth Amendment. The witness’s appearance gives “the jury the opportunity to assess [his] demeanor and whether any credibility should be given to . . . [his] prior statements. That [is] all the constitutional right to confrontation require[s].” *People v. Foalima*, 239 Cal.App.4th 1376, 192 Cal.Rptr.3d 136, 148 (2015).

Page 537. Insert at the end of the first full paragraph:

The imputation is permissible so long as the circumstances made the conspirator’s misconduct reasonably foreseeable. *United States v. Cazares*, 788 F.3d 956 (9th Cir. 2015).

C. EXCEPTIONS REQUIRING PROOF OF UNAVAILABILITY

1. Former or Prior Testimony

Page 541. Insert at the end of the last full paragraph:

; *Barraford v. T & N Ltd.*, 988 F.Supp.2d 81, 85 (D.Mass. 2013)(“There need not be an agency relationship between the parties in the current and former proceedings . . .”), *aff’d*, 778 F.3d 258 (1st Cir. 2015).

Page 542. Insert at the end of the second full paragraph:

See Diaz-Colon v. Toledo-Davila, 979 F.Supp.2d 247, 249 (D.P.R. 2013)(“Courts must look first at ‘whether the questioner is on the same side of the same issue at both proceedings,’ and second at ‘whether the questioner had a substantially similar interest in asserting that side of the issue’”).

2. Declarations Against Interest

Page 547. Insert after the Morgan citation in the first full paragraph:

“Under the perverse assumptions of terrorists, an armed attack on civilians reflects glory. Taking ‘credit’ for such an attack is [not] deemed . . . “ disserving. *Gill v. Arab Bank, PLC*, 893 F.Supp.2d 542, 569 (E.D.N.Y. 2012).

Page 547. Insert at the end of the first full paragraph:

But see United States v. Lozado, 776 F.3d 1119 (10th Cir. 2015) (“Crediting the declarant’s actual knowledge of the statement’s self-inculpatory nature is compatible with the Rule’s text. If there is proof of the declarant’s actual knowledge, ‘a reasonable person in the declarant’s position’ would have the declarant’s actual knowledge. [C]onsideration of the declarant’s actual knowledge would be consistent with our obligation to consider all the surrounding circumstances [W]ithout such evidence, as is often the case, a court must determine what ‘a reasonable person in the declarant’s position’ would know”).

4. Past Recollection Recorded

c. Past Recollection Recorded

Page 561. Insert at the end of the last full paragraph:

In the typical case, the writer supplies the voucher. Some jurisdictions require that the writer be the source of the voucher. *State v. Spaulding*, 197 Vt. 378, 103 A.3d 487 (2014). However, other jurisdictions permit the proponent to rely on other evidence to prove that the writer possessed personal knowledge at the time of the creation of the writing. *State v. Nava*, 177 Wn.App. 272, 311 P.3d 83 (2013). In these jurisdictions, the proponent can lay the foundation even if the writer disavows personal knowledge. Needless to say, such cases are rare.

Chapter 22

THE FUTURE OF THE RULE AGAINST HEARSAY: RESIDUAL EXCEPTION

B. FUTURE LEGISLATIVE CHANGES

3. Creating Broad Exceptions to the Hearsay Rule

Federal Rule of Evidence 807

Page 573. Insert a new paragraph on the bottom of the page:

However, some recent developments may augur increased judicial interest in and reliance on Rule 807. In a 2014 concurrence in *United States v. Boyce*, 742 F.3d 792 (7th Cir.), *cert.denied*, 134 S.Ct. 2321, 189 L.Ed.2d 197 (2014), one of the most respected American jurists, Judge Richard Posner, was not only critical of the policy rationales for two specific exception, namely, excited utterance and present sense impression; he also wrote:

What I would like to see is Rule 807 . . . swallow up much of Rules 801 through 806 Trials would go better with a simpler rule, the core of which would be the proposition (essentially a simplification of Rule 807) that hearsay evidence should be admissible when it is reliable, when the jury can understand its strength and limitations, and when it will materially enhance the likelihood of a correct outcome.

Id. at 800. To some extent, the Advisory Committee is seemingly sympathetic with Judge Posner's view. On May 7, 2015, the committee released for public comment a proposal to abrogate Rule 803(16), the current exception for ancient documents. In explaining the proposal, the Committee asserted:

The need for an ancient document that does not qualify under any other hearsay exception has been diminished by the fact that reliable electronic information is likely to . . . satisfy a reliability-based exception such as Rule 807

Yet, commentators are already cautioning against heavy reliance on Rule 807 and formal or virtual abandonment of the categorical approach to hearsay exceptions. Richter, *Posnerian Hearsay: Slaying the Discretion Dragon*, 67 FLA.L.REV. 1861 (2015). One of the principal reasons for the intense opposition to the Model Code of Evidence was the perception that the Code gave trial judges far too much discretion in the administration of the hearsay rule. *Id.* at 1871-73. Professor Richter fears that a highly discretionary hearsay doctrine will make rulings more unpredictable, increase the difficulty of judging the settlement value of cases, and render the litigation system less efficient. In her judgment, a more prudent course would be revising some of the enumerated exceptions but retaining the categorical scheme that has worked reasonably well for over four decades.

Chapter 23

OPINION EVIDENCE: LAY AND EXPERT

A. THE TRADITIONAL NORM EXCLUDING LAY OPINION TESTIMONY

3. Summary and Preview

Page 588. Before first sentence, insert:

In Chapter 12, we discussed the special problems in determining logical relevance posed by expert testimony. In this chapter, we will focus on the bases for expert opinion testimony.

Chapter 24

THE BEST EVIDENCE RULE: THE ADMISSIBILITY OF COPIES, SUMMARIES, ETC.

B. WHEN ARE THE DOCUMENT'S TERMS "IN ISSUE"?

2. When the Proffered Testimony Contains an Express or Implied Reference to the Contents of a Document

Page 625. Insert new Note 5:

5. A broad reading of Rule 1002 might lead one to the conclusion that the rule applies even when the thrust of the testimony is that the document does not contain certain information. However, the Advisory Committee Note accompanying Rule 1002 specifically states: "Nor does the rule apply to testimony that books or records have been examined and found not to contain any reference to a designated matter."

E. ADEQUATE EXCUSE FOR NONPRODUCTION OF THE ORIGINAL

Page 631. Insert after the next to last sentence in the paragraph beginning "More and more":

But see Linde v. Arab Bank, PLC, 922 F.Supp.2d 317, 333 (E.D.N.Y. 2013) ("[a] summary may include only evidence favoring one party so long as the witness does not represent to the jury that he is summarizing all the evidence in the case").

Page 632. Insert new Note 3 after Note 2 on the top of the page:

3. Distinguish both summaries and pedagogic aids from another practice, namely, calling "summary" or "overview" witnesses. These witnesses do not purport to summarize the contents of documents. Prosecutors sometimes call an investigator early in the case-in-chief to preview the government's case for the jury. *United States v. Brooks*, 736 F.3d 921, 930 (10th Cir. 2013), *cert.denied sub nom. Quinn v. United States*, 134 S.Ct. 1526, 188 L.Ed.2d 459 (2014). In some cases, it may be helpful to the jury to set the stage for the jury by explaining "how an investigation began, the law enforcement agencies involved, or the investigative techniques used." *Id.* However, the testimony should be limited to that information and those purposes. It is problematic to invite the witness to give additional testimony about "aspects of the investigation the witness did not participate in, before the government has presented supporting evidence." Testimony on those topics can be objectionable because it "involve[s] a witness's assertion of facts not based on his own personal knowledge when those facts are not otherwise proven." *United States v. Rosado-Perez*, 605 F.3d 48, 55 (1st Cir. 2010).

Chapter 25

PRIVILEGE: A GENERAL ANALYTICAL APPROACH

D. AN ANALYTICAL OUTLINE

4. What Type of Information is Privileged?

a. A “Communication”

Page 649. Insert at the bottom of the page?

In *North Dakota v. United States*, 64 F.Supp.3d 1314 (D.N.D. 2014), the court endorsed the broadest position. The court asserted that “the United States Supreme Court would follow the broadest approach if” it has “not done so already.” *Id.* at 1335. The court pointed out that: Wigmore endorsed the broadest view (*id.*); the American Law Institute’s Third Restatement of the Law Governing Lawyers takes that position (*id.* at 1336); the Supreme Court approved proposed Federal Rule 503 that would have codified that view (*id.* at 1336-37); and the view is consistent with the Court’s broad language in *Upjohn v. United States*, excerpted in the next chapter. *Id.* at 1337.

b. Confidentiality

Page 650. Insert after the first sentence in the second paragraph in the section:

The party claiming to be the holder of the privilege must have had an objectively reasonable belief that the communication was private and confidential. *Plate v. State*, 925 P.2d 1057, 1066 (Alaska Ct.App. 1996); *State v. Joseph P. (In re Joy P.)*, 200 Wis.2d 227, 234, 546 N.W.2d 494, 498 (1996).

c. Between “Properly Related Parties”

Page 651. Insert at the end of the last paragraph on the page:

In practice, the federal courts have been reluctant to recognize new privileges. “[E]ven without the benefit of binding Supreme Court precedents . . . on some privileges, the lower federal courts have recognized every privilege that was set out in draft Article V. [T]he courts have generally balked at recognizing the existence of any privilege that was omitted from draft Article V. [N]o privilege omitted from draft Article V has come even close to garnering majority support among the lower federal courts. The upshot is that the state of federal privilege law [today] looks amazingly like what it would have been if Congress has formally approved Article V in 1975.” Imwinkelried, *Draft Article V of the Federal Rules of Evidence on Privileges, One of the Most Influential Pieces of Legislation Never Enacted*, 58 ALA.L.REV. 41, 55 (2006).

Chapter 26

PRIVILEGE: SPECIALIZED ASPECTS

A. ATTORNEY-CLIENT PRIVILEGE

2. The Scope of the Privilege

b. Confidentiality—Clients with Shared Interests

Page 667. Insert at the end of the carryover paragraph on the top of the page:

There need not be a formal, signed agreement between the parties. *United States v. Stepney*, 246 F.Supp.3d 1069, 1079 n. 5 (N.D.Cal. 2003). For that matter, the parties need not reach an explicit oral agreement. It is best to conceive of this doctrine as an exception to the general rule that no privilege attaches when the client and attorney communicate in the presence of a third party. *In re Chevron*, 650 F.2d 276, 290 n. 19 (3d Cir. 2011).

Page 667. Insert at the end of Note 2:

The prevailing view is that the shared interest must be legal rather than commercial. *Shukh v. Seagate Tech., LLC*, 872 F.Supp.2d 851, 855 (D.Minn. 2012); Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 2000 WIS.L.REV. 31, 70-71.

c. Attorney-Client Communications in the Corporate Context

Page 671. Insert new Note 4:

4. In internal corporate investigations, it has become common practice to administer “Upjohn warnings” to the employees interviewed. Wilczek, *Preserving Privilege During Internal Probes Becomes Trickier After KBR, Other Rulings*, 83 U.S.L.W. (BNA) 1687 (May 12, 2015). At the outset of the interview, the investigator explicitly tells the interviewee that: The corporation is requiring them to submit to the interview; the purpose of the interview is to obtain information to forward to corporate counsel; until instructed to the contrary, the employee is to maintain the confidentiality of the interview; and the corporation is the holder of the attorney-client privilege. Administering these “warnings” to the employee increases the probability that a court will later invoke *Upjohn* and apply the privilege to the interview.

B. THE SPOUSAL PRIVILEGES AND OTHER CONFIDENTIAL FAMILY COMMUNICATIONS

1. The Disqualification Power

Page 682. In the fifth and sixth lines on the page, change “a testimonial privilege” to “an anti-marital fact or adverse testimonial privilege.”

2. The Spousal Communications Privilege

a. The Types of Information Protected by the Spousal Communications Privilege

2) The Requirement that the Communication Occur Between Properly Related Parties

Page 690. Insert at the end of Note 3:

Of course, after the Supreme Court’s 2015 decision in *Obergefell v. Hodges*, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), same-sex couples now have a right to marry.

3. A Parent-Child Privilege?

Page 694. Insert at the end of the third full paragraph on the page:

In sum, “few states recognize [a] privilege protecting confidential communications between parents and children and no states recognize [a] privilege against adverse parent-child testimony.” Ma, *Some Highlights of the Recent Development of Evidence Law in China*, 51 CRIM.L.BULL. 507, 549 (2015).

D. GOVERNMENT PRIVILEGES

3. Confidential Government Information

Page 712. Insert a new paragraph after the first full paragraph on the page:

The development of this privilege has been remarkable. It is the newest government privilege. The federal courts did not recognize the privilege until 1958. *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F.Supp. 939 (Ct.Cl. 1958). Yet today it is the most frequently asserted government privilege. Note, *The Reasonable Government Official Test: A Proposal for the Treatment of Factual Information Under the Federal Deliberative Process Privilege*, 49 DUKE L.J. 561, 562 (1999). At first, the privilege had a modest, limited scope. Imwinkelried, *The Government’s Increasing Reliance on—and Abuse of—the Deliberative Process Evidentiary*

Privilege: “[T]he Last Will Be First,” 83 MISS.L.J. 509, 521 (2014). However, the courts have steadily expanded its scope. *Id.* at 523. Perhaps the most controversial step has been extending the privilege to include “deliberations” over how to respond to media commentary or inquiries about existing policies. *Id.* at 533. This step poses the danger that the privilege will be transformed from a tool for formulating policy into a political instrument.

Chapter 27

COMPROMISE

B. SETTLEMENT OFFERS, STATEMENTS DURING NEGOTIATIONS, AND SURROUNDING CONDUCT IN CIVIL CASES

1. The General Exclusionary Rule

c. Which Discussions Qualify as “Compromise Negotiations”?

Page 718. Insert after the Master-Halco citation:

; *Bank of America, N.A. v. Sea-Ya Enterprises, LLC*, 872 F.Supp.2d 359, 363 (D.Del. 2012)(“Rule 408 only excludes admissions that reflect an actual dispute, or at least an apparent difference of view, between the parties concerning the validity or amount of a claim”).

d. Which Statements Are Covered?

Page 719. Insert at the end of the paragraph preceding the excerpt from Waltz & Huston:

In its deliberations on the proposed F.R.E., the House Committee on the Judiciary expressed its understanding that the Advisory Committee intended that “evidence of unqualified factual assertions” would still be admissible. For that matter, courts continue to assert that “an admission of fact is competent evidence, even though the admission was made in settlement negotiations, where the statement was intended to state a fact” *Ride, Inc. v. APS Technology, Inc.*, 11 F.Supp.3d 169, 181 (D.Conn. 2014), *aff’d in part, vacated in part*, 612 Fed.Appx. 31 (2d Cir. 2015).

e. What are the Permissible Uses of Covered Statements?

Page 723. Insert at the end of Note 3:

; *Moreta v. First Transit of PR, Inc.*, 39 F.Supp.3d 169 (D.P.R. 2014)(“an independent violation . . . unrelated to the underlying claim . . .”).

Page 725. Insert on the bottom of the page:

3. The Recognition of a Settlement Privilege

Rule 408 is a classic rule of limited admissibility. Although Rule 408(a) forbids the admission of the evidence for specified purposes, Rule 408(b) allows the introduction of the evidence for other purposes “such as proving a witness’s bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.” A few jurisdictions and courts have gone farther; they believe that it is so imperative to encourage

settlement that they have recognized a full-fledged privilege for statements and other conduct during settlement negotiations. The difference is critical because a litigant cannot defeat a privilege claim by the simple expedient of identifying an alternative theory of logical relevance.

One of the leading precedents is *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976 (6th Cir. 2003). However, only a distinct minority of jurisdictions follow *Goodyear Tire*. As one article notes,

[T]he recognition of the settlement privilege is not universal in all U.S. jurisdictions. Some courts have followed the Sixth Circuit and held that settlement negotiations are privileged. On the other hand, many courts have declined to recognize the privilege. Some courts have . . . developed a middle approach, requiring a showing of a heightened standard of relevance to allow the discovery of settlement communications.

Solow & Kerschner, *Settling the Dispute Over the Settlement Privilege: Upholding the Existence of a Settlement Privilege After FTC v. Actavis*, 83 U.S.L.W. (BNA) 1353, 1355-56 (Mar. 17, 2015). To be sure, Rule 501 empowers courts to create new privileges. However, does the very existence of Rule 408 give rise to a negative implication that Congress believed that a rule of limited admissibility was sufficient protection for the settlement process?

Chapter 28

REMEDIAL MEASURES

B. THE CURRENT STATUS OF THE EXCLUSIONARY RULE

1. The Exclusionary Rule

“Remedial Measure”

Page 738. Insert before the Rosa citation in the first full paragraph:

Estate of Hamilton v. City of New York, 627 F.3d 50 (2d Cir. 2010)(in a discrimination action, the involvement of more individuals in a promotion process to help prevent unsuccessful candidates from feeling that they were unfairly passed over was a subsequent remedial measure); *Duran v. Merline*, 923 F.Supp.2d 702 (D.N.J. 2013)(a physician’s referral of a patient to an infectious disease specialist).

Page 739. Insert at the end of Note 5:

The trend appears to be to admit reports that precede the remedial measure itself. *Lompe v. Sunridge Partners, LLC*, 54 F.Supp.3d 1252 (D.Wyo. 2014)(property inspection reports); *Aranda v. City of McMinnville*, 942 F.Supp.2d 1096 (D.Or. 2013)(a city police department’s use of force review); *Gray v. Golden Gate Nat’l Recreational Area*, 866 F.Supp.2d 1129 (N.D.Cal. 2011)(an analysis of the deficiencies rather than the remedial measures taken to eliminate the deficiencies).

2. The “Exceptions” to the Exclusionary Rule

Page 741. Insert after the Lee citation in the carryover paragraph on the top of the page:

Ginsburg v. City of Ithaca, 5 F.Supp.3d 243, 249 n. 13 (N.D.N.Y. 2014)(“While evidence of a subsequent repair is inadmissible to prove negligence it is admissible to show control or maintenance. See *Guimond v. Vill. of Keeseville*, . . . 978 N.Y.S.2d 431 (App.Div. 2014)(finding an issue of material breach regarding control of a bridge where defendant village repaired the asphalt at its own expense immediately following an accident, but later denied ownership”).

Page 742. Insert before “Cf. Tuer” in the carryover paragraph on the top of the page:

See also Esposito v. SDB Investments, Inc., 873 F.Supp.2d 418, 421 (D.N.H. 2012)(“In a June 21, 2012 conference call with the court, and in previous court filings, SDB’s counsel represented that SDB did not intend to dispute the feasibility of these measures at trial”).

Chapter 30

THE INITIAL BURDEN OF GOING FORWARD

A. INTRODUCTION

Page 760. Add at the end of the first full paragraph on the page:

Note, however, that a presumption—even as well accepted a presumption as the mailbox rule—can be rebutted. *See, e.g., Lupian v. Corinthian Colleges, Inc.*, 761 F.3d 314 (3rd Cir. 2014) (noting that the common law mailbox rule is not a conclusive presumption, but a rebuttable inference of fact founded on the probability that the officers of government will do their duty and the usual course of business); *Stein v. American Gen'l Life Ins. Co.*, 34 F. Supp.3d 224 (E.D. N.Y. 2014) (mere denial of receipt is not enough to rebut the presumption; there must be some proof that the regular office practice was not followed or was carelessly executed so the presumption that notice was mailed becomes unreasonable).

B. THE INITIAL BURDEN OF GOING FORWARD: AN OVERVIEW

1. The General Mechanics of the Burden

Page 769. At the end of Problem 30-1, after the citation to Ferry, add the following:

(Holmes, J.)(noting that “[t]he statute . . . imposed a liability that was less than might have been imposed, and that being so, the thing to be considered is the result reached, not the possibly inartificial or clumsy way of reaching it”). This mode of argument posits that “the greater power includes the lesser.”

In Note 4, delete Carr and replace with:

U.S. v. Cheever 423 F. Supp.2d 1188, 1195 (D. Kansas 2006) (noting that the presumption of innocence is not technically a presumption, which is a mandatory inference drawn from a fact, but is better characterized as an assumption indulged in the absence of contrary evidence); *cf., Taylor v. Kentucky*, 436 U.S. 478 (1978) (observing that even if the phrase “presumption of innocence” is not constitutionally mandated, the Due Process Clause of the Fourteenth Amendment safeguards the principle that guilt must be established by probative evidence, and beyond reasonable doubt).

In Problem 30-3, add the following parenthetical to Fidelity:

Add the following parenthetical to *Fidelity*: (although a party may not recover after testifying to facts that would defeat the cause of action, caution must be observed in applying the same effect to statements made during the course of a trial as that given to deliberate and carefully prepared statements contained in pleadings)

In Problem 30-4, add the following parenthetical to Sechrist:

(motorist's estimates as to speed and distance were sufficient on issue of contributory negligence).

Page 770. In Note 9, add the following parenthetical to Burdine:

(establishing a prima facie case of discrimination raises a presumption of discrimination, which defendant may rebut by producing evidence of nondiscriminatory reason for defendant's action)

In Note 9, add the following parenthetical to Usery:

(statute conferring presumption of causation is constitutional if the connection between the fact proved and the ultimate fact presumed is not arbitrary).

Page 771. In Note 10, add the following parenthetical to Durden:

(presuming validity of first marriage absent proof of invalidity).

2. The Sufficiency of "Naked" Statistical Evidence to Satisfy the Burden

Page 773. In Note 1, add the following parenthetical to Kaminsky:

(evidence that defendant owned 90% of the vehicles with the logo and colors of the truck that damaged plaintiff's vehicle gave rise to a rebuttable presumption of ownership).

C. THE BURDEN OF PRODUCTION IN CRIMINAL CASES

Page 776. In the carry-over paragraph at the top of the page, add the following parenthetical after Basic:

(noting that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity).

In the carry-over paragraph at the top of the page, add the following parenthetical after Gray:

(in construing a statute, the court looks first to the language of the statute itself and then, if necessary, to the legislative history).

1. Reaching Step #2 – Barely Sustaining the Burden

Page 776. In Problem 30-6, insert the following parenthetical after Sears:

(holding that identification of defendant was a question of fact for the jury).

Page 777. In Problem 30-7, delete Valenzuela.

2. Reaching Step #3 – Creating a True Presumption

Page 779. In the second paragraph, insert the following parenthetical after Leary:

(possession of drugs is sufficient evidence to convict under drug statute unless defendant explains possession to jury's satisfaction).

Insert the following parenthetical after Romano:

(presence of defendant at illegal still is sufficient evidence to convict for possession, custody and control unless defendant explains his presence to the satisfaction of the jury).

5. Limitations on the Effect of Presumptions – Conclusive Presumptions and Presumptions that Shift the Ultimate Burden of Proof to the Defense

Page 788. Add new Note 4:

4. Recall that on page 762, we depicted step 9, in which the judge issues a peremptory ruling in favor of the opponent of the evidence. Suppose that the prosecution has presented eyewitness testimony to a rape sufficient to sustain the prosecution's burden of going forward. The defense offers an exculpatory DNA test. Should that mandate an acquittal? What if it was a gang rape? See Andrea Roth, *Defying DNA: Rethinking the Role of the Jury in an Age of Scientific Proof of Innocence*, 93 B. U. L. REV. 1643 (2013) (discussing the role of exculpatory DNA evidence in mandating an acquittal).

Chapter 31

THE ULTIMATE BURDEN OF PERSUASION

C. THE MEASURE OF THE BURDEN OF PERSUASION

1. The Common Law

Page 802. Add to the end of the carry-over paragraph at the top of the page:

Some legal scholars have attempted to conceptualize the measure of proof in statistical terms. *See, e.g.,* Edward K. Cheng, *Reconceptualizing the Burden of Proof*, 122 YALE L. J. 1254 (2013)(reconceptualizing standards of proof as probability ratios). Despite those efforts, the legal system continues to employ a “relative plausibility” theory that relies on lay jurors’ natural reasoning and common sense. *See* Ronald J. Allen & Alex Stein, *Evidence, Probability, and the Burden of Proof*, 55 ARIZ. L. REV. 557 (2013) (criticizing probabilistic theories of proof); Michael S. Pardo, *The Nature and Purpose of Evidence Theory*, 548 VANDERBILT L. REV. 547, 575 (2013) (arguing that probabilistic conceptions of legal proof fail to adequately explain relevance, probative value or standards of proof).

Page 804. In Note 2:

change “McCormick 6th ed. 2006” to “McCormick 7th ed. 2013”

2. Constitutional Requirements

Page 815. In Problem 31-16, add the following parenthetical to Specht:

(holding that due process requires that invocation of Colorado’s Sex Offender Act presumes the making of a new criminal charge, the elements of which must be proved beyond reasonable doubt)

Add the following parenthetical to Inendino:

(holding that special offender statute does not create a separate criminal charge but only provides for enhancement of the penalty)

In Problem 31-17, add the following parenthetical to Burnick:

(the standard of proof for mentally disordered sex offender proceedings is proof beyond a reasonable doubt).

Chapter 32

CONSTITUTIONAL OVERRIDES: CONFRONTATION, COMPULSORY PROCESS AND DUE PROCESS

B. NEGATIVE OVERRIDES: EXCLUDING OTHERWISE ADMISSIBLE EVIDENCE

Page 836. In Note 4, replace the Supreme Court Reporter citation for Michigan v. Bryant with the official United States Reports citation:

562 U.S. 344 (2011).

Page 838. Replace citation to Bryant slip opinion with:

Bryant, 562 U.S. at 377-78.

Page 840. At the end of note 9, add the following paragraph:

In *Ohio v. Clark*, 576 U.S. ____ (2015), the Supreme Court considered whether statements by a three-year-old child to his preschool teachers about the identity of his abuser were testimonial under the “primary purpose” test set out in *Bryant*. The Court reversed the judgment of the Ohio Supreme Court and held – with all nine Justices agreeing on the result – that “[b]ecause neither the child nor his teachers had the primary purpose of assisting in Clark’s prosecution, the child’s statements do not implicate the Confrontation Clause and therefore were admissible at trial.” The fact that Ohio’s mandatory reporting law required certain professionals, including the teachers, to report suspected child abuse to the government did not, in the Court’s view, turn the teachers into law enforcement agents for purposes of the test. Though it declined to definitively rule that statements to persons other than law enforcement personnel would never be subject to the Confrontation Clause, the majority stated that “such statements are much less likely to be testimonial” and that the child’s statements in this case “clearly” were not testimonial. Justice Scalia, joined by Justice Ginsburg, concurred in the judgment but wrote separately to protest what he viewed as the majority’s watering down of the *Crawford* standard. Justice Thomas also concurred in the judgment and reiterated his view that the Confrontation Clause only applies to more formal statements to law enforcement agents that “bear sufficient indicia of solemnity to qualify as testimonial.”

Page 841. In Note 10, at the bottom of page 841, replace the Supreme Court Reporter citation for Bullcoming v. New Mexico with the official United States Reports citation:

564 U.S. 647 (2011).

Page 843. At the end of Note 10, add the following paragraph:

Williams continues to sow confusion in the lower courts. As one scholar recently noted, the Justices in *Williams* “set out four different approaches to determining whether the testifying analyst’s testimony violated Williams’s confrontation rights, none of which attracted the support

of a majority. The Court appears to be at a loss about how to proceed. In May 2014, it denied a dozen petitions for certiorari imploring it to clarify standards for the admissibility of forensic reports under *Williams*.” David L. Noll, *Constitutional Evasion and the Confrontation Puzzle*, 56 B.C. L. REV. 1899, 1901-02 (2016); *State v. Michaels*, 95 A.3d 648, 665 (N.J. 2014) (“[T]he fractured holdings of *Williams* provide little guidance in understanding when testimony by a laboratory supervisor or co-analyst about a forensic report violates the Confrontation Clause”). Some lower courts have seized on Justice Thomas’s opinion concurring in the judgment, which supplied the fifth vote for the result, to allow admission of surrogate testimony where the statements in the forensic report lack the “formality and solemnity” that Justice Thomas considers necessary for them to be considered testimonial. See Mark K. Hanasono, *The Muddled State: California’s Application of Confrontation Clause Jurisprudence in People v. Dungo and People v. Lopez*, 41 HAST. CONST. L. Q. (2013) (discussing and critiquing cases). Such an approach, however, appears to lack the support of any other Justice.

C. AFFIRMATIVE OVERRIDES: ADMITTING OTHERWISE INADMISSABLE EVIDENCE

Page 862. In the citation to Gianelli & Imwinkelried, change “8-3(D) (3d Ed. 1999) to 8.05 (5th ed. 2012).