FEDERAL RULES OF EVIDENCE

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Cumulative Supplement

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FEDERAL RULES OF EVIDENCE

ARTICLE VIII.

HEARSAY

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

(d) Statements That Are Not Hearsay.

Page 14: Replace provision (B) with the following:

(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; or

Page 14: Add to the amendment history as follows:
; 12-1-14

Rule 803. Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness

Page 15: Replace subdivisions (6)–(8) with the following:

(6) ***Records of a Regularly Conducted Activity.*** A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

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

(7) ***Absence of a Record of a Regularly Conducted Activity.*** Evidence

that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

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

(8) ***Public Records.*** A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

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

Page 17: Add new (D) and accompanying sentence:

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

(24) [*Other Exceptions*.]

Page 17: Add to the amendment history as follows:

; 12-1-14

ARTICLE I.

GENERAL PROVISIONS

Chapter 103

Rule 103. Rulings on Evidence

§ 103.3 Requirements for Preservation of Error for Appeal

Page 37: Add to footnote 18:

[18] United States v. City of New Orleans, 731 F.3d 434 (5th Cir. 2013) (because it made no objection at trial, City could not seek reversal on appeal from the decision of the district court to conduct hearing without observing the Rules of Evidence, to prohibit cross-examination of witnesses, and to admit nearly every document offered by the Department of Justice even though most constituted unauthenticated hearsay);

Page 38: Add to footnote 20:

[20] Wilson v. City of Chicago, 758 F.3d 875 (7th Cir. 2014) (trial counsel forfeits any claim of error in a ruling excluding evidence if he does not make an offer of proof on the record; such an offer is essential to permit the trial judge to make an informed ruling, and to permit the reviewing court to know whether the ruling was prejudicial. Even though the issue was discussed at a pretrial conference where some such offer may have been made, that conversation cannot preserve the point where the conference was not recorded); United States v. Henley, 766 F.3d 893 (8th Cir. 2014) (after defendant called a witness to testify about statements made by her husband and the trial court sustained the prosecutor's hearsay objection, any error in such a ruling would not lead to reversal because the defendant made no offer of proof and therefore laid no evidentiary foundation for any showing that the statements might have been admissible under some hearsay exception);

Page 38: Add to footnote 21:

[21] Lamonica v. Safe Hurricane Shutters, Inc., 711 F.3d 1299 (11th Cir. 2013) (alleged error in trial court ruling that excluded statement as hearsay was preserved for appeal even though proponent of the testimony made no offer of proof when the evidence was excluded; the anticipated substance of the testimony was made "apparent from the context" three days earlier in the trial when the attorney had already posed a leading question to the other alleged participant in the same conversation);

Page 40: Add to footnote 27:

[27] United States v. Marr, 760 F.3d 733 (7th Cir. 2014) (defendant did not preserve for appeal his objection to use of propensity evidence; his pretrial motion related to prospective testimony from a witness who never testified at trial, and his objections during the actual testimony were on other grounds); United States v. Zayyad, 741 F.3d 452 (4th Cir. 2014) (to preserve an argument for appeal, a party must object on the same basis he asserts on appeal; even if a defendant invokes the same rule in both instances, he may waive his claim if he fashions his appellate argument differently. When a district court excludes evidence on the grounds of relevance or low probative value, the objecting party will not normally be allowed to seek reversal on the basis of a different argument on appeal as to why that evidence was relevant); Williams v. Dieball, 724 F.3d 957 (7th Cir. 2013) (party fails to preserve an objection for appeal, even if he raises it at trial in general terms, if his arguments were underdeveloped, conclusory, or unsupported by law. Plaintiff could not seek reversal based on the admission of evidence about his criminal record, because his objection at trial did nothing more than give a barebones recitation of the relevant standard and a conclusory statement that it was not met, but did not explain with any meaningful specificity why the balancing test should have resulted in exclusion); United States v. Ramirez-Fuentes, 703 F.3d 1038 (7th Cir. 2013) (where defense counsel objected only once during testimony of DEA agent, asserting that testimony relating to the effects of ingesting drugs was irrelevant, he gave no indication to the judge that he believed there was any potential objection to the entire line of questioning and therefore failed to preserve an objection to the agent's improper references to the defendant's Mexican nationality); United States v. Hayat, 710 F.3d 875 (9th Cir. 2013) (when a party gives an invalid reason for admitting a hearsay statement at trial, the district court is not required on its own to come up with alternative grounds on which the statement could be admitted, and the appellate court will not reverse unless the lower court's failure amounted to plain error);

Page 41: Add to footnote 30:

[30] United States v. Adejumo, 772 F.3d 513 (8th Cir. 2014) (although an objection must be timely and contemporaneous to preserve an evidentiary issue for appellate review, that requirement was satisfied when defense counsel objected "mere moments" after an exhibit was introduced and shown to the jury, because there was still ample opportunity for the judge to prevent further potential damage);

Page 42: Add to footnote 32:

[32] *But see* United States v. Pust, 798 F.3d 597 (7th Cir. 2015) (when a party intentionally abandons a known right, the issue is waived and cannot be reviewed on appeal, not even for plain error, and an attorney who affirmatively states "I do not object" normally waives any right to seek appellate review; plain error review may be available, however, if the attorney's response was nothing more than a simple "no objection" during a rote call-and-response colloquy with the district judge, rather than a knowing and intentional waiver of a specific objection).

Page 43: Add to footnote 38:

[38] United States v. McGlothin, 705 F.3d 1254 (10th Cir. 2013) (where appellant makes no objection in the lower court, and then fails on appeal to argue or explain why he would be entitled to reversal under the standard for plain error, he will forfeit any claim to reversal because the appeals court has no obligation to initiate plain error review *sua sponte*);

§ 103.4 Objections in Special Circumstances

Page 45: Add to footnote 44:

[44] United States v. Young, 753 F.3d 757 (8th Cir. 2014) (after trial court excluded defense evidence by announcing "I guess I'm sustaining the Government's objection at this point in time," the district court's invitation to re-raise the issue prevented its ruling from being definitive, and the defendant therefore failed to preserve this issue for normal appellate review when he did not renew his argument at trial); Lawrey v. Good Samaritan Hosp., 751 F.3d 947 (8th Cir. 2014) (when a party's evidence is excluded by the court as the result of a pretrial motion in limine, that party need not make an offer of proof to preserve for appellate review any claim of error in that ruling); United States v. McGlothin, 705 F.3d 1254 (10th Cir. 2013) (defendant's unsuccessful pretrial motion to exclude evidence of other firearms offenses did not preserve his claim of error in the admission of that evidence, because the trial court stated that its final ruling should be made "in the context of the trial itself" and that the motion was only "conditionally denied," thus placing him on notice of the need to renew his objection at trial, which he failed to do); United States v. Big Eagle, 702 F.3d 1125 (8th Cir. 2013) (the district court's tentative ruling on the admissibility of uncharged crimes evidence was not definitive or final, and not sufficient to preserve defendant's objections on appeal, where the court explicitly stated its ruling was "preliminary," noted the court had not heard the evidence the government intended to present, and emphasized the court would "make further rulings on objections as the case progresses");

Page 46: Add to footnote 46:

[46] United States v. Banks, 706 F.3d 901 (8th Cir. 2013) (after making a pretrial ruling excluding evidence of the defendant's earlier conviction under Rule 404(b), the district court did not abuse its discretion in changing that ruling at the close of the government's case in light of the defendant's assertion of a general denial, because evidentiary rulings in limine are preliminary and may be changed based on the course of the trial).

Chapter 104

Rule 104. Preliminary Questions

§ 104.3 Conditional Relevance

Page 53: Add to footnote 15:

[15] United States v. Zayyad, 741 F.3d 452 (4th Cir. 2014) (when a defendant charged with selling counterfeit prescription drugs never testified or offered any evidence that he actually thought that he was selling them legally in a so-called "gray market," the trial court did not err in precluding him from cross-examining a government witness about that potential defense; "a defendant cannot distract the jury by introducing evidence concerning a potential defense that he never raised");

§ 104.6 Rule 104 and Preserving the Role of the Jury

Page 53: Add to footnote 46:

[46] United States v. West, 813 F.3d 619 (7th Cir. 2015) (Defense expert should have been allowed to testify about the defendant's low IQ and mental illness, to assist the jury in deciding whether those factors undermined the reliability of his confession; even though the judge rejected that same evidence as a basis for excluding the confession, it was still relevant to the jury's assessment of the weight and credibility of that evidence.)

Chapter 105

Rule 105. Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes

§ 105.2 Limiting Instructions

Page 66: Add to footnote 7:

[7] United States v. Imo, 739 F.3d 226 (5th Cir. 2014) (if evidence is admitted for one purpose but not another, the court cannot refuse to give a limiting instruction upon request, but the instruction need not be given in the particular form or manner that is sought by the parties); United States v. Robinson, 724 F.3d 878 (7th Cir. 2013) (when trial court read jurors an inaccurate limiting instruction, that error was not cured by the fact that the court gave the jurors an accurate version in a 28-page written copy of its complete instructions. Although supplementary written instructions can help jurors understand difficult legal concepts, our system has always relied on oral jury instructions, and a trial judge commits error if he fails to read aloud jury instructions in their entirety);

Page 67: Add to footnote 8:

[8] United States v. Robinson, 724 F.3d 878 (7th Cir. 2013) (when evidence is properly

admitted for only one purpose, it is error for trial court to instruct the jury merely as to that one permissible purpose without also instructing the jurors that they may use the evidence *only* for the purpose, or that they are forbidden from using it for any other purpose).

Page 67: Add to footnote 10:

[10] United States v. Cone, 714 F.3d 197 (4th Cir. 2013) (when complaint letters from the defendant's customers were admitted not to prove their truth but merely to show notice to the defendant, the court erred in denying the defendant's request for a limiting instruction);

Page 67: Add to footnote 12:

[12] United States v. Feliciano, 761 F.3d 1202 (11th Cir. 2014) (it may be best for district courts to routinely issue an instruction limiting the use of a prior inconsistent statement admitted under Rule 613(b) to impeachment and to clarify that such statements are not admissible as substantive evidence, but the failure to do so did not constitute plain error where the defendant made no request for such an instruction); United States v. Big Eagle, 702 F.3d 1125 (8th Cir. 2013) (after defendant declined the government's pretrial offer of a limiting instruction concerning certain prosecution evidence, he waived his right to challenge the admission of the evidence to the extent that any unfair prejudice would have been alleviated by a curative instruction);

Page 68: Add to footnote 14:

[14] United States v. Gomez, 763 F.3d 845 (7th Cir. 2014) (although a limiting instruction must be given upon request, a defendant may choose to go without one to avoid highlighting the evidence, and judicial freelancing is discouraged because *sua sponte* limiting instructions in the middle of trial when the evidence is admitted may preempt a defense preference to let the evidence come in without the added emphasis of a limiting instruction, so the court should consult counsel about whether and when to give a limiting instruction); United States v. Benjamin, 711 F.3d 371 (3d Cir. 2013) (district court is not required to issue a limiting instruction without a request, and the defendant waived any challenge to the failure to give such an instruction when he did not request one at trial);

Chapter 106

Rule 106. Remainder of or Related Writings or Recorded Statements

§ 106.1 Function and Purpose of the Rule

Page 71: Add to footnote 1:

[1] United States v. Liera-Morales, 759 F.3d 1105 (9th Cir. 2014) (government could ask agent to testify to only certain incriminating portions of defendant's post-arrest statement; because those portions were neither misleading nor taken out of context, the defendant had no right to insist that the jury also hear about other exculpatory statements made by him in the same interview);

Page 73: Add to footnote 9:

[9] United States v. Ford, 761 F.3d 641 (6th Cir. 2014) (although the rule of completeness

allows a party to correct a misleading impression created by the introduction of only part of a writing or conversation, it is not designed to make something admissible that should be excluded, and does not permit the admission of otherwise inadmissible exculpatory hearsay—not even to complete the context of an incriminating statement made by the accused); United States v. Dotson, 715 F.3d 576 (6th Cir. 2013) (Rule 106 does not make inadmissible evidence admissible, nor justify the admission of irrelevant portions of a confession that is partially admitted into evidence);

Page 74: Add to footnote 11:

[11] United States v. Duygu Kivanc, 714 F.3d 782 (4th Cir. 2013) (Rule 106 applies only to writings and recorded statements, not to conversations); United States v. Hayat, 710 F.3d 875 (9th Cir. 2013) (the rule of completeness applies only to written and recorded statements, and does not compel admission of otherwise inadmissible hearsay evidence. A district court therefore is not required to allow a defendant, on cross-examination of government witness, to ask the witness to repeat hearsay statements made by the accused);

ARTICLE II.
JUDICIAL NOTICE

Chapter 201

Rule 201. Judicial Notice of Adjudicative Facts

§ 201.3 Qualification of Adjudicative Facts

Page 79: Add to footnote 7:

[7] Freeman v. Town of Hudson, 714 F.3d 29 (1st Cir. 2013) (a federal court may take judicial notice of the contents of some public records, such as statutes and curricular standards, but not 911 transcripts and police reports);

Page 80: Add to footnote 9:

[9] Swindol v. Aurora Flight Sciences Corp., 805 F.3d 516 (5th Cir. 2015) (in ascertaining the existence of diversity jurisdiction and determining a corporate party's principal place of business, the Court of Appeals may take judicial notice of public records on the websites of the Mississippi Secretary of State and the Virginia State Corporation Commission, as the accuracy of such websites could not reasonably be questioned);

Page 81: Add to footnote 14:

[14] United States v. Brooks, 715 F.3d 1069 (8th Cir. 2013) (trial court could properly take judicial notice of the reliability and accuracy of Global Positioning System ("GPS") technology);

Page 82: Add to footnote 16:

[16] *See also* Zalewski v. Cicero Builder Dev., Inc., 754 F.3d 95 (2d Cir. 2014) (in deciding whether builders infringed copyright in architectural works, the Court of Appeals would consider excerpts from treatises describing the basics of colonial architecture as a basis for taking judicial notice as to the features of prominent architectural styles, particularly of home designs).

§ 201.7 Time of Taking Judicial Notice

Page 84: Add to footnote 25:

[25] United States v. Zepeda, 705 F.3d 1052 (9th Cir. 2013) (where accused was prosecuted under statute requiring government to prove his status as an American Indian, even though it would have been proper to ask the trial court to take judicial notice that his tribe was on the Bureau of Indian Affairs' list in the Federal Register of federally recognized tribes—and even though judicial notice may generally be taken on appeal—the Court of Appeals cannot do so when the prosecution made no such request at trial and the district court did not do so. Judicial notice cannot be taken at the request of the prosecution for the first time on appeal to uphold a conviction, for that would displace the role of the jury and make a factual finding on its behalf);

§ 201.9 Selected Matters Judicially Noticed

Page 89: Add to footnote 45:

[45] *In re* September 11 Litigation, 751 F.3d 86 (2d Cir. 2014) (appellate court would take judicial notice of facts concerning the terrorist attacks of September 11, 2001 to establish that those events constituted an "act of war");

Page 90: Add to footnote 52:

[52] *In re* Omnicare, Inc. Securities Litigation, 769 F.3d 455 (6th Cir. 2014) (appellate courts can take notice of the actions of other courts, but generally will recognize only indisputable court actions, such as the entry of a guilty plea or the dismissal of a civil action, and cannot take notice of pleadings or testimony as true simply because these statements are filed with a court);

ARTICLE III.
PRESUMPTIONS IN CIVIL CASES

Chapter 301

Rule 301. Presumptions in Civil Cases Generally

§ 301.3 The Policy of Presumptions

Page 98: Add to footnote 17:

[17] CGC Holdings Co., LLC v. Broad and Cassel, 773 F.3d 1076 (10th Cir. 2014) (in fraud securities cases, plaintiffs can take advantage of a rebuttable "presumption of reliance" that the defendant's misrepresentations affected their investment decision in situations where proving causation is unfeasible, at least where the defendant is accused of a fraudulent failure to disclose material facts, but this presumption does not apply to affirmative misrepresentations by the defendant and this presumption is unsuited for RICO fraud cases because they involve a more self-contained universe of plaintiffs and conduct by defendants that does not necessitate a legal presumption); United States v. Zuniga, 767 F.3d 712 (7th Cir. 2014) (under the presumption of regularity, courts will presume that public officers will properly carry out their duties and adhere to established procedures, so long as there is no evidence to the contrary).

Chapter 302

Rule 302. Applying State Law to Presumptions in Civil Cases

§ 302.2 Application of State Law

Page 106: Add to footnote 6:

[6] Rudisill v. Ford Motor Co., 709 F.3d 595 (6th Cir. 2013) (in diversity action brought under state law, the federal district judge was bound to follow Ohio state law that a deliberate removal of an equipment safety guard by an employer creates a rebuttable presumption that the removal was done with the intent to injure another if injury results).

ARTICLE IV.

RELEVANCE AND ITS LIMITS

Chapter 401

Rule 401. Test for Relevant Evidence

§ 401.2 Determination of Relevance

Page 114: Add to footnote 3:

[3] Wilson v. City of Chicago, 758 F.3d 875 (7th Cir. 2014) (in wrongful death case, evidence that the alleged victim of police shooting had knife strapped to his leg was relevant, even though the police did not know about the knife at the time of the shooting, because such

evidence supported the inference that the young man was prepared for battle and more likely to act aggressively, which corroborated the officers' account that he lunged at them with another knife);

§ 401.3 Standard of Relevance

Page 115: Add to footnote 6:

[6] Wilson v. City of Chicago, 758 F.3d 875 (7th Cir. 2014) (in wrongful death case, evidence that plaintiff's son—the alleged victim of illegal police shooting—used drugs and alcohol was relevant, even if there had been no drug use at the time of the shooting, because such evidence was relevant to the calculation of damages based on the loss of the young man's society and comfort); Plyler v. Whirlpool Corp., 751 F.3d 509 (7th Cir. 2014) (after plaintiff testified that he suffered emotional injury as the result of a fire caused by a microwave oven, the defendant was properly allowed to cross examine him about the details of his divorce to explore whether, despite his denial, the divorce might have contributed to some part of his emotional distress). *See* United States v. Gibson, 708 F.3d 1256 (11th Cir. 2013) (district court did not abuse its discretion in admitting evidence that man charged with cocaine distribution had spent large sums of money on dog-fighting operation; the evidence was relevant to show that he had somehow earned a substantial income not attributable to any legitimate business, and the court disallowed any testimony about the fights or how the dogs were handled and trained); Smith v. Hunt, 707 F.3d 803 (7th Cir. 2013) (in civil suit accusing police officers with excessive force causing physical injuries during an arrest, trial court properly allowed the defense to prove that the plaintiff had taken heroin before the arrest; such evidence was relevant to damages because it suggested that he may have requested a specific opiate pain killer by name not because of his pain level, but because of its chemical similarity to heroin, an argument the jury could understand even without expert testimony on the effects of those opiates); United States v. Tavares, 705 F.3d 4 (1st Cir. 2013) (in prosecution for prostitution and sex trafficking of children, there was no error in admitting evidence of defendant's violence toward one of his victims; violence, abuse, and other forms of human degradation are part and parcel of sex trafficking. Moreover, evidence of violence was relevant to demonstrate the control the defendants exercised over the women in their prostitution operation);

§ 401.6 Relevance and Materiality

Page 118: Add to footnote 15:

[15] United States v. Campbell, 764 F.3d 880 (8th Cir. 2014) (district court properly precluded defendant from cross-examining minor victim about her prior prostitution activity, at his trial for sex trafficking of a child; any evidence of victim's earlier prostitution was immaterial, as she was a minor and could not have legally consented, and evidence that she engaged in other acts of prostitution before meeting the defendant would only have proven that other people may have been guilty of similar offenses of recruiting, enticing, or causing her to engage in a commercial sex act); United States v. Dotson, 715 F.3d 576 (6th Cir. 2013) (after government introduced redacted portions of statement in which the accused confessed that he had sexually molested a minor and possessed child pornography, he had no right to insist on the admission of other irrelevant portions of the statement in which he claimed that he had a rough upbringing and had been sexually abused as a child, that he appreciated his girlfriend and intended to marry her, and that he felt some concern for his victim); United States v. Burge, 711 F.3d 803 (7th Cir. 2013) (in criminal perjury prosecution for false answers given by the defendant in answer to interrogatories he received in civil litigation, the accused was not entitled to prove that the allegations of the civil suit were fraudulent or false, because that was irrelevant to whether he was guilty of perjury in the answers he gave in that case);

Chapter 402

Rule 402. General Admissibility of Relevant Evidence

§ 402.1 Admissibility—In General

Page 121: Add new footnote at the end of the first paragraph in section 402.1:

[2.1] United States v. Evans, 728 F.3d 953 (9th Cir. 2013) (Although Rule 104 gives a judge the power to decide whether evidence is inadmissible under any other rule of evidence, it does not give the judge an independent basis for excluding otherwise relevant evidence that is not excluded by other evidence rules. When defendant sought to offer his Idaho birth certificate as proof of his citizenship, the court erred in excluding the evidence merely because it was persuaded that the document was illegitimate and posed a risk of a miscarriage of justice, because there was conflicting evidence that could have supported a jury verdict either way on that issue.).

Chapter 403

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

§ 403.1 In General

Page 125: Add to footnote 2:

[2] Because of the way in which Rule 403 is so closely connected to concerns about protecting jurors from confusion or evidence raising a risk of unfair prejudice, at least one Circuit has stated that Rule 403 has no applicability to trials conducted without a jury. United States v. Preston, 706 F.3d 1106 (9th Cir. 2013).

§ 403.2 Balance of Probative Values versus Counterweight, Discretion of Trial Judge

Page 129: Add to footnote 14:

[14] United States v. Schneider, 801 F.3d 186 (3d Cir. 2015) (defendant was properly prevented from telling the jury that he had been in jail for nearly 5 months before trial, even though that evidence was relevant to his inability to obtain medical treatment, because there were other ways to prove that inability without mentioning his incarceration, and without

raising the potential for unfair prejudice to the government by inducing jury sympathy for the defendant);

Page 129: Add to footnote 15:

[15] *But see* United States v. Worthey, 716 F.3d 1107 (8th Cir. 2013) (trial court did not err in allowing jury to view several short clips of videos found on defendant's computer, even though defendant was willing to stipulate that the video clips showed child pornography). United States v. Dudley, 804 F.3d 506 (1st Cir. 2015) (even though defendant charged with possession of child pornography on his computer offered to stipulate that the videos were pornographic, it was still proper to play the first 30 seconds of two of those videos to prove that anyone who watched even a portion of those videos would have known of their pornographic nature, making it more likely that the defendant knew of their content).

Page 129: Add to footnote 17:

[17] United States v. Caldwell, 760 F.3d 267 (3d Cir. 2014) (when a court engages in a Rule 403 balancing and articulates on the record a rational explanation, that ruling will rarely be disturbed on appeal, but no such deference is appropriate where the trial court engages in nothing more than a bare recitation of the text of the rule and states that "the probative value outweighs any prejudicial effect");

§ 403.3 Exclusion of Relevant Evidence Based upon Unfair Prejudice

Page 130: Add to footnote 18:

[18] United States v. Guzman-Montanez, 756 F.3d 1 (1st Cir. 2014) (the law shields a defendant against unfair prejudice, not against all prejudice. All admissible evidence is meant to be prejudicial; if it were not, the prosecution would not be introducing it); United States v. Joseph, 709 F.3d 1082 (11th Cir. 2013) (in prosecution of physician charged with dispensing controlled substances without legitimate medical purposes, district court did not abuse its discretion under Rule 403 in allowing a police officer to testify that defendant's patients included about 300 "known drug offenders," because this evidence was relevant to whether patients abused drugs or sold their drugs and whether defendant knew or should have known of such misuse);

Page 130: Add to footnote 19:

[19] United States v. Ramirez-Fuentes, 703 F.3d 1038 (7th Cir. 2013) (it is improper for government witnesses to tie the race or ethnicity of a defendant to the racial or ethnic characteristics of a specific drug trade, because a defendant's race, ethnicity, or national origin cannot be considered by the jury in reaching a verdict. It was error to allow a government agent to offer the gratuitous and unnecessary opinion that the drugs found in the possession of the accused were "Mexican methamphetamine");

Page 131: Add to footnote 20:

[20] United States v. Schneider, 801 F.3d 186 (3d Cir. 2015) (evience that defendant had been in jail for nearly 5 months before trial, even though admittedly relevant, had the potential for unfair prejudice to the government by inducing jury sympathy for the defendant).

§ 403.4 Exclusion of Relevant Evidence Based upon Confusion of the Issues or Misleading the Jury

Page 132: Add to footnote 25:

[25] Lund v. Henderson, 807 F.3d 6 (1st Cir. 2015) (in civil suit for false arrest and excessive force, evidence of four earlier contested complaints against officer was properly excluded,

because it would have turned the trial into a series of mini-trials).

Page 133: Add to footnote 26:

[26] United States v. Condon, 720 F.3d 748 (8th Cir. 2013) (in prosecution for sexual abuse of a 14-year-old minor, the district court did not abuse its discretion in excluding a tape-recorded conversation in which the defendant told his mother that he was "guilty" but his lawyer sought an acquittal based on a "technicality"; the statement raised the risks of unfair prejudice and misleading the jury, because it was unclear whether he was admitting all the elements of the offense—or merely the fact that he had sexual contact with the victim but intended to seek acquittal based on the affirmative defense that he reasonably believed she was 16 years old);

§ 403.5 Exclusion of Relevant Evidence Based upon Waste of Time, Undue Delay and Needless Presentation of Cumulative Evidence

Page 135: Add to footnote 38:

[38] United States v. Moreno, 727 F.3d 255 (3d Cir. 2013) (in prosecution of woman accused of falsely representing herself as a United States citizen, it was not an abuse of discretion to exclude certain FBI documents that listed her citizenship as "United States," because the jury had already heard testimony about government documents listing her as a United States citizen, making this evidence cumulative);

Chapter 404

Rule 404. Character Evidence; Crimes or Other Acts

§ 404.4 Exclusionary Rule as to Character Evidence

Page 140: Add to footnote 20:

[20] United States v. Briley, 770 F.3d 267 (4th Cir. 2014) (all propensity evidence carries the risk that the government could deploy the uncharged misconduct as a character smear that might infect the entire trial by portraying the defendant as a person deserving of condemnation irrespective of the misconduct for which he is on trial, and by shifting the trial's focus away from that misconduct toward the portrayal of a character of general disrepute);

§ 404.5 Character of the Accused, Rule 404(a)(2)(A)

Page 142: Add to footnote 28:

[28] United States v. De Leon, 728 F.3d 500 (5th Cir. 2013) (criminal defendant has the right to offer opinion or reputation testimony to prove his pertinent character traits, and his character trait as a law-abiding citizen is always pertinent; the district judge therefore erred in limiting defense counsel to ask character witnesses whether De Leon was honest, because he was the accused and not a witness);

§ 404.10 Character in Issue—Test for Application

Page 152: Add to footnote 69:

[69] United States v. McLaurin, 764 F.3d 372 (4th Cir. 2014) (when defendant raises defense of entrapment, he forces the Government to prove his predisposition to commit the charged offense, and therefore permit the admission to certain evidence of bad acts that would otherwise be inadmissible; the defense does not justify the admission of every bad act ever done by the defendant, but a broad swath of evidence, including aspects of his character and criminal past, is relevant to proving predisposition); United States v. Matias, 707 F.3d 1 (1st Cir. 2013) (in criminal prosecution for cocaine distribution, evidence of large sums of case found in his possession was relevant to show his ability to complete the cocaine deal, especially since he raised the defense of entrapment and thus required the Government to prove his predisposition to commit the charged offense); United States v. Cervantes, 706 F.3d 603 (5th Cir. 2013) (after defendant charged with planning a home invasion raised the defense that he had been entrapped by an undercover ATF agent, it became the government's burden to prove his predisposition to commit the charged offense, and so the prosecution was properly permitted to introduce footage from a security camera and testimony about an attempted armed home invasion committed by the accused several years earlier);

§ 404.12 Policy of Rule 404(b)(1) in Criminal Cases

Page 157: Add new footnote at the end of section 404.12:

[86.1] United States v. Dimora, 750 F.3d 619 (6th Cir. 2014) (defendant at bribery trial was properly precluded from offering evidence that he sometimes did favors for people who did not pay him bribes; for the same reason that prior "bad acts" may not be used to show a predisposition to commit crimes, prior "good acts" generally may not be used to show a predisposition not to commit crimes, and have little probative value).

§ 404.13 Admissible Extrinsic Acts—In General

Page 157: Add to footnote 89:

[89] United States v. Benjamin, 711 F.3d 371 (3d Cir. 2013) (evidence of defendant's parole status was admissible as "helpful background" under Rule 404(b) so that jury could understand why his parole officer was conducting a search of the premises where the defendant was found in possession of firearms, and why the defendant would have a motive to use an alias and hide those weapons).

Page 157: Add to footnote 90:

[90] United States v. Castleman, 795 F.3d 904 (8th Cir. 2015) (in prosecution for manufacturing of methamphetamine, evidence that the defendant killed one of his alleged conspirators—evidently after learning the conspirator had decided to change his plea and cooperate with the government—was admissible to prove his "consciousness of guilt"); United States v. Straker, 800 F.3d 570 (D.C. Cir. 2015) (in hostage-taking conspiracy, evidence of defendants' involvement in other uncharged hostage takings was admissible, not to prove criminal propensity, but to prove how they started to work together, their motive and intent to kidnap wealthy civilians to extort ransom, and to help explain how they developed a relationship of mutual trust); United States v. Vizcarrondo-Casanova, 763 F.3d 89 (1st Cir. 2014) (in prosecution of conspiracy that included several police officers, evidence of prior crimes committed together by the defendants is admissible to prove the basis for their relationship of mutual trust, especially in a case in which each defendant would not have knowingly participated in such a risky undertaking unless he had good reason to trust the reliability and competence of the others); United States v. Barefoot, 754 F.3d 226 (4th Cir. 2014) (in prosecution for solicitation to destroy government buildings by explosive, prosecution was entitled to prove that defendant was involved in unrelated murder, not to show the defendant's criminal propensity or bad character but to show his seriousness, and to rebut the defense attempt to downplay his solicitation as insubstantial and fanciful talk);

Page 159: Add to footnote 95:

[95] United States v. Caldwell, 760 F.3d 267 (3d Cir. 2014) (in prosecution for firearms possession, trial court erred in admitting evidence of defendant's two earlier convictions for firearms possession to show his "knowledge," since the prosecution proceeded solely on a theory of actual possession—making no claim that the gun was found in some place under his control—and the defendant's knowledge is almost never relevant when the Government relies only on a theory of actual possession. The defendant denied entirely that he possessed a gun; he did not claim that he held some object but was unaware that it was a gun); United States v. Lee, 724 F.3d 968 (7th Cir. 2013) ("Simply because a subject like intent is formally at issue when the defendant has claimed innocence and the government is obliged to prove his intent as an element of his guilt does not automatically open the door to proof of the defendant's other wrongful acts for purposes of establishing his intent." At trial of drug charges, it was error to admit evidence of defendant's drug possession conviction to show his intent or knowledge, since his defense was that he knew nothing about the drugs in the trunk and was an innocent bystander, and the conviction did not undermine that defense except to the extent that it portrayed him as having a propensity to engage in drug offenses. The case for admission might have been stronger if he had made his intent a central issue by claiming, for example, that he knowingly possessed some substance but did not know it was cocaine, or that it was not intended for sale but only for personal use, or that he had picked up someone else's bag by mistake);

§ 404.15 Extrinsic Act Evidence Offered to Show Intent, Knowledge, or Absence of Mistake in a Criminal Case

Page 161: Add to footnote 113:

[113] United States v. Heard, 709 F.3d 413 (5th Cir. 2013) (in criminal prosecution for conspiracy to defraud the United States out of employment taxes, lower court did not err in admitting evidence that he was also guilty at the same time of filing a fraudulent bankruptcy petition to defraud the United States out of several personal debts to the IRS; the evidence was admissible to show his "intent" to commit the charged offense); United States v. Tarnow, 705 F.3d 809 (8th Cir. 2013) (in sexual assault prosecution where the accused maintained that his sexual contact with his girlfriend was consensual and not violent, the trial court properly admitted testimony under Rule 404(b) from another woman who described how he had once used force to abduct and subdue her, because such evidence was admissible to show his "intent and motive" in using force or the threat of force to subdue and control his alleged rape victim);

Page 162: Add to footnote 115:

[115] United States v. Williams, 796 F.3d 951 (8th Cir. 2015) (in prosecution of defendant for alleged possession of a firearm found in a car occupied by two men, evidence of his two earlier firearms possession convictions—even though they were 11 and 18 years old—were properly admitted not to prove his criminal propensity, but to prove his knowledge of the presence of the firearm in the car and his intent to possess that weapon; any unfair prejudice was minimized by limiting instruction that while "the defendant may have committed similar acts in the past, this is not evidence that he committed such an act in this case") (decision is extremely dubious); United States v. Cornelison, 717 F.3d 623 (8th Cir. 2013) (in prosecution on charges of being a felon in possession of a firearm, trial court properly admitted evidence of the fact that he had been previously convicted of the same offense; such evidence was admitted under Rule 404(b) not to show his criminal propensity, but his "knowledge" about the guns that were located in his home, which is a central issue in cases where the defendant asserts that he was not aware of the presence of contraband); United States v. Moore, 709 F.3d 287 (4th Cir. 2013) (in prosecution for carjacking committed with a firearm, the trial court

properly admitted evidence that the accused had once been seen in the possession of a revolver, the same type of gun used in the commission of his alleged offense. But the court abused its discretion under Rule 404(b) in admitting evidence of his possession of a different firearm, a semiautomatic pistol. Such evidence was not admissible to show his "opportunity" to possess guns, as the trial court held, but was forbidden as evidence of his criminal disposition); United States v. Banks, 706 F.3d 901 (8th Cir. 2013) (after defendant at trial presented a "general denial defense" to charge of conspiring to distribute cocaine, it was not an abuse of discretion under Rule 404(b) to admit evidence of his 10-year old conviction for possession of marijuana, since such evidence was admissible to show his knowledge of the existence of the conspiracy and his intention to join that conspiracy, and the jury was instructed to only consider the evidence to decide those issues of knowledge and intent); United States v. McGlothin, 705 F.3d 1254 (10th Cir. 2013) (when the defendant placed his intent as issue by denying that he knowingly possessed gun found in a closet of the apartment where he was staying, Rule 404(b) allowed the admission of evidence about his two earlier firearms offenses for the limited purpose of showing his "knowledge" and his knowing possession of the firearm).

Page 162: Add to footnote 118:

[118] United States v. Doe, 741 F.3d 217 (1st Cir. 2013) (evidence of past drug sales by the accused were not admissible to prove his propensity for selling drugs, but they were admissible to show his "knowledge that the substance was in fact crack and to show that he intended to distribute that crack"); United States v. Ramos-Atondo, 732 F.3d 1113 (9th Cir. 2013) (at trial of defendant charged with conspiring to import marijuana, his conviction for smuggling aliens was admissible to show his knowledge of cross-border smuggling procedures, including managing panga-style boat as it moved from Mexico to United States in middle of the night, and showed modus operandi involving use of open boats that were to be unloaded on dark beach in early morning hours); United States v. Esquivel-Rios, 725 F.3d 1231 (10th Cir. 2013) (when defendant said he had no idea that drugs were located in a secret compartment of the minivan he was driving, evidence of his prior drug deals was admissible to show his knowledge of the drugs' presence and his intent to distribute them, with a limiting instruction that the evidence of past crimes was permissible not to show propensity but only to show intent and knowledge). Other examples include possession of stolen property, possession of unregistered firearms, and harboring or transporting an illegal alien.

Page 162: Add to footnote 119:

[119] United States v. Lee, 724 F.3d 968 (7th Cir. 2013) (provision in Rule 404(b) allowing evidence of other crimes to show an "absence of mistake" refers only to a mistake on the part of the accused, not the government; such evidence is not admissible to show that the Government made no mistake in its accusations against him—that he was in fact guilty—because that it is precisely the inference forbidden by the rule);

Page 163: Add to footnote 122:

[122] The Courts are divided as to whether a conviction for mere narcotics possession should be admissible to prove intent to distribute drugs in a later case. *See* United States v. Davis, 726 F.3d 434 (3d Cir. 2013) (although a defendant's convictions for cocaine distribution can be admitted as proof of his knowledge and intent to distribute, a conviction for mere possession is not sufficiently probative to be admissible as proof of intent to sell or knowledge of cocaine's appearance, especially since cocaine may appear as a powder, a rock, or a crystal); *but see* United States v. Smith, 741 F.3d 1211 (11th Cir. 2013) (at trial of accused charged with possession of cocaine with intent to distribute, trial court properly admitted evidence of the defendant's earlier drug convictions as evidence of his criminal "intent," even though they occurred six and 10 years before the charged offense, and even though the prior convictions were merely for cocaine possession and not distribution).

Page 164: Add to footnote 130:

[130] United States v. Lespier, 725 F.3d 437 (4th Cir. 2013) (in prosecution of man for murdering his ex-girlfriend, evidence of his earlier threats and violence against her was properly admitted not to prove his criminal propensity but merely to show his intent and that she was not shot by accident or mistake, as he had originally told the police); United States v. Gant, 721 F.3d 505 (8th Cir. 2013) (at trial of man charged with three counts of arson, evidence that he started fires on four other occasions was properly admitted to prove that "he intended to start the charged fires, and they were no accident");

§ 404.16 Extrinsic Act Evidence Offered to Show Motive in a Criminal Case

Page 165: Add to footnote 132:

[132] United States v. Moon, 802 F.3d 135 (1st Cir. 2015) (in prosecution for possession of firearms and ammunition, drugs and related paraphernalia found in defendant's bedroom were admissible not as evidence of a criminal propensity, but to show his control over the area where the gun was found and to prove his motive for possessing the gun—namely, to protect his drugs and drug money). United States v. Schmitt, 770 F.3d 524 (7th Cir. 2014) (In firearms possession prosecution, the prosecutor was properly allowed to prove the defendant possessed drugs in the home to establish why he would have a gun—a "propensity-free chain of reasoning" for the evidence's admission—and not simply to suggest that he engaged in illicit conduct in the past and so must have had the propensity to do it again, the inference that Rule 404(b) forbids); United States v. Roux, 715 F.3d 1019 (7th Cir. 2013) (in prosecution of man charged with coercing a minor to create sexually explicit images, evidence that he sexually molested the victim's sisters was not admissible to show his propensity, but was admissible to show his sexual interest in children and thus his "motive" to commit an offense involving the sexual exploitation of children);

Page 166: Add to footnote 134:

[134] *But see* United States v. Smith, 725 F.3d 340 (3d Cir. 2013) (at trial for threatening federal officers with a gun, it was error to admit evidence that two years earlier, the accused had been observed dealing drugs at the same location, to support the Government's theory that it showed his motive to protect his "turf," because the evidence would not logically support such an inference without the forbidden inference that because he was a drug dealer in the past he must have been a drug dealer on the day in question); United States v. Hamilton, 723 F.3d 542 (5th Cir. 2013) (in trial on gun possession charges, it was reversible error to admit evidence connecting the accused to a gang that often carried guns, supposedly to show his motive for possessing a firearm, because the defendant admitted only that he had once been a member of the gang and there was no evidence that he was still a member of that gang at the time of the alleged offense).

§ 404.17 Extrinsic Act Evidence Offered to Show Identity in a Criminal Case

Page 166: Add to footnote 135:

[135] Such evidence is sometimes offered by the accused in his own defense, in an effort to suggest that his alleged offense was committed by someone else. *See* United States v. Sanders, 708 F.3d 976 (7th Cir. 2013) (so-called "reverse 404(b) evidence" involves a defendant who seeks to prove that some other person committed other crimes that were probably committed by the same person who committed the defendant's alleged crimes, thus tending to suggest that the defendant is innocent. Although such evidence poses relatively little risk of unfair prejudice, its probative value is also slight, and so it may properly be excluded unless the other crime and the present crime were sufficiently similar to make it likely that the same

person committed both crimes).

§ 404.21 Notice Requirement for the Prosecution in a Criminal Case; Procedure

Page 170: Add to footnote 159:

[159] United States v. Heard, 709 F.3d 413 (5th Cir. 2013) (reasonable notice to the accused required by Rule 404(b) need not be in writing, and no specific form of notice is required, but it was dubious whether the government complied with that rule when it merely told the accused about its intention to use evidence of a bankruptcy petition he had filed without specifically telling him that it intended to prove the petition was fraudulent. But the violation was harmless error, because the government revealed that intention in its response to his pretrial motion to exclude the evidence).

Chapter 405

Rule 405. Methods of Proving Character

§ 405.1 Methods of Proving Character—In General

Page 174: Add to footnote 5:

[5] United States v. White, 737 F.3d 1121 (7th Cir. 2013) (defendant in mail fraud trial was properly prevented from testifying about the details of the time she contacted and cooperated with the FBI in disclosing an unrelated fraud in which she was not involved; a defendant who offers evidence of her law-abiding character may not support such a defense with evidence about specific acts of law-abiding conduct);

§ 405.4 Cross-examination of a Character Witness

Page 176: Add to footnote 15:

[15] *But see* United States v. Hough, 803 F.3d 1181 (11th Cir. 2015) (in general, the government may not ask a defendant's character witnesses questions that assume the defendant is guilty of the charged crime, or whether their opinion of him would change if they learned he was guilty or convicted of that crime; such questions are permissible, however, when the defense attorney had already asked those witnesses if their opinion would change in view of the allegations against the accused);

§ 405.5 Cross-examination of a Character Witness; Rule 105 and Rule 403

Page 178: Add to footnote 25:

[25] United States v. Woods, 710 F.3d 195 (4th Cir. 2013) (on cross-examination of defendant's character witnesses, it is improper to ask the witness to assume the defendant's guilt of the crime for which he is on trial and to ask how that would affect the opinion of the character witness);

Chapter 406

Rule 406. Habit; Routine Practice

§ 406.2 Definition of Habit

Page 182: Add to footnote 8:

[8] United States v. Anderson, 755 F.3d 782 (5th Cir. 2014) (criminal defendant charged with aiding a bank robbery had no right to offer evidence that his codefendant robbed a bank by himself two weeks earlier, there was no evidence that robbing banks alone was codefendant's regular practice; the fact that he committed one bank robbery by himself does not demonstrate that he had, or acted upon, a habit of committing bank robberies alone); United States v. Heard, 709 F.3d 413 (5th Cir. 2013) (accountant charged with failure to collect employment taxes was not entitled to prove under Rule 406 that he had always faithfully collected payroll taxes for two of his clients, because his experience with two clients was not an adequate sample for showing that he had a habit, and it was doubtful that such an "involved action" as filing and paying taxes could be an invariable and reflexive response to a specific situation);

Chapter 408

Rule 408. Compromise Offers and Negotiations

§ 408.4 Admissible Statements of Compromise—In General

Page 200: Add to footnote 25:

[25] A. D. v. State of Cal. Highway Patrol, 712 F.3d 446 (9th Cir. 2013) (when a court decides the extent of the plaintiff's "success" in obtaining a jury verdict to determine the appropriate amount of fees that may be awarded to the plaintiff, Rule 408 does not preclude the court from evaluating the extent of plaintiff's recovery in light of the amounts that were discussed by the parties in pretrial settlement talks);

Chapter 410

Rule 410. Pleas, Plea Discussions, and Related Statements

§ 410.1 Pleas, Plea Discussions, and Related Statements—In General

Page 210: Add to footnote 4:

[4] *See also* United States v. Smith, 770 F.3d 628 (7th Cir. 2014) (because the Federal Rules of Evidence do not apply at sentencing and forfeiture proceedings, a proffer statement made by the accused in support of plea negotiations—even if otherwise protected by Rule 410—may be used against him as a basis for a forfeiture of his assets); Doe No. 1 v. United States, 749 F.3d 999 (11th Cir. 2014) (Rule 410 governs the admissibility of plea negotiations, not their discoverability; in an action by victims against the United States Attorney's Office for a violation the Crime Victim's Rights Act, the rule did not create a privilege which would entitle the defendants to object to the disclosure of plea negotiations with the government, which were to be used as evidence against the United States, not the defendant).

§ 410.2 Withdrawn Pleas of Guilty

Page 211: Add to footnote 11:

[11] United States v. Escobedo, 757 F.3d 229 (5th Cir. 2014) (after defendant entered and later withdrew guilty plea before it was accepted by the district court, he did not waive his right to insist upon the exclusion of evidence concerning that plea, even though the plea agreement stated that he waived his rights under Rule 410 if he breached the agreement; the waiver clause must be strictly construed against the Government, and was ambiguous as to whether the waiver clause would become effective only after the plea agreement was accepted by the court);

§ 410.3 Pleas of Nolo Contendere

Page 213: Add to footnote 19:

[19] Sharif v. Picone, 740 F.3d 263 (3d Cir. 2014) (in civil claim against prison officers for excessive force, evidence that the plaintiff pled no contest to a charge of assaulting those guards was not admissible, not even for impeachment after he testified he had done nothing wrong, because a plead of nolo contendere is not an admission of guilt and therefore does not logically contradict his later denial of wrongdoing).

Page 215: Add to footnote 28:

[28] United States v. Johnson, 803 F.3d 279 (6th Cir.2015) (in prosecution for firearm possession by a convicted felon, evidence of his prior felony conviction was admissible even though it was based upon a plea of no contest, where such evidence was only offered to prove that he was a convicted felon).

Page 215: Add to footnote 30:

[30] Sharif v. Picone, 740 F.3d 263 (3d Cir. 2014) (although Rule 410 bars the use of a "no contest" plea for impeachment, it does not forbid cross-examination based upon the conviction that resulted from the plea, which is admissible to impeach the character of the witness subject to the restrictions of Rule 609);

§ 410.4 Statements Attending Pleas and Offers to Plead

Page 219: Add new footnote at the end of the first sentence in section 410.4:

[43.1] Rule 410 only makes evidence of plea bargaining statements inadmissible "against the defendant," and so that rule would not require such exclusion in the rare case where the accused wishes to offer such evidence in his defense, but evidence offered for that purpose would usually be excluded under Rule 403 because of its low probative value and potential for confusion. United States v. Goffer, 721 F.3d 113 (2d Cir. 2013) (criminal defendant's decision to decline an offer of complete immunity out of an insistence that he was innocent is admissible as evidence of his "consciousness of innocence," but a trial court does not abuse its discretion in refusing to allow a defendant to prove that he declined an ordinary plea offer involving a conviction and a reduced sentence, because such evidence has much less

probative value as evidence of innocence, and would require the collateral consequences of a conviction to be discussed at length, adding additional trial complexity and possibility of jury confusion).

Page 219: Add to footnote 44:

[44] United States v. McCauley, 715 F.3d 1119 (8th Cir. 2013) (Rule 410 did not preclude prosecution from using statements made by defendant to DEA agent who came to the defendant's home to execute search warrant, and who asked the accused if he was interested in trying to "help himself out" by cooperating; Rule 410 covers statements made to an agent who has express authority to act for the prosecutor, but here the suspect had not been arrested or charged and the conversations were not the equivalent of plea discussions); United States v. Gomez, 705 F.3d 68 (2d Cir. 2013) (Rule 410 did not bar the admission of statements made by the defendant during a telephone conversation with a federal agent, because the agent was not an attorney, and there was no evidence of any plea discussion in that telephone conversation, even if it did take place during the time frame when defendant was allegedly discussing cooperation with the government);

Page 220: Add to footnote 47:

[47] *See also* United States v. Nelson, 732 F.3d 504 (5th Cir. 2013) (defendant who signed document outlining the factual basis for his proposed guilty plea waived his objection to the use of that document at trial because the plea agreement contained an enforceable waiver provision stating that even if he decided not to plead guilty, the factual basis could be used against him in a future prosecution).

Page 220: Add to footnote 49:

[49] United States v. Shannon, 803 F.3d 778 (6th Cir. 2015) (Government was properly allowed to offer statements made by defendant during plea negotiations; the parties had agreed that such statements could be used at trial "to rebut any evidence offered by [the defendant]" that was inconsistent with those statements, and a defendant may "offer evidence" merely by asking questions on cross-examination intended to suggest that he was innocent, even though he did not call any witnesses to the stand himself);

Chapter 412

Rule 412. Sex Offense Cases: The Victim's Sexual Behavior or Predisposition

§ 412.2 Scope

Page 235: Add text after the last paragraph in section 412.2:

Similarly, the rule does not forbid cross-examination of the alleged victim about the fact that she has made false accusations of sexual misconduct against others in the past, because such questions do not involve her sexual history or predisposition.[29.1]

[29.1] United States v. Willoughby, 742 F.3d 229 (6th Cir. 2014) (in sex offense prosecution, Rule 412 did not forbid the accused from questioning the alleged victim about

an unrelated allegation of sexual abuse she once made and then retracted, because false allegations of sexual abuse are not evidence of sexual activity, and are not offered to prove sexual predisposition; such questions are proper to impeach the witness by proving her dishonesty, although they may not be proved with extrinsic evidence under Rule 608(b)).

§ 412.5 Exception: Physical Evidence

Page 236: Add to footnote 36:

[36] United States v. Seibel, 712 F.3d 1229 (8th Cir. 2013) (man accused of sexually molesting his minor daughter was properly precluded from proving that the young woman was sexually active and that some other individual's semen was found on the girl's bedding, because the court allowed the accused to prove that his semen was not found there, and the government offered no proof of any bodily fluids found in the bedding; there is no need to prove that someone else was the source of physical evidence that the jury is not told about);

§ 412.6 Exception: Victim's Past Behavior

Page 237: Add new footnote in second paragraph of section 412.6:

[40.1] United States v. Mack, 808 F.3d 1074 (6th Cir. 2015) (in prosecution for coercing victims into prostitution, evidence that the victims had previously engaged in acts of prostitution was inadmissible evidence of their sexual behavior, and was not admissible under the exception for the "victim's sexual behavior with respect to the person accused of the sexual misconduct," because the earlier acts of prostitution did not relate to him, and were irrelevant to whether he coerced them into prostitution).

§ 412.7 Exception: Constitutional Violation

Page 238: Add to footnote 45:

[45] United States v. Rivera, 799 F.3d 180 (2d Cir. 2015) (defendant charged with coercing bar workers into prostitution had no right under Rule 412 or the Sixth Amendment to prove that the alleged victims had been prostitutes before they met him; despite his argument that this evidence proved the victims "knew what they were getting into," such evidence was not logically relevant to rebut the charge that he had coerced them into prostitution through threats of violence and deportation);

Page 239: Add to footnote 45:

See also United States v. Crow Eagle, 705 F.3d 325 (8th Cir. 2013) (defendant charged with sexual abuse of his two nieces had no constitutional right to cross-examine his victims on their allegedly false allegations of sexual assault against other men, because he presented no evidence that those allegations were in fact false, and such a conclusion by the jurors would have involved sheer speculation).

Chapter 413

Rule 413. Similar Crimes in Sexual-Assault Cases

§ 413.1 In General

Page 244: Add to footnote 3:

[3] United States v. Lewis, 796 F.3d 543 (5th Cir. 2015) (evidence that the accused had sex with two underage girls was highly probative of his proclivity for having sex with underage girls, and made it significantly more likely that he transported the named victims across state lines with the intent that they engage in criminal sexual activity);

Page 244: Add to footnote 5:

[5] United States v. Foley, 740 F.3d 1079 (7th Cir. 2014) (although the defendant was charged with child pornography production and possession under 18 U.S.C. chapter 110, those crimes involved conduct that was also prohibited by 18 U.S.C. chapter 109A, which satisfied the definition of "sexual assault" under Rule 413; the trial court therefore properly admitted the testimony of a victim who was molested by the accused several years earlier. Rule 413 "uses statutory definitions to designate the covered conduct, but the focus is on the conduct itself rather than how the charges have been drafted");

Chapter 414

Rule 414. Similar Crimes in Child-Molestation Cases

§ 414.2 Relationship to Rules 403 and 404

Page 249: Add to footnote 6:

[6] United States v. Axsom, 761 F.3d 895 (8th Cir. 2014) (in prosecution for possessing and distributing child pornography, evidence of the defendant's prior conviction for trafficking in material involving sexual exploitation of children was relevant and admissible, even though the offenses were not identical, because in both cases he used a computer, file-sharing program, and similar search terms, and he downloaded images of children of approximately the same age); United States v. Crow Eagle, 705 F.3d 325 (8th Cir. 2013) (at trial of man charged with sexual abuse of two of his nieces, trial court did not err in allowing the testimony of three other female relatives who claimed that he also subjected them to sexual abuse when they were between six and 11 years old, since the offenses were so similar to the charged offense);

ARTICLE V.
PRIVILEGES

Chapter 501
Rule 501. Privilege in General

§ 501.1 The Rule as to Privilege—In General

Page 259: Add to footnote 7:

[7] *See also* United States v. Sterling, 724 F.3d 482 (4th Cir. 2013) (Federal Rule of Evidence 501 allows courts to adopt new common-law privileges and modify existing ones in appropriate cases, but nothing in the rule or its legislative history authorizes federal courts to ignore existing Supreme Court precedent).

§ 501.5 Attorney-Client Privilege

Page 269: Add to footnote 67:

[67] *In re* Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014) (attorney-client privilege applies to communications by company employees to in-house attorneys so long as at least one of the significant purposes for the communication was to obtain or provide legal advice, regardless of whether there were other purposes such as business purposes or compliance with government regulations);

Page 269: Add to footnote 71:

[71] United States v. Spencer, 700 F.3d 317 (8th Cir. 2012) (attorney-client privilege did not apply to communications between defendant and accountant hired to help prepare his taxes, even though the accountant was also a lawyer, because he did not hold himself out as a lawyer and did not provide legal advice to his client);

Page 270: Add to footnote 73:

[73] United States v. Bey, 772 F.3d 1099 (7th Cir. 2014) (defendant charged with failing to surrender could not object on the grounds of attorney-client privilege to the admission of a letter from her lawyer advising her of the data that she was required to serve her sentence; a lawyer's communication to a client about the terms of a public court order is not confidential legal advice, but is merely the transmission of information);

Page 272: Add to footnote 86:

[86] United States v. Tyerman, 701 F.3d 552 (8th Cir. 2012) (defendant implicitly waived attorney-client privilege because he told his lawyer about the location of a firearm during plea negotiations, and thus implicitly authorized the lawyer to share that information with the prosecutor);

Page 273: Add to footnote 94:

[94] *See also In re* Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014) (attorney-client privilege protected communications by company employees to in-house attorneys during an attorney-led internal investigation undertaken to gather facts and ensure compliance with the law after being informed of potential misconduct, even though investigation was conducted without consultation with any outside lawyers, and many of the interviews were conducted by nonlawyers).

Page 276: Add to footnote 109:

[109] *In re* Grand Jury Subpoena, 745 F.3d 681 (3d Cir. 2014) (for the crime-fraud exception to the attorney-client privilege to apply, the client must be committing or intending to commit a crime or fraud at the time he consults the attorney; the client must intend the advice to advance his criminal or fraudulent purpose, and the advice cannot merely relate to the crime or fraud. An attorney's advice was used by the targets of a grand jury investigation to fashion conduct in furtherance of their crime, and thus crime-fraud exception applied to claim of attorney-client privilege with regard to verbal communications so that attorney could be compelled to testify before grand jury, where attorney provided information about the types of conduct that violated the law, in addition to advice that he should not make payment, but the client stated he was going to make payment anyway); *In re* Grand Jury, 705 F.3d 133 (3d Cir. 2012) (a party seeking to apply the crime-fraud exception to overcome the attorney-client privilege must demonstrate that there is a "reasonable basis" to suspect the privilege holder was committing or intending to commit a crime or fraud, and that the attorney-client communication was used in furtherance of that crime or fraud. This standard is reasonably demanding, and neither speculation nor a distant likelihood of corruption is enough, but it does not require the party opposing the privilege to prove that the crime or fraud occurred by a preponderance of the evidence. The attorney does not have to be implicated in the crime or fraud or even have knowledge of the alleged criminal or fraudulent scheme; all that is necessary is that the client intend to misuse the attorney's advice to further an improper purpose);

§ 501.6 Spousal Privileges

Page 285: Add to footnote 150:

[150] *See also* United States v. Hamilton, 701 F.3d 404 (4th Cir. 2012) (defendant waived the marital communications privilege by communicating with his wife on his workplace computer through his work email account, and failing to safeguard the emails; defendant did not take any steps to protect or delete the emails, even after he was on notice of his employer's policy permitting inspection of emails stored on the system at the employer's discretion).

Page 285: Add to footnote 151:

[151] United States v. Breton, 740 F.3d 1 (1st Cir. 2014) (when defendant was charged with involving his minor daughter in the production of child pornography, his wife was properly allowed to testify to incriminating statements he made to her, because the privilege for confidential marital communications does not extend to a man accused of an offense against his spouse or the child of either spouse);

§ 501.8 Physician-Patient Privilege

Page 290: Add to footnote 183:

[183] United States v. Bolander, 722 F.3d 199 (4th Cir. 2013) (psychotherapist-patient privilege only extends to those psychotherapists who are being consulted for diagnosis and treatment, not those who are retained as experts for testimony);

Page 292: Add to footnote 197:

[197] United States v. Bolander, 722 F.3d 199 (4th Cir. 2013) (patient waived any

psychotherapist-patient privilege concerning his participation in sex offender treatment program, because he answered questions at his deposition concerning that program without asserting the privilege);

§ 501.9 Recognizing Additional Privileges

Page 293: Add to footnote 199:

[199] *See, e.g.*, *In re* Perez, 749 F.3d 849 (9th Cir. 2014) (The Government Informants privilege protected the identity of employees who gave statements about their work conditions after the Secretary of the Department of Labor brought FLSA claims against their employer; Government needed on information and complaints received from employees, and the informants privilege was an effective means of preventing retaliation by protecting the identity of persons who furnish information of violations of law from those who would have cause to resent the communication).

Page 293: Add to footnote 200:

[200] Under Seal v. United States, 755 F.3d 213 (4th Cir. 2014) (although Rule 501 allows for recognition of new privileges based on a confidential relationship on a case-by-case basis in appropriate cases, new privileges are most aptly created via the legislative process; courts should be circumspect about creating new privileges based upon perceived public policy considerations, and leaving the task to the legislative branch would allow for the privilege to be more precisely defined)

Page 294: Add to footnote 202:

[202] Under Seal v. United States, 755 F.3d 213 (4th Cir. 2014) (joining every other federal appellate court to consider the issue, the Court declined to adopt a parent-child privilege to shield a son from testifying before a grand jury investigating his father for firearms offense; the son was not a young child but a college student, his father would not "cut him off" or "hold it against him" if he testified, he did not rely exclusively on his father for support, the testimony was not related to familial communications, and it was dubious that the testimony would damage the parent-child relationship)

Page 294: Add text at the end of section 501.9:

or a privilege to protect a news reporter's sources.[211]

[211] United States v. Sterling, 724 F.3d 482 (4th Cir. 2013) (in light of the Supreme Court's refusal to recognize a First Amendment privilege to shield a reporter from compelled disclosure of the identity of her sources, as well as the fact that Congress has considered but failed to create such a privilege legislatively, it would not be appropriate for the courts to create such protection as a common-law privilege).

ARTICLE VI.
WITNESSES

Chapter 601

Rule 601. Competency to Testify in General

§ 601.1 Competency of Witnesses—In General

Page 311: Add to footnote 2:

[2] Liebsack v. United States, 731 F.3d 850 (9th Cir. 2013) (in action under the Federal Torts Claim Act, which is governed by state law, the federal court was bound to follow Alaska law that made experts competent to testify only if they are trained and experienced in the same discipline, and the court therefore erred in allowing a doctor who was board-certified in general family practice to testify as to the proper standard of care for psychiatric treatment);

§ 601.3 Infancy and Psychological and Mental Impairment

Page 315: Add to footnote 19:

[19] United States v. Callahan, 801 F.3d 606 (6th Cir. 2015) (even though prosecution witness was cognitively impaired, suffered a traumatic brain injury in a car accident, and was receiving federal disability benefits due to mental retardation, the witness was competent to testify without the need for the court to conduct or permit a psychological evaluation);

Page 315: Add to footnote 20:

[20] United States v. Barnes, 803 F.3d 209 (5th Cir. 2015) (district court did not abuse its discretion in denying defendants' motion to strike witness's testimony, even though witness admitted that he smoked methamphetamine on the morning of his testimony; the witness met the minimum threshold for competency to testify, and any remaining issues with his credibility went only to the weight of his testimony and were properly left to the jury).

Chapter 602

Rule 602. Need for Personal Knowledge

§ 602.1 General Requirement of Personal Knowledge

Page 319: Add to footnote 2:

[2] Widmar v. Sun Chemical Corp., 772 F.3d 457 (7th Cir. 2014) (personal knowledge can include reasonable inferences, but it does not include speculating as to another individual's state of mind, or other intuitions, hunches, or rumors);

Chapter 606

Rule 606. Juror's Competency as a Witness

§ 606.2 Rule 606(b)—Juror's Competency to Testify at a Subsequent Proceeding Concerning Original Verdict or Indictment; Matters Internal to the Deliberative Process

Page 336: Add to footnote 3:

[3] Warger v. Shauers, — U.S. —, 135 S. Ct. 521, 190 L. Ed. 2d 422 (2014) (rule forbidding juror testimony as to what another juror said during deliberations applies even to a party who seeks to prove that a juror lied during jury selection; the rule applies to any inquiry into the validity of a verdict, and that would include a challenge to the outcome of the trial based on alleged dishonesty during jury selection);

§ 606.3 Juror's Competency as to Extraneous Prejudicial Information, Outside Influence, or Mistakes in Entering the Verdict on the Verdict Form

Page 338: Add to footnote 10:

[10] Warger v. Shauers, — U.S. —, 135 S. Ct. 521, 190 L. Ed. 2d 422 (2014) (although jurors are competent to testify as to "extraneous prejudicial information" that was improperly brought to the jury's attention, that would not include a statement by one juror during deliberations about her general views and experience with a family member involved in a car crash. Information is deemed "extraneous" if it derives from a source "external" to the jury, which include publicity and information related specifically to the case the jurors are meant to decide, while "internal" matters include the general body of experiences that jurors are understood to bring with them to the jury room);

Page 342: Add to footnote 35:

[35] United States v. Daniels, 803 F.3d 335 (7th Cir. 2015) (the district court did not abuse its discretion in refusing to interview a juror who contacted the court hours after the verdict and reported that she "was bullied and railroaded in the jury deliberation process" and wanted to change her vote to not guilty, because there was no evidence that she had been subjected to outside influence or physical threats from anyone outside the jury);

Page 342: Add to footnote 40:

[40] United States v. Kennedy, 714 F.3d 951 (6th Cir. 2013) (defendant's speculation that jurors may have reached a "compromise verdict" could not justify post-trial juror interviews, because such suspicions merely involve the possibility of an improper "internal influence," which such jurors would not be competent to confirm).

Chapter 607

Rule 607. Who May Impeach a Witness

§ 607.5 Impeachment by Contradiction

Page 356: Add to footnote 45:

[45] Barber v. City of Chicago, 725 F.3d 702 (7th Cir. 2013) (impeachment by contradiction may not be done with extrinsic evidence on a collateral matter);

Chapter 608

Rule 608. A Witness's Character for Truthfulness or Untruthfulness

§ 608.8 Rule 608(b)—Restriction on Extrinsic Evidence; Exercise of Discretion by the Trial Judge

Page 370: Add to footnote 34:

[34] Barber v. City of Chicago, 725 F.3d 702 (7th Cir. 2013) (it was improper to ask a witness about his arrest for underage drinking because a witness's credibility may not be impeached with evidence of his arrests, accusations, or charges, especially since it is so easy to ask him instead about the underlying behavior that led to the arrest); Thompson v. City of Chicago, 722 F.3d 963 (7th Cir. 2013) (in general, a witness's arrest record is not admissible, either because it is inadmissible character evidence or substantially more unfairly prejudicial than probative. Although it was proper to allow cross-examination of plaintiff about his history of using false aliases, it was error to allow the questions to be structured in a way that made it plain to the jury that these events took place during arrests and that he had been arrested 12 times).

Page 370: Add to footnote 35:

[35] *But see* United States v. Dvorkin, 799 F.3d 867 (7th Cir.2015) (Rule 608(b) only forbids the use of extrinsic evidence, but not lines of questioning, including questions put to the

witness regarding the punishment that was imposed upon him by others for his dishonest conduct).

Page 370: Add to footnote 39:

[39] United States v. Perez-Solis, 709 F.3d 453 (5th Cir. 2013) (trial court properly allowed cross-examination of an accused about specific financial transactions that impeached his testimony and cast doubt on his claims of running an honest business; such questions did not violate Rule 608(b) because the cross-examination was not intended to prove that the accused had a generally dishonest character, but merely that his precise testimony in this case was not truthful);

§ 608.9 Rule 608(b)—Types of Specific Instances of Conduct Appropriate for Inquiry

Page 371: Add to footnote 41:

[41] United States v. Desposito, 704 F.3d 221 (2d Cir. 2013) (in prosecution of defendant accused of trying to get a friend to create falsified evidence for his defense, the defendant was properly cross-examined under Rule 608(b) about his otherwise unrelated plan to discourage a witness from testifying against him in a New Jersey state criminal prosecution, because such evidence was probative of his truthfulness, and the jury never learned what the underlying New Jersey crime was);

Page 371: Add to footnote 42:

[42] United States v. Heard, 709 F.3d 413 (5th Cir. 2013) (in tax evasion prosecution, defense was not entitled under Rule 608(b) to attack the honesty of an IRS agent by questioning him about his suspension for viewing pornography on his computer during business hours, because such misconduct was not clearly probative of his alleged untruthfulness, and was "nothing like perjury, fraud, swindling, forgery, bribery, or embezzlement");

Chapter 609

Rule 609. Impeachment by Evidence of a Criminal Conviction

§ 609.1 Rule 609(a)—Impeachment by Evidence of a Criminal Conviction—In General

Page 376: Add to footnote 3:

[3] United States v. Tetioukhine, 725 F.3d 1 (1st Cir. 2013) (party may introduce evidence to contradict material and false testimony given by a witness even if the evidence would have otherwise been inadmissible; convictions that would not be admissible under Rule 609 may be used for "impeachment by contradiction" when defendant opened the door to such use by falsely testifying that he was a law-abiding citizen who left a job for innocent reasons and had not been prosecuted for a minor episode of theft at that job).

Page 378: Add to footnote 8:

[8] United States v. Moon, 802 F.3d 135 (1st Cir. 2015) (by offering selective and misleading testimony about his earlier convictions, a party can open the door to evidence about those convictions, regardless of whether they meet the requirements of Rule 609; a

cross-examiner may introduce evidence to impeach a witness's specific testimony by contradiction, and this principle applies to the admission of convictions).

§ 609.2 Operation of Discretionary Balancing under Rule 609(a)(1)—Impeachment by Evidence of Capital Offenses and Crimes Punishable by Imprisonment in Excess of One Year

Page 379: Add to footnote 17:

[17] Sharif v. Picone, 740 F.3d 263 (3d Cir. 2014) (convictions for assault and crimes of violence are not always improper for impeachment, but they are less probative of honesty than are crimes involving deceit or fraud, and generally have little or no direct bearing on honesty and veracity, especially when the witness's character has already been impeached with other convictions);

Page 380: Add to footnote 22:

[22] United States v. Caldwell, 760 F.3d 267 (3d Cir. 2014) (in prosecution for firearms possession, it would be an abuse of discretion to impeach the accused with evidence of his earlier convictions for firearms possession; the earlier offenses were highly similar to the charged offense, had little to do with veracity, and their probative value was undermined by the fact that they were more than six years old).

§ 609.5 What Constitutes "Conviction" under Rule 609

Page 384: Add to footnote 40:

[40] United States v. Barnes, 803 F.3d 209 (5th Cir. 2015) (the mere fact that a witness has been arrested or indicted is generally inadmissible for impeachment purposes unless the arrest or accusation arises out of the case at hand or is admissible to show the witness's possible bias or motivation for testifying); Barber v. City of Chicago, 725 F.3d 702 (7th Cir. 2013) (it was improper to ask a witness about his arrest for underage drinking because a witness's credibility may not be impeached with evidence of his arrests, accusations, or charges, especially since it is so easy to ask him instead about the underlying behavior that led to the arrest); Thompson v. City of Chicago, 722 F.3d 963 (7th Cir. 2013) (in general, a witness's arrest record is not admissible, because it is inadmissible character evidence or substantially more unfairly prejudicial than probative. Although it was proper to allow cross-examination of plaintiff about his history of using false aliases, it was error to allow the questions to be structured in a way that made it plain to the jury that these events took place during arrests and that he had been arrested 12 times);

§ 609.6 Introduction of the Conviction

Page 387: Add to footnote 52:

[52] United States v. Chapman, 765 F.3d 720 (7th Cir. 2014) (after testifying defendant was impeached with evidence that he had been convicted of a felony six times, the district court erred in refusing to allow him to attempt to rehabilitate himself by explaining that he had pleaded guilty in those cases because he wanted to take responsibility for his actions, and to suggest that he was not necessarily a dishonest person despite his criminal history. Rule 609 allows impeachment with evidence of felony convictions, but nothing in that rule states that this method of impeachment is irrebuttable);

§ 609.7 Rule 609(b)—Time Limit

Page 387: Add to footnote 53:

[53] United States v. Rucker, 738 F.3d 878 (7th Cir. 2013) (convictions more than 10 years

old should be admitted for impeachment very rarely and only in exceptional circumstances; defendant was properly precluded from asking government witness about theft conviction more than 10 years old because its admission would be cumulative where witness had already acknowledged 11 more recent convictions for fraud and admitted that she was a "liar");

Chapter 611

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence

§ 611.1 Rule 611—Background and Purpose

Page 394: Add to footnote 2:

[2] United States v. Fields, 761 F.3d 443 (5th Cir. 2014) (after *pro se* murder defendant asked numerous improper questions on cross-examination of prosecution witness, argued with the witness, and tried to read from documents not in evidence, the trial judge did not err in deciding to force the defendant to do a "dry run" of the cross in the jury's absence so that the court could rule upon all objections and settle on the permissible questions that would later be permitted in the jury's presence); Baugh v. Cuprum S.A. de C.V., 730 F.3d 701 (7th Cir. 2013) (in products liability case, after trial judge ruled that ladder could be used only as an exhibit, it was reversible error for the court to grant a request from the jurors to examine the exhibit during deliberations);

§ 611.2 Rule 611(a)—Mode and Order of Proof Within Discretion of Court

Page 396: Add to footnote 15:

[15] *But see* United States v. Hawkins, 796 F.3d 843 (8th Cir. 2015) (although hybrid devices that summarize both witness testimony and voluminous records may be admissible in unusual cases involving highly complex testimony or transactions, it was error to admit "Exhibit 1000," a fifteen-page document which dramatically and provocatively reframed witness testimony in an argumentative and conclusory manner).

Page 398: Add to footnote 27:

[27] United States v. Beckton, 740 F.3d 303 (4th Cir. 2014) (when pro se defendant chose to testify, the district court did not abuse its discretion in refusing his request to testify in the form of a narrative, and insisting that he proceed in question-and answer-format, by asking himself questions before answering each one, so that opposing counsel would have the opportunity to lodge any objection prior to each answer).

§ 611.3 Rule 611(b)—Scope of Cross-Examination

Page 401: Add to footnote 43:

[43] United States v. Perez-Solis, 709 F.3d 453 (5th Cir. 2013) (an inquiry about an action is not outside the scope of cross merely because that action was not discussed on direct examination; a criminal defendant who testified on direct examination about his legitimate interest was properly subject to questions on cross about financial transactions that cast doubt

on that testimony, and such questions were therefore within the scope of direct examination even though the accused had not testified about those specific financial details).

§ 611.4 Rule 611(b)—Cross-Examination Relating to the Credibility of the Witness

Page 404: Add to footnote 52:

[52] United States v. Willner, 795 F.3d 1297 (11th Cir. 2015) (cross-examination of an expert witness as to the basis for his testimony and potential bias cannot be precluded on the grounds that it is "outside the scope" of direct exam, especially with a government witness during a criminal case, because such topics involve the credibility of the witness).

§ 611.6 Rule 611(c)—Leading Questions

Page 406: Add to footnote 68:

[68] United States v. Callahan, 801 F.3d 606 (6th Cir. 2015) (leading questions are permissible on direct examination of a cognitively impaired witness when necessary to facilitate the progression of trial, avoid wasting time, to make her testimony effective for determining the truth, and to protect her from harassment and undue embarrassment); United States v. Farlee, 757 F.3d 810 (8th Cir. 2014) (the trial judge did not err in allowing the Government to ask leading questions of a witness on direct examination because she was hesitant in responding and lengthy delays preceded her answers; leading questions are permissible when necessary to develop the testimony of the witness);

Chapter 612

Rule 612. Writing Used to Refresh a Witness's Memory

§ 612.5 Production of the Writing Used to Refresh Recollection

Page 414: Add new footnote to first sentence in section 612.5:

[19.1] In re Kellogg Brown & Root, Inc., 796 F.3d 137 (D.C. Cir. 2015) (when a party notices a deposition and asks the opposing party to review certain documents in preparation for questions about those documents, the witness's compliance with that direction does not make those documents discoverable under Rule 612 unless they were used to refresh memory or influenced the testimony of the witness).

Chapter 613

Rule 613. Witness's Prior Statement

§ 613.3 Rule 613(b)—Extrinsic Evidence of Prior Inconsistent Statements

Page 422: Add to footnote 11:

[11] United States v. Feliciano, 761 F.3d 1202 (11th Cir. 2014) (after a defense witness was asked whether he spoke with his brother on the phone about any topic concerning the case and he denied it, the District Court committed no error in allowing the Government to impeach that testimony by playing a recording of such a phone conversation after the witness left the witness stand. Rule 613(b) specifies no particular time or sequence for this foundation requirement);

Chapter 614

Rule 614. Court's Calling or Examining Witness

§ 614.3 Rule 614(b)—Interrogation by Court

Page 429: Add to footnote 9:

[9] United States v. Rivera-Rodriguez, 761 F.3d 105 (1st Cir. 2014) (in questioning witnesses, the court must scrupulously avoid any appearance of partiality. The danger with judicial interrogation is not with the damaging truth that the questions might uncover, or the possibility that a trial court's questioning exposes bad facts, inconsistencies, or weaknesses in the case itself, but reversal may be required if the court's questions give jurors the impression that the judge has an opinion on the correct or desirable outcome of the case, or that he has become an advocate for either party); United States v. Ottaviano, 738 F.3d 586 (3d Cir. 2013) (trial court erred in questioning the accused in a manner that seemed to suggest that he regarded that testimony with skepticism; "judges must be especially careful about their conduct during trial because they hold a position of special authority and credibility in the eyes of the jury");

ARTICLE VII.

OPINIONS AND EXPERT TESTIMONY

Chapter 701

Rule 701. Opinion Testimony by Lay Witnesses

§ 701.3 Standards of Admissibility—Opinions Rationally Based on the Perception of a Witness

Page 443: Add to footnote 8:

[8] United States v. Lloyd, 807 F.3d 1128 (9th Cir. 2015) (a lay witness's opinion draws on the witness's own understanding, including a wealth of personal information, experience, and education, that cannot be placed before the jury, but lay witness may not testify based on speculation or hearsay, or interpret unambiguous, clear statements. Even though a witness had extensive experience working as a telemarketer soliciting and closing investments, he should not have been allowed to offer testimony that investors did not understand the risks and that all telemarketers took advantage of this ignorance, largely based on statements he heard from unidentified telemarketers and investors); United States v. Freeman, 730 F.3d 590 (6th Cir. 2013) (without a proper foundation to show that his opinions were based on personal knowledge or experience, it was improper for FBI agent to give his lay opinion as to the meaning of phrases used on recorded phone calls, since there was a danger that his opinions might have been based on hearsay, speculation, or other inadmissible evidence that is not before the jury);

§ 701.4 Standards of Admissibility—Helpfulness to the Jury; Judicial Discretion

Page 444: Add to footnote 12:

[12] United States v. Saraeun Min, 704 F.3d 314 (4th Cir. 2013) (undercover police agent was properly allowed to explain the meaning of certain phrases used by one member of drug conspiracy, because the agent's opinion was rationally based on his personal knowledge as to how those phrases had been employed in past conversations with the same criminal suspect); United States v. J.J., 704 F.3d 1219 (9th Cir. 2013) (in evaluating the intellectual development and psychological maturity of a juvenile suspect when ruling upon a motion to transfer the case for adult prosecution, the district court properly relied on the testimony of lay witnesses who directly observed and interacted with defendant, even though the witnesses admitted that they had no mental health training);

Page 445: Add to footnote 15:

[15] United States v. Gyamfi, 805 F.3d 668 (6th Cir. 2015) (even though they had no previous experience with the defendant, customs agents testifying as lay opinion witnesses could testify that he appeared "nervous" and to "give up" when heroin was found in his suitcase; they had the benefit of physical presence in their encounter with the accused which was unique and separate from anything that a juror could observe in court, and merely described their sensory observations, distinct from any broad conclusions directed to the merits of the case); United States v. Prange, 771 F.3d 17 (1st Cir. 2014) (a lay witness may offer an opinion that is rationally based on the witness's perception, and though one cannot actually read another person's mind, one is often able to infer, from what the person says or from the expression on his face or other body language, what he is thinking. Given that the agent was a lay witness, he was free to state his rationally-based perception of what an accused was thinking during their face-to-face conversation); United States v. Westerfield, 714 F.3d 480 (7th Cir. 2013) (conspirator was properly permitted to testify that he had a "suspicion" regarding a relationship between defendant, who was a title agent, and another conspirator involved in fraudulent real estate transactions, because the witness had sufficient personal knowledge of the scheme through his own involvement in it, and his testimony was based on his own experience in the scheme and further explained how the scheme operated).

Page 445: Add to footnote 16:

[16] United States v. Haines, 803 F.3d 713 (5th Cir. 2015) (opinion testimony is unhelpful and improper on topics the jury is capable of determining for itself; because a lay opinion should not waste time or merely tell the jury what result to reach, a case agent may not explain to the jury what inferences to draw from recorded conversations involving ordinary English language).

§ 701.5 Standards of Admissibility—Not Based on Specialized Knowledge; Distinguishing Lay and Expert Testimony

Page 445: Add to footnote 18:

[18] United States v. Toll, 804 F.3d 1344 (11th Cir. 2015) (because lay witnesses may testify based on knowledge gained from their personal experience, a business owner or officer may provide lay opinion testimony based on knowledge he acquired by virtue of his position in the business); Hot Stuff Foods, LLC v. Houston Cas. Co., 771 F.3d 1071 (8th Cir. 2014) (even when not testifying as an expert, a business owner or officer may offer lay opinion testimony as to lost profits as long as his experience with that business provided the foundation for all the specifics as to which he testified); Ryan Dev. Co., L.C. v. Ind. Lumbermens Mut. Ins. Co., 711 F.3d 1165 (10th Cir. 2013) (although accountants often testify as experts, they may also offer lay opinions under Rule 701 based upon their personal experience with matters such as the profits or loss of their company);

Page 446: Add to footnote 20:

[20] United States v. Jones, 739 F.3d 364 (7th Cir. 2014) (when police officer testifies to an opinion based on technical or specialized knowledge obtained in the course of his position, and not based on personal observations accessible to ordinary persons, it was error to allow such testimony when the prosecutor did not first qualify the witness as an expert and follow the disclosure rules for expert, but reversal will not normally result when the objecting party neither demonstrates that the witness was unqualified nor questions the validity of the expert's opinion).

Page 446: Add to footnote 22:

[22] United States v. Haines, 803 F.3d 713 (5th Cir. 2015) (DEA Case Agent may testify as an expert concerning the "coded" meaning of specific words and terms commonly used in the drug trade, and may also offer lay opinion testimony when explaining the meaning of specific words and terms used by the defendants in this case, based on his familiarity with the investigation of those individuals and their earlier conversations); United States v. Prange, 771 F.3d 17 (1st Cir. 2014) (witnesses commonly help interpret recorded conversations by translating jargon common among criminals, and such opinions can be admitted as lay testimony from experienced officers, expert testimony, or both depending on the circumstances. Where the basis of an interpretation comes from the officer's personal involvement in the case, rather than from specialized outside knowledge, it is typically construed as lay testimony).

Page 447: Add to footnote 23:

[23] United States v. Garcia, 752 F.3d 382 (4th Cir. 2014) (trial court erred in allowing an FBI agent to testify both as a fact witness concerning aspects of the investigation and also as an expert witness to interpret and decode recordings of drug related conversations. Although the court properly qualified the witness as a decoding expert, the judge did not take sufficient cautionary steps to guard against the inherent risk of jury confusion when an individual is allowed to testify as both a fact and expert witness); United States v. Willoughby, 742 F.3d 229 (6th Cir. 2014) (witness may testify as both a fact witness and an expert witness so long as there is either a cautionary jury instruction regarding the dual roles or a clear demarcation between his fact and expert-opinion testimony. Without a proper instruction, the jury might think that his opinions—which in some cases might be relatively speculative—are just as reliable as his factual statements, or might think that the witness's role as a fact witness somehow enhances his credibility as an expert); United States v. Cheek, 740 F.3d 440 (7th Cir. 2014) (government may use a law enforcement officer as both an expert and lay witness in the same trip to the witness stand, but there are inherent dangers with this "dual testimony," because the jury might be confused by his dual role, or smitten by his aura of special

reliability and give his factual testimony undue weight, or might unduly credit his opinion testimony based on the assumption that the expert was privy to facts not presented at trial);

Page 447: Add at the end of footnote 23:

But see United States v. Garrett, 757 F.3d 560 (7th Cir. 2014) (although expert testimony is allowed to discuss common practices of the drug trade, such expert testimony may be overly prejudicial if the expert witness was an officer involved in the investigation at issue, because the jury may unduly credit his fact testimony given his expert status. But the district court did not abuse its discretion in allowing such testimony when the court never referred to the agent as an expert in the jury's presence and did not allow the parties to so refer to him, and the parties only used the term "opinion testimony" in referring to his experience and testimony regarding terminology and practices of the drug trade).

Chapter 702

Rule 702. Testimony by Expert Witnesses

§ 702.3 Subjects Regarding Which Expert Testimony Is Proper

Page 452: Add to footnote 8:

[8] United States v. Azmat, 805 F.3d 1018 (11th Cir. 2015) (a court cannot simply accept that an opinion is reliable because the expert says that his methodology is sound; if admissibility could be established merely by the ipse dixit of an admittedly qualified expert, the reliability requirement would be, for all practical purposes, subsumed by the qualification requirement); Brown v. Ill. Cent. R.R. Co., 705 F.3d 531 (5th Cir. 2013) (trial court did not err in excluding the "transparently subjective" testimony of an alleged expert who was unable to articulate a credible methodology for his conclusion that a railroad crossing was hazardous, and who said his conclusions were based on his "education and experience." An expert must furnish more than credentials and a subjective opinion);

Page 452: Add to footnote 9:

[9] United States v. Collins, 715 F.3d 1032 (7th Cir. 2013) (government agent could offer expert testimony that interpreted narcotics trafficking "code words" in tape recordings; the testimony linked the words used with their generally-accepted meaning in the drug-dealing community, since "the community's cryptic vernacular is likely outside the knowledge of the average juror"); United States v. Hayat, 710 F.3d 875 (9th Cir. 2013) (Professor of Islamic Studies, fluent in Arabic, could testify as an expert as to the proper translation and significance of an Arabic note found in the possession of the defendant after his return from Pakistan, even though the expert spoke no Urdu and was not an expert on Pakistani culture, because he did not testify about such matters);

Page 454: Add to footnote 11:

[11] United States v. Lespier, 725 F.3d 437 (4th Cir. 2013) (trial court properly excluded testimony by defense psychologist who was called to explain how inconsistencies in defendant's statements to the police could have been caused by sleep deprivation; such effects are readily comprehended by jurors without expert explanation, which might intrude on the jury's assessment of witness credibility); United States v. Hayat, 710 F.3d 875 (9th Cir. 2013) (the district court did not abuse its discretion in denying the defense request to call a former

FBI agent as an expert witness to testify about the defendant's recorded interview, because the jurors could see for themselves that the FBI had not videotaped the entire interview, that the agents had used leading questions, and whether the accused appeared tired, isolated, or naive during the videotaped interview sessions); United States v. Allen, 716 F.3d 98 (4th Cir. 2013) (criminal defendant was properly denied the chance to call an expert witness to explain how a codefendant's credibility might have been affected by his plea agreement; the jurors can connect the dots and understand the common-sense implications that a plea agreement might have on a codefendant's testimony and on his incentive to incriminate the defendant in exchange for a lower sentence).

Page 454: Add to footnote 12:

[12] United States v. Fuertes, 805 F.3d 485 (4th Cir. 2015) (although expert testimony is not permitted on matters within the common knowledge of jurors, and experts therefore may not testify about the credibility of other witnesses, it is not improper for an expert to offer opinions that corroborate the testimony of another witness—for example, for a medical expert to testify that the victim's injuries are consistent with being hit with a belt, just as she claimed, as long as the expert does not offer an opinion on the victim's credibility); United States v. Haire, 806 F.3d 991 (8th Cir. 2015) (experts may help the jury with the meaning of jargon and code words used by drug dealers, and to interpret terms and phrases used on recordings that are common drug terminology);

Page 455: Add to footnote 13:

[13] United States v. Medina-Copete, 757 F.3d 1092 (10th Cir. 2014) (at drug trafficking trial, district court erred in allowing a purported expert on religious icons to testify that veneration of a figure known as "Santa Muerte" was so connected with drug trafficking as to constitute evidence that the occupants of the vehicle were aware of the presence of drugs in a secret compartments, and allowing the witness to wander far afield and render theological opinions about the "legitimacy" of Santa Muerte vis-à-vis other venerated figures);

Page 455: Add to footnote 16:

[16] United States v. Laureano-Perez, 797 F.3d 45 (1st Cir. 2015) ("overview testimony," which occurs when a government witness testifies about the results of a criminal investigation, usually including aspects of the investigation the witness did not participate in, before the government has presented supporting evidence, is inherently problematic, especially when the witness is a law enforcement official because juries may place greater weight on evidence perceived to have the imprimatur of the government, which may be construed as an official endorsement of the veracity of the testimony that will follow); United States v. Kilpatrick, 798 F.3d 365 (6th Cir. 2015) (a government agent may not, at the beginning of trial, provide a summary of evidence that has not yet been admitted; the law provides a place for such summaries in opening statement and closing argument. But agents may testify regarding how they became involved in a case, what allegations they were investigating, who the suspects were, and similar background, and such testimony designed to set the stage for the introduction of evidence, differs from problematic "preview testimony" that purports to sum up in advance the government's overall case); United States v. Eiland, 738 F.3d 338 (D.C. Cir. 2013) (FBI agent was properly permitted to offer "overview testimony" describing general methods of narcotics dealers and investigative techniques of government agents, but it was plain error to allow the agent to also vouch for the Government's cooperating witnesses by testifying that the Government is able to verify information received from its sources, since such testimony infringes the role of the jurors as the sole judges of witness credibility);

Page 456: Add to footnote 18:

[18] Killion v. KeHE Distributors, LLC, 761 F.3d 574 (6th Cir. 2014) (although the opinion of an expert witness may embrace an ultimate issue, it may not define legal terms, recite legal

principles, or contain legal conclusions);

Page 456: Add to footnote 19:

[19] Jimenez v. City of Chicago, 732 F.3d 710 (7th Cir. 2013) (apart from a few special exceptions, including some issues in patent and legal malpractice actions, it is improper for a legal expert to testify on the law, because it is the role of the judge to explain the applicable law to the jurors, but in constitutional tort cases, an expert may offer an opinion applying a legal standard such as probable cause, as long as the testimony is limited to describing sound professional standards, such as the investigative techniques employed by a reasonable police department);

§ 702.4 Reliability of Expert Testimony

Page 461: Add to footnote 41:

[41] Stuhlmacher v. Home Depot USA, Inc., 774 F.3d 405 (7th Cir. 2014) (trial court erred in striking testimony by plaintiff's expert, an accident reconstructionist, merely because his theory as to how plaintiff fell from a ladder was not consistent with the plaintiff's recollection; the jury could have found the expert's theory credible, and it is not the trial judge's job to determine whether an expert's opinion is correct); Johnson v. Mead Johnson & Co., LLC, 754 F.3d 557 (8th Cir. 2014) (District courts should not assess the correctness of competing expert opinions; as long as the expert's scientific testimony rests upon good grounds, it should be tested by the adversary process with competing expert testimony and cross-examination, rather than excluded by the court at the outset. Under these liberal standards favoring admission, the jury, not the trial court, should decide among the conflicting views of different experts as long as those opinions are within the range where experts might reasonably differ, even if those opinions had some flaws); City of Pomona v. SQM North America Corp., 750 F.3d 1036 (9th Cir. 2014) (shaky but admissible evidence is generally to be attacked not by exclusion by cross examination, contrary evidence, and attention to the burden of proof. In the case of expert testimony, the judge should screen the jury from unreliable nonsense opinions, but not exclude opinions merely because they are impeachable; the court is not to decide whether the expert is right or wrong, but merely whether his testimony has enough substance to be helpful to a jury). *See also* Wells Fargo Bank N.A. v. Tex. Grand. Prairie Hotel Realty, L.L.C. (*In re* Tex. Grand Prairie Hotel Realty, L.L.C.), 710 F.3d 324 (5th Cir. 2013) (a trial court should not transform a *Daubert* hearing into a trial on the merits, and most of the safeguards provided for in *Daubert* are not as essential when the judge sits as the trier of fact in place of a jury).

§ 702.5 Qualifications of Expert Witness; Function of Trial Judge

Page 463: Add to footnote 51:

[51] F.T.C. v. BurnLounge, Inc., 753 F.3d 878 (9th Cir. 2014) (when ruling upon the admissibility of expert testimony at a bench trial conducted without a jury, there is less danger that a judge will be unduly impressed by the expert's testimony or opinion than a jury would be).

Chapter 703

Rule 703. Bases of an Expert's Opinion Testimony

§ 703.5 Bases of Expert Testimony—Evidence Not Admitted at the Hearing

Page 468: Add to footnote 13:

[13] United States v. Turner, 709 F.3d 1187 (7th Cir. 2013) (under Rule 703, an expert who gives testimony about the nature of a suspected controlled substance may rely on information gathered and produced by an analyst who does not himself testify, at least where the Government does not introduce the analyst's report, notes, or test results into evidence);

Page 469: Add to footnote 14:

[14] United States v. Beavers, 756 F.3d 1044 (7th Cir. 2014) (in tax fraud prosecution, district court properly ruled that defense tax expert could not base his expert opinions on what the accused had told him about his state of mind at the time of the charged offenses; the defendant otherwise could have gotten highly selective and favorable statements of his before the jury without having to face cross-examination);

Chapter 704

Rule 704. Opinion on an Ultimate Issue

§ 704.1 Opinion on an Ultimate Issue—In General

Page 474: Add to footnote 4:

[4] United States v. Miner, 774 F.3d 336 (6th Cir. 2014) (district court erred in allowing IRS Agent to testify to her opinion that letters prepared by the accused for his tax clients were written "to impede the IRS," because such opinions constituted forbidden expert opinion on the defendant's state of mind); United States v. Beavers, 756 F.3d 1044 (7th Cir. 2014) (in tax fraud prosecution, defense tax expert could not testify as to whether he believed various checks were loans or income, for such testimony would have been the equivalent of opining on whether the defendant had the "willfulness" necessary for conviction); United States v. Medeles-Cab, 754 F.3d 316 (5th Cir. 2014) (a qualified narcotics agent typically may testify about the significance of certain conduct or methods of operation unique to the drug business, but such testimony is forbidden if it amounts to the functional equivalent of an opinion that the defendant knew he was carrying drugs. A so-called "drug courier profile" is generally inadmissible because of its potential for including innocent citizens as profiled drug couriers); United States v. Haynes, 729 F.3d 178 (2d Cir. 2013) (government agent was improperly allowed to testify to his opinion, based on his review of all the details of the case, that the

accused "realized" that there were drugs concealed in the car she was driving, since that amounted to a forbidden expert opinion on the mental state of the accused);

Page 474: Add to footnote 5:

[5] United States v. Hite, 769 F.3d 1154 (D.C. Cir. 2014) (the defendant was erroneously denied the chance to call an expert witness to support his defense that he was a fantasist with no real sexual interest in children; although Rule 704(b) forbids the expert from offering an opinion that the accused lacked the requisite intent, he should have been allowed to generally explain the world of sexual fantasy on the internet);

§ 704.2 Rationale

Page 476: Add new paragraph to end of § 704.2:

Creative criminal defense attorneys have grown increasingly imaginative at raising objections under Rule 704(b) to a wide variety of expert opinions that tend to support any sort of an inference as to the intentions of the accused, and such testimony is arguably within the scope of the rule's broad prohibition of expert opinions concerning the "mental state or condition" of the defendant. But such objections have been almost entirely rejected by the federal courts, even when doing so requires the courts to essentially disregard the unfortunate language of this poorly-drafted rule. For example, the Courts of Appeals will routinely allow experts to testify about the significance of the actions by the accused and what they reveal about his intentions and motivations, as long as the witness merely opines as to what such facts usually tell us about the intentions of most people who do such things, and the expert does not explicitly claim to have any direct knowledge of the defendant's mind or thought processes.[13.1] The result reached by these cases appears to be sensible and sound, at least where the expert opinions are helpful and otherwise satisfy the general requirements for expert testimony under Rule 702, but these cases seem to reduce Rule 704(b) to something close to a nullity, for no expert witness is ordinarily inclined to insist that he "knows" what the accused intended. Moreover, these cases essentially ignore the language of Rule 704(b), which forbids prosecution experts from telling jurors not merely what they claim to know about the mental state of the accused, but also their "opinion" on that topic.

[13.1] United States v. Garcia-Avila, 737 F.3d 484 (7th Cir. 2013) (DEA Agent did not offer forbidden expert testimony on the mental state of the accused when he testified to what the defendant meant by certain code phrases on recording of alleged drug transaction, even though the questions alluded to the mental state of the accused, because the agent was not testifying based on personal knowledge or any special familiarity with the workings of the defendant's mind, but was relying upon his years of experience and his knowledge of common criminal practices to help explain coded language related to drug transactions); United States v. Davis, 726 F.3d 434 (3d Cir. 2013) (prosecution experts may testify about common practices of those in the drug trade, and such testimony is admissible even if it supports a conclusion that the defendant had the necessary state of mind, as long as the expert does not draw the ultimate conclusion for the jury or testify in such a way that the ultimate conclusion is inevitable. There was no error in allowing a government expert to testify that it would be unusual for someone to possess a large quantity of narcotics in the presence of someone who had no connection to those drugs); United States v. Collins, 715 F.3d 1032 (7th

Cir. 2013) (expert testimony explaining the meaning of drug jargon on recorded telephone conversation did not improperly constitute a forbidden opinion on the defendant's mental state, since the witness testified based on his knowledge of common practices in the drug trade and not on some special familiarity with the workings of the defendant's mind); United States v. Hayat, 710 F.3d 875 (9th Cir. 2013) (Rule 704(b) does not bar expert testimony supporting an inference that a defendant had the requisite mental state, so long as the expert does not draw the ultimate inference for the jury and that ultimate inference does not necessarily follow from the testimony. There was no plain error when Professor of Islamic Studies testified about the "kind of person" who would carry an Arabic note such as the one found in the defendant's wallet and what such a person might have intended, but never commented directly on whether the accused had such a mental state); United States v. Wells, 706 F.3d 908 (8th Cir. 2013) (Rule 704(b) was not violated by DEA agent's testimony that drug store logs showed purchases of pseudoephedrine consistent with the purpose of manufacturing methamphetamine, and expressing the opinion that "[t]his pseudoephedrine is being purchased to be used in the manufacturing of methamphetamine," because his opinions were clearly based on his general knowledge of the drug trade and not any special knowledge of the defendant's thought processes, and the jury was left to draw from that testimony its own conclusion about the defendant's intentions).

§ 704.3 Admissibility of Ultimate Issue Opinions

Page 476: Add to footnote 14:

[14] United States v. Richter, 796 F.3d 1173 (10th Cir. 2015) (it was error to allow a state regulatory official to offer his expert opinion that the electronic materials exported by the defendants were "waste"—the ultimate issue for the jury to decide. An expert witness may testify about an ultimate question of fact, but may not instruct the jury how it should rule, without providing any basis for that opinion, or state legal conclusions by applying the law to the facts, because that usurps the fact-finding function of the jury and interferes with the function of the judge in instructing the jury on the law); Hyland v. HomeServices of America, Inc., 771 F.3d 310 (6th Cir. 2014) (even though an opinion is not objectionable merely because it embraces an ultimate issue, a witness may not testify to a legal conclusion, and the district court properly precluded expert witnesses from offering an opinion as to whether the defendants engaged in a price-fixing conspiracy, although the experts were allowed to describe many aspects of the relevant market); Valadez v. Watkins Motor Lines, Inc., 758 F.3d 975 (8th Cir. 2014) (Opinion of investigating police officer that one driver was at fault for an accident is exactly the sort of opinion testimony about an ultimate conclusion that "merely tells the jury what result to reach" and is therefore not sufficiently helpful to the trier of fact to be admissible); United States v. Miner, 774 F.3d 336 (6th Cir. 2014) (government expert witness should not be allowed to present "argument" in the guise of expert opinion; the jury, not the witness, must draw the inference, and the government should not spoon-feed its theory of the case to the jury through a government agent with an aura of expertise and authority who might prompt the jury uncritically to substitute the agent's view of the evidence for its own);

Page 476: Add to footnote 15:

[15] United States v. Pena-Santo, 809 F.3d 686 (1st Cir. 2015) (Rule 704(b), forbidding expert testimony on the ultimate issue of the defendant's mental state, does not preclude testimony on the facts from which a jury might infer such intent, and therefore did not preclude a government agent from offering expert testimony regarding the differing roles played by individuals on board vessels transporting narcotics); United States v. Schneider, 704 F.3d 1287 (10th Cir. 2013) (an expert may opine on an "ultimate issue" to be decided by the trier of fact, as long as he does not simply tell the jury what result it should reach, and explains the basis for any summary opinion. There was no error in allowing prosecution experts in health care fraud prosecution to testify that the defendant's "clinic was at fault" for

illegal drug distribution, and that defendant "engaged in health care fraud" resulting in death, because neither expert told the jury to reach a particular verdict, *i.e.* that defendant was guilty, but rather explained at great length their observations from the evidence);

ARTICLE VIII.

HEARSAY

Chapter 801

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

Page 501: Add at beginning of Chapter 801:

Editor's Note: On April 25, 2014, the Supreme Court submitted to Congress an order amending Rule 801. The proposed amendment will take effect on December 1, 2014, unless Congress acts otherwise. Set forth below is a comparison of the amended rule with the rule as it appeared before the amendments. The explanatory Advisory Committee Note is also set forth below.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE*

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

* * * * *

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

* * * * *

(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

* New material is underlined in red; matter to be omitted is lined through.

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; or

* * * * *

Committee Note

Rule 801(d)(1)(B), as originally adopted, provided for substantive use of certain prior consistent statements of a witness subject to cross-examination. As the Advisory Committee noted, "[t]he prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally."

Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that Rule was limited. The Rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The Rule did not, for example, provide for substantive admissibility of consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness's testimony. Nor did it cover

consistent statements that would be probative to rebut a charge of faulty memory. Thus, the Rule left many prior consistent statements potentially admissible only for the limited purpose of rehabilitating a witness's credibility. The original Rule also led to some conflict in the cases; some courts distinguished between substantive and rehabilitative use for prior consistent statements, while others appeared to hold that prior consistent statements must be admissible under Rule 801(d)(1)(B) or not at all.

The amendment retains the requirement set forth in *Tome v. United States,* 513 U.S. 150 (1995): that under Rule 801(d)(1)(B), a consistent statement offered to rebut a charge of recent fabrication of improper influence or motive must have been made before the alleged fabrication or improper inference or motive arose. The intent of the amendment is to extend substantive effect to consistent statements that rebut other attacks on a witness — such as the charges of inconsistency or faulty memory.

The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible bolstering of a witness. As before, prior consistent statements under the amendment may be brought before the factfinder only if they properly rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403. As before, the trial court has ample discretion to exclude prior consistent statements that are cumulative accounts of an event. The amendment does not make any consistent

statement admissible that was not admissible previously — the only difference is that prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.

Changes Made After Publication and Comment

The text of the proposed amendment was changed to clarify that the traditional limits on using prior consistent statements to rebut a charge of recent fabrication or improper influence or motive are retained. The Committee Note was modified to accord with the change in text.

§ 801.2 Hearsay and the Confrontation Clause of the Sixth Amendment

Page 510: Add to footnote 41:

[41] *See also* United States v. Duron-Caldera, 737 F.3d 988 (5th Cir. 2013) (40-year-old affidavit signed by defendant's deceased grandmother concerning the years she lived in the United States might well have been admissible as an ancient document or a statement of family history, but its admission against him to prove his alienage in a criminal proceeding was forbidden by the Confrontation Clause, since the prosecution could not prove that the affidavit was not testimonial, or that it was prepared in connection with an immigration matter and not a criminal prosecution); United States v. Charles, 722 F.3d 1319 (11th Cir. 2013) (after customs agent interviewed the defendant with the aid of a translator, it was a violation of the Confrontation Clause for the agent to repeat the translation made by that interpreter, who was not produced for cross-examination at trial; even though the statements of the translator were admissible under the hearsay exception for statements by an agent of the opposing party, they were testimonial and therefore forbidden by the Confrontation Clause).

Page 513: Add to footnote 56:

[56] Likewise, just as a finding of testimonial purpose is undernmined by evidence that a crime victim or other witness was severely injured, a finding of testimonial intent is also less likely if the witness is so young that he or she is unlikely to understand the details of the criminal justice system, or to intend that his statement might be used as a substitute for trial testimony. Ohio v. Clark, — U.S. —, 135 S. Ct. 2173, 192 L. Ed. 2d 306 (2015). Indeed, for this very reason, the Supreme Court has held that "[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause." *Id.*

Page 514: Add to footnote 64:

[64] *See also* Ohio v. Clark, — U.S. —, 135 S. Ct. 2173, 192 L. Ed. 2d 306 (2015) (interview of young child by school teacher was not testimonial because, among other reasons, it was "informal and spontaneous" in the "informal setting of a preschool lunchroom and classroom," and was nothing like "formalized station-house questioning").

Page 515: Add to footnote 70:

[70] In its most recent discussion of the issue, the Court once again declined to adopt a categorical rule excluding all such statements from the reach of the confrontation clause, because "at least some statements to individuals who are not law enforcement officers could conceivably raise confrontation concerns," but the Court held that "such statements are much less likely to be testimonial than statements to law enforcement officers." Ohio v. Clark, — U.S. —, 135 S. Ct. 2173, 192 L. Ed. 2d 306 (2015) (holding that statements by 3-year old crime victim to school teacher were not testimonial). The Court added that "statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers." *Id.*

Page 515: Add to footnote 72:

[72] United States v. Preston, 706 F.3d 1106 (9th Cir. 2013) (excited utterances are not testimonial hearsay, and therefore not barred by the Confrontation Clause);

Page 515: Add to footnote 73:

[73] It must be emphasized, however, that *Bordeaux* involved an interview that was set up and arranged by government officials for the specific purpose (among others) of collecting information for law enforcement. Statements made by a very young abuse victim are not testimonial when the child is questioned by school teachers whose primary purpose and

immediate concern was to protect the child and to identify the abuser in order to protect the child from future attacks, even if the teachers were subject to a mandatory reporting law that required them to report suspected abuse to government authorities. Ohio v. Clark, — U.S. —, 135 S. Ct. 2173, 192 L. Ed. 2d 306 (2015).

Page 517: Add to footnote 86:

[86] United States v. Wells, 706 F.3d 908 (8th Cir. 2013) (admission of drug store logs showing purchases of pseudoephedrine was not a violation of the Confrontation Clause, because they were routine business records and were not testimonial hearsay);

Page 517: Add to footnote 87:

[87] United States v. Morales, 720 F.3d 1194 (9th Cir. 2013) (in prosecution for conspiracy to transport aliens who unlawfully entered the United States, the admission of forms filled out by Border Patrol agents in the field, which included statements by the smuggled aliens that they were in the United States illegally, did not violate the Confrontation Clause. The documents were nontestimonial, because they were created primarily for administrative purposes—to notify the aliens of their administrative rights, and to give the aliens a chance to request their preferred disposition—and not for the purpose of establishing some fact for use at a criminal trial); *see* United States v. Brooks, 715 F.3d 1069 (8th Cir. 2013) (Global Positioning System ("GPS") tracking reports were not testimonial hearsay subject to the Confrontation Clause, even though they were used by the police to track the accused in an ongoing pursuit from a bank robbery and later used against him at his trial, because they were not created for the purpose of being used at that trial).

Page 519: Add to footnote 95:

[95] *But see* United States v. Turner, 709 F.3d 1187 (7th Cir. 2013) (under Rule 703, an expert who gives testimony about the nature of a suspected controlled substance may rely on information gathered and produced by an analyst who does not himself testify, at least where the Government does not introduce the analyst's report, notes, or test results into evidence).

Page 524: Add to footnote 117:

[117] It is not necessary, however, that the actions of the accused were intended solely for that purpose. United States v. Jackson, 706 F.3d 264 (4th Cir. 2013) (under Rule 804(b)(6) and the Confrontation Clause, statements made by an unavailable witness are admissible against a defendant who intentionally killed or otherwise caused that witness to be unavailable as a witness, even if that was not the defendant's only motive in killing the witness, as long as he was motivated in part by that intention).

§ 801.3 Definition of a Statement

Page 527: Add to footnote 133:

[133] Stollings v. Ryobi Technologies, Inc., 725 F.3d 753 (7th Cir. 2013) (on cross-examination of plaintiff's expert, it was error to admit a newspaper article that purported to relate a statement made by that witness, since the article was inadmissible hearsay by the reporter when offered as proof that the expert in fact made those statements). *Cf.* United States v. Love, 706 F.3d 832 (7th Cir. 2013) (although there is "some force" to the suggestion that questions can at least implicitly convey information and can therefore qualify as assertions and hearsay, the federal courts do not take this approach; ordinary questions that are intended to elicit information and a response are therefore not excluded by the hearsay rule); United States v. Rutland, 705 F.3d 1238 (10th Cir. 2013) (trial court correctly admitted witness's testimony that conspirator told him to dispose of bag and to burn photo album stolen from victim, in defendant's conspiracy prosecution, even if they were not made in furtherance of any conspiracy; these statements were merely instructions, not assertions offered for their

truth);

§ 801.5 Definition of Hearsay

Page 531: Add to footnote 151:

[151] United States v. Cruse, 805 F.3d 795 (7th Cir. 2015) (statements by police informants are not hearsay when they are offered to explain the course of the investigation, rather than to prove the truth of the matter asserted, if the jury would otherwise not understand why an investigation targeted a particular defendant, or to dispel an accusation that the officers were staking out the defendant for improper purposes. After defense attorney emphasized in opening statement that there was no physical evidence of drug trafficking, the government was entitled to ask DEA agent how the agency came to suspect the accused despite a lack of physical evidence).

§ 801.7 Non-Hearsay, Out-of-Court Statements; Statements Offered for Effect on a Particular Listener or Reader

Page 537: Add to footnote 180:

[180] United States v. Leonard-Allen, 739 F.3d 948 (7th Cir. 2013) (in money-laundering prosecution, trial court erred in precluding defendant from testifying as to what he was told by another person to explain why he went to the bank and purchased a certificate of deposit. "A witness's statement is not hearsay if the witness is reporting what he heard someone else tell him for the purpose of explaining what the *witness* was thinking at the time or what motivated him to do something."). *But see* United States v. Nelson, 725 F.3d 615 (6th Cir. 2013) (it was reversible error to allow police officers to testify that they received a hearsay report from an anonymous caller about an armed man matching the description of the accused, even with a limiting instruction that the evidence was not offered for its truth; the information was not needed to explain the motives or mental state of the police, because that was never an issue at the trial, and because such explanation could have consisted merely of testimony that they had received a report of unspecified illegal or suspicious activity, without mentioning that the man in question allegedly possessed a firearm); Smith v. Wilson, 705 F.3d 674 (7th Cir. 2013) (in civil rights action alleging racial discrimination by town and police chief, hearsay rule did not preclude police chief from testifying that he had been told that African-American operator of towing company was suspected of drug dealing and overcharging his towing customers; the evidence was not offered to prove that those rumors were true but merely to explain why the police excluded operator's company from the town's tow list);

Page 537: Add to footnote 181:

[181] United States v. Cone, 714 F.3d 197 (4th Cir. 2013) (emails sent to the defendant by customers complaining that his product was "fake" were not hearsay and were admissible to prove that the defendant was on notice of the counterfeit nature of the goods he was selling); United States v. Dupree, 706 F.3d 131 (2d Cir. 2013) (in bank fraud prosecution, state court temporary restraining order, which prohibited defendant from removing funds from bank, was not hearsay; the evidence permitted the jury to infer that defendant had notice that he was depriving the bank of its property interests when he withdrew money for personal use in violation of credit agreement's terms, and jury could draw this inference without deciding whether order itself created any obligations that defendant subsequently violated, and without relying on the truth of any assertion that order might contain. A statement is not hearsay if it is used solely to show its effect on the one who heard or read it);

Page 538: Add to footnote 182:

[182] Boutros v. Avis Rent a Car System, LLC, 802 F.3d 918 (7th Cir. 2015) (when plaintiff claimed that he had been fired on the basis of his race, the hearsay rules did not prevent the

defendant from offering evidence of statements made by various witnesses accusing plaintiff of dishonesty; the statements were not offered for their truth, or to prove that plaintiff was dishonest, but merely to explain why the defendant terminated his employment and to rebut the claim of racial motivation).

§ 801.8 Non-Hearsay, Out-of-Court Statements; Verbal Acts or Operative Facts

Page 538: Add to footnote 186:

[186] United States v. Bowles, 751 F.3d 35 (1st Cir. 2014) (in theft prosecution, signature endorsements on the back of checks written to the defendant's parents and deposited in the defendant's bank account were not hearsay, because the endorsements—written after the death of the parents—were obviously false and therefore could not have been offered to prove the truth of what they implicitly stated, and because those endorsements were thus a legally operative verbal act of imposture for a fraudulent purpose);

§ 801.13 Rule 801(d)(1) Statements That Are Not Hearsay—A Declarant-Witness's Prior Statement

Page 543: Add to footnote 202:

[202] United States v. Demmitt, 706 F.3d 665 (5th Cir. 2013) (written statement made out of court by a witness as part of his guilty plea was inadmissible hearsay at the trial of his mother, even though the statement was made under oath, and even though he testified at her trial, was made available for cross-examination about the statement, and verified that he had sworn to tell the truth when he made the statement).

§ 801.14 Statements That Are Not Hearsay—Prior Inconsistent Statements

Page 543: Add to footnote 205:

[205] United States v. Cooper, 767 F.3d 721 (7th Cir. 2014) (to be admissible for impeachment as an inconsistent statement, the prior testimony need not be diametrically opposed or logically inconsistent; after mother of defendant testified at trial that she knew nothing about his group's illicit activities, the Government could impeach her with her grand jury testimony that implicated them in drug trafficking);

Page 544: Add to footnote 208:

[208] United States v. Cooper, 767 F.3d 721 (7th Cir. 2014) (after mother of defendant testified at trial that she knew nothing about his illicit activities, the Government could impeach her with her grand jury testimony that implicated him in drug trafficking, and those prior inconsistent statements were therefore admissible as substantive evidence of his guilt);

§ 801.15 Statements That Are Not Hearsay—Prior Consistent Statements

Page 546: Add to footnote 218:

[218] United States v. Davis, 726 F.3d 434 (3d Cir. 2013) (after government impeached a defense witness with evidence of the inconsistency in his statements, the defendant was not entitled to rehabilitate the witness by offering his "prior consistent statement" that was consistent with his trial testimony, because the government never suggested that the discrepancy in his statements was the result of any intentional recent fabrication; inconsistency alone is not a charge of recent fabrication);

§ 801.18 Statements That Are Not Hearsay—Party's Own Statement

Page 550: Add to footnote 230:

[230] United States v. Mallay, 712 F.3d 79 (2d Cir. 2013) (the hearsay rules allow a criminal defense to introduce a prosecutor's statement from a prior trial when the prosecution offered an inconsistent assertion of fact at the prior trial and the prosecution can offer no "innocent explanation" for the contradiction. But district court properly denied defendants' motion to admit government's summation from earlier trial of cooperating witness, which largely blamed her, and not defendants, for murder, based on an innocent explanation for inconsistency; government explained change in view towards witness's culpability resulted from series of discoveries after her conviction);

Page 551: Add to footnote 235:

[235] United States v. Ford, 761 F.3d 641 (6th Cir. 2014) (after FBI Agent testified that the accused admitted his involvement in a robbery but only as a lookout, the defendant had no right on cross-examination to ask the agent about exculpatory parts of the same statement made the officer by the defendant, because any portion of the statement offered by the accused was inadmissible hearsay. The exception for statements by an opposing party does not permit a party to introduce his/her own statements through the testimony of other witnesses).

§ 801.19 Statements That Are Not Hearsay—Adoptive Admissions

Page 554: Add to footnote 247:

[247] Transbay Auto Service, Inc. v. Chevron USA Inc., 807 F.3d 1113 (9th Cir. 2015) (even if a party never read or reviewed the contents of a document, and was only vaguely aware of its contents, that party manifests an intent to adopt these contents when he uses the document to accomplish an objective or by acting in conformity with the document—for example, by giving an independent appraisal to a lender in support of a loan application—and the document therefore becomes admissible against that party as an adoptive admission. Where, however, a party forwards a document while acting as a mere messenger, this does not constitute an adoption);

§ 801.21 Statements That Are Not Hearsay—Conspirator's Statements—In General

Page 559: Add to footnote 270:

[270] *See also* United States v. Graham, 711 F.3d 445 (4th Cir. 2013) (before admitting hearsay under the exception for statements by a conspirator, the trial court is not required to hold a hearing to determine whether a conspiracy exists, and need not explain the reasoning behind its evidentiary ruling; the Court of Appeals may affirm as long as the record reveals that the conspirator's statements were plainly admissible, even without a detailed rationale for admitting the statements by the trial court).

§ 801.23 Statements That Are Not Hearsay—Conspirator's Statements—When Statement Is Made

Page 560: Add to footnote 273:

[273] United States v. Arrellano, 757 F.3d 623 (7th Cir. 2014) (in determining whether statements of defendant's alleged conspirators were admissible against him under the conspirator exception to hearsay rule, it was irrelevant when defendant joined conspiracy, so long as he joined it at some point; a defendant who joins a conspiracy takes it as he found it, and adopts the previous acts and declarations of his conspirators);

Page 560: Add to footnote 274:

[274] United States v. Mandell, 752 F.3d 544 (2d Cir. 2014) (defendant has the burden of proof to demonstrate his withdrawal from a conspiracy, and mere cessation of the conspiratorial activity is not sufficient to prove withdrawal; there must have been some affirmative action that he took to disavow or defeat the purpose of the conspiracy). *But see* United States v. Mallay, 712 F.3d 79 (2d Cir. 2013) (the fact that members of a conspiracy have had a disagreement or a falling out is not sufficient to establish withdrawal from the conspiracy; the conspiracy is presumed to continue until there has been some affirmative action to either make a clean breast to the authorities or communicate the abandonment to the conspirators).

§ 801.24 Statements That Are Not Hearsay—Conspirator's Statements—In Furtherance Requirement

Page 561: Add to footnote 278:

[278] United States v. Rutland, 705 F.3d 1238 (10th Cir. 2013) (statements made in furtherance of a conspiracy include statements that explain events of importance to the conspiracy; provide reassurance or maintain trust and cohesiveness; inform each other of the current status of the conspiracy; identify a fellow conspirator; discuss future intent; set transactions to the conspiracy in motion; or maintain the flow of information among conspiracy members. But mere "narrative declarations of past events" are not in furtherance of the conspiracy);

Page 562: Add to footnote 282:

[282] The only exception to this rule involves the very unusual case in which a conspirator, in an effort to further the conspiracy, makes a statement to the police in the hopes of concealing the nature of the criminal activity. *See* United States v. Heron, 721 F.3d 896 (7th Cir. 2013) (in drug distribution conspiracy prosecution, police officer was properly allowed to testify that driver of truck identified the defendant as his "co-driver," since that statement was made in furtherance of a conspiracy involving both men, even though it was made to a police officer, because it was made in an effort to prevent the police from discovering the illegal drugs in the truck and to portray the trip in a legitimate light).

Page 562: Add to footnote 283:

[283] United States v. Miller, 738 F.3d 361 (D.C. Cir. 2013) (statements by conspirator were improperly admitted because they were not in furtherance of the conspiracy, which had concluded several months earlier; they were merely casual comments and idle chatter recounting past victories and losses, and therefore could not be admitted on the theory that they were updating anyone on the status of the conspiracy);

Page 562: Add to footnote 284:

[284] United States v. Lloyd, 807 F.3d 1128 (9th Cir. 2015) (mere conversations or narrative declarations between conspirators are not necessarily made in furtherance of a conspiracy, but may be in furtherance if they were made with the intent to keep certain members abreast of what others had done or would do in the future);

Page 563: Add to footnote 285:

[285] United States v. Bey, 725 F.3d 643 (7th Cir. 2013) (because recorded conversation between two men described a drug transaction as it was taking place, it would presumably be admissible against the accused as a "present sense impression" even if it was not in furtherance of any conspiracy that included him);

Page 563: Add to footnote 287:

[287] *See also* United States v. Lyons, 740 F.3d 702 (1st Cir. 2014) (records that can be

shown by a preponderance of the evidence to have been made by a member of a conspiracy are admissible even if their precise author cannot be identified, as long as there is sufficient evidence that the records were authored by someone involved with the conspiracy, or that they contained information that would have been available only to someone in the conspiracy).

§ 801.25 Statements That Are Not Hearsay—Conspirator's Statements—Other Considerations

Page 564: Add to footnote 289:

[289] United States v. Rutland, 705 F.3d 1238 (10th Cir. 2013) (trial court correctly admitted witness's testimony that conspirator told him to dispose of bag and to burn photo album stolen from victim, in defendant's conspiracy prosecution, even if they were not made in furtherance of any conspiracy; these statements were merely instructions, not assertions offered for their truth).

Page 564: Add to footnote 293:

[293] United States v. Nelson, 732 F.3d 504 (5th Cir. 2013) (to be admissible as a statement in furtherance of a conspiracy, the alleged conspiracy need not be criminal or unlawful; the statement may be made in furtherance of a lawful joint undertaking or a common plan or endeavor that was non-criminal in nature, such as an effort by two mayors to attract certain business to their towns);

Page 564: Add to footnote 294:

[294] United States v. Rutland, 705 F.3d 1238 (10th Cir. 2013) (there were two conspiracies involved in defendant's prosecution, one to engage in drug trafficking and other to rob competing drug dealer, and his alleged conspirator's statements could be admitted against him under the conspirator's exception to the hearsay rule even if they were not in furtherance of the conspiracy charged in the indictment, so long as the statement was in furtherance of the uncharged conspiracy and the defendant was also part of that conspiracy);

Chapter 803

Rule 803. Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness

Page 569: Add at beginning of Chapter 803

Editor's Note: On April 25, 2014, the Supreme Court submitted to Congress an order amending Rule 803. The proposed amendment will take effect on December 1, 2014, unless Congress acts otherwise. Set forth below is a comparison of the amended rule with the rule as it appeared before the amendments. The explanatory Advisory Committee Note is also set forth below.

Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

* * * * *

(6) ***Records of a Regularly Conducted Activity.*** A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) ~~neither~~ the opponent does not show that the source of information ~~nor~~ or the method or circumstances of preparation indicate a lack of trustworthiness.

* * * * *

Committee Note

The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception — regular business with regularly kept record, source with personal knowledge, record made timely, and foundation testimony or certification — then the burden is on the opponent to show that the source of information or

the method or circumstances of preparation indicate a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. It is appropriate to impose this burden on opponent, as the basic admissibility requirements are sufficient to establish a presumption that the record is reliable.

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point. A determination of untrustworthiness necessarily depends on the circumstances.

Changes Made After Publication and Comment

In accordance with a public comment, a slight change was made to the Committee Note to better track the language of the rule.

Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

* * * * *

(7) ***Absence of a Record of a Regularly Conducted Activity.*** Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) ~~neither~~ the opponent does not show that the possible source of the information ~~nor~~ or

other circumstances indicate a lack of trustworthiness.

* * * * *

Committee Note

The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception — set forth in Rule 803(6) — then the burden is on the opponent to show that the possible source of the information or other circumstances indicate a lack of trustworthiness. The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

Changes Made After Publication and Comment

In accordance with a public comment, a slight change was made to the Committee Note to better track the language of the rule.

Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

* * * * *

(8) ***Public Records.*** A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual

findings from a legally authorized investigation; and

(B) ~~neither~~ the opponent does not show that the source of information ~~nor~~ or other circumstances indicate a lack of trustworthiness.

* * * * *

Committee Note

The Rule has been amended to clarify that if the proponent has established that the record meets the stated requirements of the exception — prepared by a public office and setting out information as specified in the Rule — then the burden is on the opponent to show that the source of information or other circumstances indicate a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. Public records have justifiably carried a presumption of reliability, and it should be up to the opponent to "demonstrate why a time-tested and carefully considered presumption is not appropriate." *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 301 (4th Cir. 1984). The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point. A determination of untrustworthiness necessarily depends on the circumstances.

Changes Made After Publication and Comment

In accordance with a public comment, a slight change was made to the Committee Note to better track the language of the rule.

§ 803.8 Elements for Application of Rule 803(2)

Page 581: Add to footnote 30:

[30] United States v. Gonzalez, 764 F.3d 159 (2d Cir. 2014) (even if statement by son of murder victim was an excited utterance, the statement was inadmissible in the absence of any evidence that the son had any personal first-hand knowledge of the subject matter, or that he had actually observed the killing at all);

§ 803.9 Nature of the Stimulus—Requirement That Event or Condition Be Startling

Page 582: Add to footnote 33:

[33] United States v. Zuniga, 767 F.3d 712 (7th Cir. 2014) (hearsay statement by a witness that the defendant had a gun was admissible as an excited utterance, even though the statement was merely whispered; excited utterances need not be yelled, and "in almost every imaginable scenario, seeing a person pointing a gun at the head of another is a startling situation");

§ 803.10 Requirement That Declarant Be Under Stress of Excitement Caused by Startling Event When Statement Is Uttered

Page 583: Add to footnote 37:

[37] United States v. Graves, 756 F.3d 602 (8th Cir. 2014) (victim's statements to police officer that defendant pointed a shotgun at her and threatened to shoot her were admissible as excited utterances, even though they were made 30 minutes after the incident and she later recanted her statements at trial; the victim was still shaking and appeared to have been crying when she made the statement, and her answer was in response to a general question and not the detailed, interrogation-style questioning that might negate the finding of an excited utterance);

Page 584: Add to footnote 38:

[38] *But see* United States v. Zuniga, 767 F.3d 712 (7th Cir. 2014) (hearsay statement may be admissible as an excited utterance even though the declarant made the statement while thinking about how he would avoid creating a dangerous situation; the party offering the hearsay evidence under this exception need not demonstrate that the declarant was completely incapable of deliberative thought when he made the statement).

Page 584: Add to footnote 40:

[40] United States v. Preston, 706 F.3d 1106 (9th Cir. 2013) (in child sex abuse prosecution, trial court did not abuse its discretion in admitting testimony as an "excited utterance" about statements made by the alleged victim to his grandmother, even though there was conflicting evidence as to how much time had passed since the assault, because the child ran from the defendant's home in tears, and was still crying and visibly upset when he reported the incident some time later);

§ 803.19 "Reasonably Pertinent" Requirement

Page 602: Add to footnote 100:

[100] United States v. JDT, 762 F.3d 984 (9th Cir. 2014) (although statements of fault are not ordinarily admissible under the medical examination exception, statements by a minor victim identifying her sexual abuser may be admissible because sexual abuse involves more than physical injury, and the physician must treat the victim's emotional and psychological injuries, the exact nature and extent of which often depend on the identity of the abuser, and the identity of the abuser may be pertinent to the treatment of sexually transmitted diseases);

§ 803.31 Necessity That Record Be Regularly Prepared and Maintained in Course of Regularly Conducted Business Activity—Scope of Business

Page 618: Add to footnote 147:

[147] United States v. Brooks, 715 F.3d 1069 (8th Cir. 2013) (Global Positioning System ("GPS") tracking reports were admissible under hearsay exception for business records);

Page 619: Add to footnote 152:

[152] United States v. Cone, 714 F.3d 197 (4th Cir. 2013) (the business records exception, which applies to records containing information necessary in the regular operation of a business, usually will not apply to email communications, which are typically a more casual form of communication than other records kept in the course of business, so it may not be appropriate to assume the same degree of accuracy and reliability. More specificity is required regarding the party's recordkeeping practices to show a particular email in fact constitutes a reliable business record, and it is not sufficient merely to prove that the emails were used and kept as part of the routine practice of the business);

§ 803.33 Necessity That Record Be Made Contemporaneously With Act, Event or Condition

Page 622: Add to footnote 157:

[157] Ira Green, Inc. v. Military Sales & Service Co., 775 F.3d 12 (1st Cir. 2014) (chain of e-mail messages between two businesses was not admissible as business records where the e-mails were not made at or near the time of the act or event recorded; the e-mails, written in 2012, described what supposedly occurred in 2011);

§ 803.34 Foundational Requirements: Custodian or Some Other Qualified Person—Rule 902(11) and (12)

Page 623: Add to footnote 160:

[160] United States v. Isgar, 739 F.3d 829 (5th Cir. 2014) (witness presenting the foundation for the admission of a business record need not be the author of the record or be able to personally attest to its accuracy; because this exception hinges on the "trustworthiness of the records," it may apply to documents from a custodian that never worked for the employer that created the documents as long as that custodian explains how she came to possess them and how they were maintained);

§ 803.35 Exclusion Where Lack of Trustworthiness Is Indicated

Page 625: Add to footnote 166:

[166] *But see* United States v. Smith, 804 F.3d 724 (5th Cir. 2015) (accounting ledger of funds received by city was admissible as a business record, despite defendant's unsupported objection that the ledger was not proved to be accurate. The witness who lays the foundation for admission of a business record need not personally attest to its accuracy, and courts should not focus on the accuracy of a record in making the trustworthiness determination required by Rule 803, because the jury is responsible for assessing credibility and deciding what weight to afford admitted evidence).

Page 625: Add to footnote 168:

[168] Jordan v. Binns, 712 F.3d 1123 (7th Cir. 2013) (business records are normally presumed reliable because businesses depend on them to conduct their own affairs, so there is little if any incentive to be deceitful, and because the regularity of creating such records leads to habits of accuracy, but documents prepared in anticipation for litigation—including an adjuster's post-accident investigation and report—raise serious trustworthiness concerns and are not admissible under that exception);

§ 803.43 Matters Observable Under Legal Duty, Rule 803(8)(A)(ii)

Page 637: Add to footnote 215:

[215] Jordan v. Binns, 712 F.3d 1123 (7th Cir. 2013) (in a civil case, the public records exception only authorizes the admission of a police report to the extent that it includes firsthand observations by the officer, but the court should exclude portions of the report including statements made by third parties unless those statements qualify for admission under some other hearsay exception);

Page 637: Add to footnote 218:

[218] United States v. Morales, 720 F.3d 1194 (9th Cir. 2013) (at trial of charges for conspiracy to transport aliens who unlawfully entered the United States, forms filled out by Border Patrol agents in the field, which included statements by the smuggled aliens that they were in the United States illegally, were not admissible under the hearsay exception for public records, because statements by third parties who are not government employees or otherwise under a legal duty to report may not be admitted pursuant to the public records exception unless they satisfy some other hearsay exception);

§ 803.44 Special Problem: Admissibility of Investigative Reports

Page 639: Add to footnote 229:

[229] Cortes v. MTA New York City Transit, 802 F.3d 226 (2d Cir. 2015) (administrative decision by the New York State Division of Human Rights, dismissing city employee's disability discrimination claims against city employer, was admissible under the public records exception to the hearsay rule as factual findings from a legally authorized investigation by a public office); United States v. Wood, 741 F.3d 417 (4th Cir. 2013) (federal presentence report prepared concerning the accused is admissible against him as a public report under Rule 803(8) in a later civil case, even a civil commitment proceeding to have him declared a "sexually dangerous person"). *See also* General Mills Operations, LLC v. Five Star Custom Foods, LLC, 703 F.3d 1104 (8th Cir. 2013) (many press releases are inadmissible hearsay, but a press release issued by the Government is admissible under the public-records hearsay exception if it sets forth factual findings from a legally authorized investigation. A press release about a product recall issued by the CPSC was admissible to prove that the meat products at issue in this case were unfit for human consumption).

§ 803.45 Use Restrictions on Public Records and Reports in Criminal Cases, Rule 803(8)(A)(ii) and Rule 803(8)(A)(iii)

Page 643: Add to footnote 247:

[247] United States v. Morales, 720 F.3d 1194 (9th Cir. 2013) (at trial for conspiracy to transport aliens who unlawfully entered the United States, it was error for the court to admit forms filled out by Border Patrol agents in the field under the "business records" exception, Rule 803(6), because this exception does not apply to records of government agencies, and so their admissibility must be analyzed under the exception for public records, Rule 803(8));

§ 803.51 Rule 803(10) Absence of a Public Record

Page 650: Add to footnote 282:

[282] United States v. Morales, 720 F.3d 1194 (9th Cir. 2013) (at trial of charges for conspiracy to transport aliens who unlawfully entered the United States, a Border Patrol agent was properly allowed to testify that he had searched in three government databases and determined that the three aliens had no documentation allowing them to be present in the

United States. The government may establish a foundation for the absence of a record through testimony that the agent conducting the search was familiar with both the process of searching the records and the government's recordkeeping practices with regard to the database);

§ 803.52 Foundation and Authentication Requirements

Page 651: Add to footnote 287:

[287] United States v. Parker, 761 F.3d 986 (9th Cir. 2014) (9th Cir. 2014) (exception for evidence showing the absence of a public record or entry only requires testimony that a diligent search did not turn up a public record, and Forest Service officer was permitted to testify that his diligent search failed to disclose a public record of a permit, where he detailed substantial knowledge of the permit system and his regular use of the system, and described how the register was maintained and how he undertook his search);

§ 803.65 Application

Page 661: Add to footnote 321:

[321] Brumley v. Albert E. Brumley & Sons, Inc., 727 F.3d 574 (6th Cir. 2013) (newspaper articles are self-authenticating, and admissible under the ancient documents exception if they are more than 20 years old);

§ 803.74 Rule 803(19) Reputation Concerning Personal or Family History

Page 671: Add to footnote 369:

[369] *See* Porter v. Quarantillo, 722 F.3d 94 (2d Cir. 2013) (hearsay affidavits signed by woman and her relatives, attesting that she was slightly more than one-year-old when she left the United States more than 80 years earlier, were not admissible under the exception for reputation as to "personal or family history," because they gave no reason why the precise date of her relocation was sufficiently significant or unusual that it would have naturally become—much less remain for more than 80 years—a subject of presumptively accurate family lore).

Chapter 804

Rule 804. Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness

§ 804.3 Rule 804(a)(1) Criteria for Being Unavailable—Privilege

Page 687: Add to footnote 16:

[16] United States v. Velez, 797 F.3d 192 (2d Cir.2015) (a trial court may find that a declarant is unavailable on the ground of privilege without the declarant being haled into court to invoke the privilege, where, for example, the court reasonably relies on representations of the attorneys for incarcerated declarants concerning their clients' intentions to rely on their Fifth Amendment privilege);

§ 804.5 Rule 804(a)(3) Criteria for Being Unavailable—Lack of Memory

Page 690: Add new paragraph at end of § 804.5:

When a witness appears in court and denies any recollection of a statement he allegedly made about a certain subject matter, the witness is not unavailable within the meaning of this section, as long as he is able and willing to answer questions about the subject matter described in that statement. The rule requires a showing that the witness is unable to recall a certain subject upon which some party desires to question the witness; it does not matter whether he is able to remember every statement he has made on that topic.[32.1]

[32.1] Lamonica v. Safe Hurricane Shutters, Inc., 711 F.3d 1299 (11th Cir. 2013) (a witness who appears in court is not "unavailable" within the meaning of Rule 804(a)(3) unless he testifies to not remembering some general subject matter, such as when he does not remember the events described in his alleged statement out of court; the fact that he does not remember making those statements themselves is irrelevant and does not make him unavailable. Statements made by a witness are therefore not admissible as statements against interest merely because the witness claims that he does not remember making those statements).

§ 804.20 Rule 804(b)(3) The Exceptions—Statement Against Interest

Page 713: Add to footnote 129:

[129] United States v. Hawkins, 803 F.3d 900 (7th Cir. 2015) (a trial judge deciding whether to admit evidence of a statement against interest may properly conclude that the evidence is not corroborated to be sufficiently trustworthy, and may base that decision on an assessment of all the evidence of the defendant's guilt; this does not usurp the jury's role as the ultimate factfinder, because the judge must decide all questions of admissibility, and it is the judge's role to determine whether sufficient corroborating circumstances exist under Rule 804(b)(3)).

Page 715: Add new footnote at end of section 804.20:

[138.1] Such cases are rare, but they occur occasionally. *See, e.g.*, United States v. Dargan, 738 F.3d 643 (4th Cir. 2013) (statements by the accused's codefendant to a cellmate were properly admitted against the accused as statements against interest of the declarant, since they exposed him to risk of criminal liability and were not made to prosecutor or police agents, thus giving him no reason to lie; declarant was unavailable because of his invocation of the Fifth Amendment, and the reliability of his statement was corroborated by other Government evidence at trial).

§ 804.22 Rationale

Page 717: Add to footnote 141:

[141] United States v. Ferrell, 816 F.3d 433 (7th Cir. 2015) (when a defendant offers evidence of a statement made out of court by a witness who tried to minimize the guilt of the accused, the existence of a longstanding personal and professional relationship between the two men strongly supports the conclusion that the statement was not sufficiently corroborated to be admissible as a statement against interest);

§ 804.23 Admission of "Statement" of "Fact Asserted" Therein—"Reasonable Person" Test

Page 721: Add to footnote 159:

[159] United States v. Awer, 770 F.3d 83 (1st Cir. 2014) (driver's statements to her attorneys claiming responsibility for the drugs found in defendant's car were not against her criminal interest, because, when they were made, they were confidential and protected by the attorney-client privilege, and thus did not expose her to a risk of penal liability); United States v. Henley, 766 F.3d 893 (8th Cir. 2014) (hearsay statement by a man who claimed that he shot another individual was not clearly against his interest because he claimed in the statement that he acted in self-defense).

§ 804.25 Foundational Requirements—Contrary to Interest—"Pecuniary or Proprietary" Interest—"Penal" Interest

Page 723: Add to footnote 169:

[169] United States v. Kivanc, 714 F.3d 782 (4th Cir. 2013) (statements by a medical doctor were admissible against his parents in forfeiture action as statements against interest, even assuming that such statements must be corroborated in a civil case, because be he made each statement in the course of discussing work-related issues with his employees, with no apparent reason to lie to them, and those statements exposed him to criminal liability);

§ 804.26 Statements Against Penal Interest—Requirement of "Corroborating Circumstances"—In General

Page 724: Add to footnote 173:

[173] United States v. Henley, 766 F.3d 893 (8th Cir. 2014) (when defendant offered an affidavit signed by another gang member who claimed that he and not the defendant was the one who shot a victim, the statement was properly excluded, even if it was against the penal interest of the declarant, because it lacked sufficient indicia of trustworthiness, since the two men were members of an organization based on loyalty to its members and he had a motive to help the accused.); United States v. Gadson, 763 F.3d 1189 (9th Cir. 2014) (in general, exculpatory statements by family members are not highly reliable, for purposes of hearsay exception for statements against interest; district court properly excluded hearsay statement by defendant's brother that he "should not be in it" because statement did not admit guilt and had no assurances of trustworthiness). *See, e.g.*, United States v. Henderson, 736 F.3d 1128 (7th Cir. 2013) (in prosecution of a felon for possession of loaded firearm found in car he was driving, hearsay statement by a passenger in the car to another friend that he found the gun on the street was not sufficiently corroborated to be admissible as statement against interest; the statement was intrinsically implausible, not sufficiently detailed, was not sufficiently corroborated, and appeared to have been made to help his friend evade prosecution).

Page 725: Add to footnote 177:

[177] United States v. Hawkins, 803 F.3d 900 (7th Cir. 2015) (a statement made out of court by a witness, asserting that he had committed the crime with someone other than the defendant, was not sufficiently corroborated to be admissible as a statement against interest, because the statement was contradicted by an earlier statement by that same witness, and by considerable extrinsic evidence that confirmed the defendant's participation, and because the witness refused to name the individual who robbed the bank with him when he entered his guilty plea);

Page 726: Add to footnote 179:

[179] United States v. Henderson, 736 F.3d 1128 (7th Cir. 2013) (corroboration requirement for admission of statement against penal interest in a criminal prosecution merely requires corroboration that the hearsay statement was true, not that it was made; whether the declarant actually *made* the alleged statement implicates the credibility of the testifying witness, an

issue reserved for the jury);

§ 804.31 Rationale

Page 732: Add to footnote 201:

[201] *But see* Porter v. Quarantillo, 722 F.3d 94 (2d Cir. 2013) (hearsay affidavits signed by woman and her relatives, attesting that she was slightly more than one-year-old when she left the United States more than 80 years earlier, were not admissible under the exceptions for statements of "personal or family history," because they gave no reason why the precise date of her relocation was sufficiently significant or unusual that it would have naturally become—much less remain for more than 80 years—a subject of presumptively accurate family lore).

§ 804.33 Rule 804(b)(6) The Exceptions—Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability

Page 733: Add to footnote 203:

[203] United States v. Jonassen, 759 F.3d 653 (7th Cir. 2014) (in prosecution of man for kidnapping and sexually assaulting his adult daughter, police officers could testify about victim's statements after she testified at trial to a total lack of recall; her claimed ignorance made her unavailable as a witness, and the Government proved that her feigned ignorance was the result of the defendant's wrongful efforts to persuade her to recant, including a campaign to manipulate this vulnerable woman with guilt, bribes, pleas for sympathy, and intimidation);

Page 735: Add to footnote 213:

[213] It does not matter, however, whether the actions of the accused were intended solely for that purpose. United States v. Jackson, 706 F.3d 264 (4th Cir. 2013) (under Rule 804(b)(6) and the Confrontation Clause, statements made by an unavailable witness are admissible against a defendant who intentionally killed or otherwise caused that witness to be unavailable as a witness, even if that was not the defendant's only motive in killing the witness, as long as he was motivated in part by that intention).

Chapter 805

Rule 805. Hearsay Within Hearsay

§ 805.1 Hearsay Within Hearsay

Page 738: Add to footnote 8:

[8] Jordan v. Binns, 712 F.3d 1123 (7th Cir. 2013) (at civil negligence trial brought by wife injured in vehicle crash and her husband, it was permissible for a police officer to testify for the defense that the husband told the officer that the wife had said the accident was all her fault, because both the husband and the wife—both links in the chain of multiple hearsay—were the defendant's opponents in the litigation. But it was not proper for the officer, at the request of the defense, to relate what he had been told at the accident scene by the defendant);

Chapter 806

Rule 806. Attacking and Supporting the Declarant's Credibility

§ 806.1 Attacking and Supporting the Credibility of Hearsay Declarant—An Overview

Page 741: Add to footnote 4:

[4] United States v. Adams, 722 F.3d 788 (6th Cir. 2013) (after the judge allowed a prosecution witness to testify to a hearsay statement made by one of the defendant's alleged conspirators, the defendant had a right to ask the witness about the conspirator's memory problems).

Chapter 807

Rule 807. Residual Exception

§ 807.1 History and Rationale

Page 746: Add to footnote 6:

[6] *See* United States v. Awer, 770 F.3d 83 (1st Cir. 2014) (Congress intended the residual hearsay exception to be used very rarely, and only in exceptional circumstances).

§ 807.2 Basic Application

Page 747: Add to footnote 10:

[10] United States v. Burdulis, 753 F.3d 255 (1st Cir. 2014) (district court properly overruled defendant's hearsay objection and admitted the inscription on his thumb drive, "Made in China," to prove the device traveled in interstate commerce; the evidence had sufficient guarantees of trustworthiness because federal law prohibits false designations of origin, and there was little chance that someone would stamp such a thing on a device made in the United States and meant to be marketed here); Brumley v. Albert E. Brumley & Sons, Inc., 727 F.3d 574 (6th Cir. 2013) (recorded hearsay statement was sufficiently reliable to be admissible under residual exception because it was a statement by a man to his son, it concerned an important matter that he would have been likely to recall, there was no allegation that he was an untruthful person, the statement was clear and unambiguous, and the conversation was recorded, which added an element of formality and a reason to have given the statement added consideration);

Page 748: Add to footnote 16:

[16] Cynergy, LLC v. First American Title Ins. Co., 706 F.3d 1321 (11th Cir. 2013) (in title insurance dispute between bank and title insurance company, district court properly ruled that Rule 807 would permit the admission of an affidavit signed by the bank's former president, signed at the request of the insurance company, who was undergoing cancer treatment when

he signed the affidavit and who died six months later. The affidavit was particularly trustworthy and the most probative evidence on the critical issue of the information that was known to the bank at the time of the disputed loan);

Page 749: Add to footnote 18:

[18] United States v. Burdulis, 753 F.3d 255 (1st Cir. 2014) (although party offering hearsay evidence under Rule 807 must give opposing parties notice of its intent to offer that evidence, the notice need not inform the others that the party intends to rely on Rule 807 as the basis for admission; Government was remiss, however, in failing to notify the defendant the name and address of manufacturer which inscribed "Made in China" on thumb drive, but that failure was not plain error, since defendant could have obtained that address through a simple online search and he never requested any additional information from the prosecutor about the manufacturer of the device);

ARTICLE IX.

AUTHENTICATION AND IDENTIFICATION

Chapter 901

Rule 901. Authenticating or Identifying Evidence

§ 901.1 Rule 901(a) Authenticating or Identifying Evidence

Page 759: Add to footnote 3:

[3] United States v. Vayner, 769 F.3d 125 (2d Cir. 2014) (government did not provide sufficient basis from which jury could conclude that printout was defendant's profile page from Russian social networking website, since defendant may not have created or controlled that profile page; even though his name, photograph, and some details about his life were on that page, there was no evidence that he had created that page or was responsible for its contents, and the mere existence of a webpage with someone's name and photograph does not permit a reasonable conclusion that the page was created by that person or on his behalf);

§ 901.2 Threshold Standard of Authenticating Evidence

Page 760: Add to footnote 9:

[9] United States v. Barnes, 803 F.3d 209 (5th Cir. 2015) (government laid sufficient foundation to authenticate text and Facebook messages allegedly sent by quadriplegic defendant; witness testified that she had seen defendant use the website and recognized his account on the website, that the messages matched his manner of communication, and that defendant could send text messages from his cell phone. Although she was not certain that he author to the messages, conclusive proof of authenticity is not required for the admission of

disputed evidence).

§ 901.6 Identification of Real Proof

Page 766: Add to footnote 34:

[34] United States v. Collins, 715 F.3d 1032 (7th Cir. 2013) (to lay the foundation for the admission of a tape recorded telephone conversation, the government need only prove that it took reasonable precautions in preserving the evidence; it need not exclude all possibility of tampering, and a mere chance of a gap in the chain of custody goes to the weight of the evidence and not its admissibility);

§ 901.7 Authentication of Other Types of Demonstrative Evidence

Page 768: Add to footnote 42:

[42] United States v. Cejas, 761 F.3d 717 (7th Cir. 2014) (government laid an adequate foundation for the admission of a video from a camera outside the defendant's home, based on FBI agent's testimony that the camera produced accurate results, even though he watched a live feed of the video and did not personally witness the events being recorded, and despite the fact that the video intermittently skipped a few seconds at a time, especially since there was no evidence that the video was inaccurate or had been spliced or altered);

§ 901.22 Authentication by Proof of External Circumstances

Page 781: Add to footnote 104:

[104] United States v. Bowles, 751 F.3d 35 (1st Cir. 2014) (Souter, J.) (evidence that government checks had been mailed to the defendant's home address after her mother's death, and then deposited in her personal bank account after they were purportedly endorsed by the deceased mother, was sufficient to establish a reasonable likelihood that the endorsements on the checks were written by the defendant).

§ 901.25 Voice Identification by Lay or Expert Witness

Page 783: Add to footnote 111:

[111] United States v. Collins, 715 F.3d 1032 (7th Cir. 2013) (government agent could properly identify the voice of the accused on a tape recording because he became familiar with the defendant's voice during a 45-minute interview after he was arrested);

§ 901.27 Evidence Establishing Voice Identification

Page 786: Add text after second sentence of § 901.27:

Courts are especially likely to allow a witness to identify the voice of an individual on a recorded conversation if the witness is fluent in a foreign language that is spoken on the recording, because such witnesses—even if they have never met the speaker in question—are better equipped than the jurors would be to identify that individual.[122.1]

[122.1] United States v. Diíaz-Arias, 717 F.3d 1 (1st Cir. 2013) (government agent was properly allowed to offer lay opinion that voices on various recorded tapes were the same speaker, even though he had never personally spoken with the accused and the jurors were able to listen to the same tapes, because the agent was a native speaker familiar with the particular accents, intonations, and speaking habits of persons from the Dominican Republic); United States v. Mendiola, 707 F.3d 735 (7th Cir. 2013) (voice identification is a proper subject for lay testimony, not expert opinion, and so a Spanish-speaking linguist working for the DEA was properly permitted to testify to her opinion that the voice on a wiretapped phone

call was the same as the defendant's voice on recorded prison telephone conversations, even though the witness had never met the accused and had not been vetted as an expert. Such lay testimony is likely to be helpful to the jury, because an English-speaking jury cannot adequately identify voices in languages in which they are not familiar or even fluent).

§ 901.28 Rule 901(b)(6) Example—Evidence About a Telephone Conversation

Page 788: Add to footnote 129:

[129] *But see* Hansen v. PT Bank Negara Indon. (Persero), 706 F.3d 1244 (10th Cir. 2013) (plaintiff was unable to properly establish that individuals with whom he spoke on the telephone actually worked for the defendant BNI, a Pakistan bank; plaintiff merely called a number that he found on a purported BNI website that no longer existed, and there was no evidence that the number had ever been assigned to that bank by the telephone company).

Chapter 902

Rule 902. Evidence That Is Self-Authenticating

§ 902.11 Rule 902(5) Official Publications

Page 822: Add text at the end of § 902.11:

Information contained on websites purportedly maintained by foreign entities may be admissible under this rule, but only if the foreign government's sponsorship of those sites can be readily verified through the internet.[42.1]

[42.1] Qiu Yun Chen v. Holder, 715 F.3d 207 (7th Cir. 2013) (in application by Chinese woman for asylum, the Court could rely on a document posted on the Chinese Government's official website; a document posted on a government website is presumptively authentic if government sponsorship can be verified by visiting the website). *But see* Hansen v. PT Bank Negara Indon. (Persero), 706 F.3d 1244 (10th Cir. 2013) (the alleged website of a foreign bank is not self-authenticating and does not fall within the definition of a "book, pamphlet, or other publication purporting to be issued by a public authority"; information retrieved from such a website does not have sufficient indicia of reliability to justify self-authentication, because the risk of possible fraud or forgery is substantial). United States v. Vayner, 769 F.3d 125 (2d Cir. 2014) (government did not provide sufficient basis from which jury could conclude that printout was defendant's profile page from Russian social networking website, since defendant may not have created or controlled that profile page; even though his name, photograph, and some details about his life were on that page, there was no evidence that he had created that page or was responsible for its contents, and the mere existence of a webpage with someone's name and photograph does not permit a reasonable conclusion that the page was created by that person or on his behalf).

§ 902.20 Rule 902(11) and (12) Certified Domestic and Foreign Records of a Regularly Conducted Activity

Page 832: Add to footnote 93:

[92] *See also* United States v. Komasa, 767 F.3d 151 (2d Cir. 2014) (loan application files were admissible as self-authenticating business records even though Government failed to provide defendants with the required written notice; the absence of written notice may be excused where the defendants had actual notice of Government's intent through its oral representations of a plan to proffer the documents as self-authenticating and the Government provided copies of the records long before trial).

ARTICLE X.

CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Chapter 1001

Rule 1001. Definitions That Apply to This Article

§ 1001.1 The Best Evidence Rule—An Overview

Page 841: Add to footnote 7:

[7] United States v. Nelson, 732 F.3d 504 (5th Cir. 2013) (opinion of a witness with personal or expert knowledge pertaining to some document admitted at trial, if helpful, is not objectionable on the ground that the document "speaks for itself." The original writings rule, Rule 1002, should not be misunderstood as a "best evidence" device to exclude otherwise admissible opinion testimony interpreting a writing after it has been introduced into evidence, although such evidence may be excluded under Rule 403 if it is needlessly cumulative);

§ 1001.13 Duplicates—In General

Page 850: Add to footnote 48:

[48] United States v. Chapman, 804 F.3d 895 (7th Cir. 2015) (data recorded on a computer may be played for a jury after it has been copied onto a DVD; the DVD is a "duplicate" because the computer's software was an electronic process that reproduced a true and accurate copy of the original recording on the DVD);

Chapter 1002

Rule 1002. Requirement of the Original

§ 1002.3 Application of the Best Evidence Rule; Proving the Contents of Writings, Recordings, and Photographs

Page 856: Add to footnote 23:

[23] United States v. Mendiola, 707 F.3d 735 (7th Cir. 2013) (where transcript of wiretapped phone call was admitted without objection and the defense never requested that the government submit the original recording to the jury, the Best Evidence Rule was not violated when prosecution witness offered opinion testimony identifying one voice on the recording as that of the accused; the witness was not proving the contents of the recording, but merely identifying the voice on the recording);

Chapter 1004

Rule 1004. Admissibility of Other Evidence of Content

§ 1004.2 Originals Lost or Destroyed—An Overview

Page 869: Add to footnote 10:

[10] United States v. Flanders, 752 F.3d 1317 (11th Cir. 2014) (after detective testified that audio recording of defendant's statements had been inadvertently destroyed, the best evidence rule did not forbid the Government from offering a transcript of that recording, since there was no evidence that the transcript was untrustworthy);

Chapter 1006

Rule 1006. Summaries to Prove Content

§ 1006.1 Summaries, Charts, and Calculations—In General

Page 887: Add to footnote 11:

[11] United States v. Hawkins, 796 F.3d 843 (8th Cir. 2015) (although Rule 1006 allows the use of summaries, charts, or calculations to prove the content of otherwise admissible for

luminous writings or recordings, that rule does not allow the creation or admission of documents that also summarize the testimony of witnesses at the trial);

§ 1006.3 Requirement of Availability of Originals or Duplicates

Page 889: Add to footnote 20:

[20] United States v. Appolon, 715 F.3d 362 (1st Cir. 2013) (the district court did not err in admitting the testimony of a witness who summarized voluminous documentary evidence, as well as certain charts used during that testimony, even though the summary testimony addressed evidence not admitted at trial; Rule 1006 requires only that the summarized documents be produced for inspection, and they need not themselves be introduced into evidence);

§ 1006.4 Laying the Proper Foundation

Page 889: Add to footnote 23:

[23] United States v. Fahnbulleh, 752 F.3d 470 (D.C. Cir. 2014) (although a summary should normally be introduced at trial by the witness who prepared it, the district court properly admitted a summary of over 10,000 pages of raw data contained in 36 government binders despite the fact that the witness who testified about the summary did not prepare it himself, because he supervised the team of auditors who reviewed the raw data and produced the summary and he reviewed it);

Appendix A

Advisory Committee Notes to The Federal Rules of Evidence

ARTICLE VIII. HEARSAY

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

Page 1085: Add to Rule 801:

ADVISORY COMMITTEE NOTE TO THE 2014 AMENDMENT. Rule 801(d)(l)(B), as originally adopted, provided for substantive use of certain prior consistent statements of a witness subject to cross-examination. As the Advisory Committee noted, "[t]he prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally."

Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that Rule was limited. The Rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The Rule did

not, for example, provide for substantive admissibility of consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness's testimony. Nor did it cover consistent statements that would be probative to rebut a charge of faulty memory. Thus, the Rule left many prior consistent statements potentially admissible only for the limited purpose of rehabilitating a witness's credibility. The original Rule also led to some conflict in the cases; some courts distinguished between substantive and rehabilitative use for prior consistent statements, while others appeared to hold that prior consistent statements must be admissible under Rule 801(d)(l)(B) or not at all.

The amendment retains the requirement set forth in Tome v. United States, 513 U.S. 150 (1995): that under Rule 801(d)(l)(B), a consistent statement offered to rebut a charge of recent fabrication of improper influence or motive must have been made before the alleged fabrication or improper inference or motive arose. The intent of the amendment is to extend substantive effect to consistent statements that rebut other attacks on a witness—such as the charges of inconsistency or faulty memory.

The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible bolstering of a witness. As before, prior consistent statements under the amendment may be brought before the factfinder only if they properly rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403. As before, the trial court has ample discretion to exclude prior consistent statements that are cumulative accounts of an event. The amendment does not make any consistent statement admissible that was not admissible previously—the only difference is that prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.

Rule 803. Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness

Page 1103: Add to Rule 803:

ADVISORY COMMITTEE NOTE TO THE 2014 AMENDMENT. Subdivision (6) The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception—regular business with regularly kept record, source with personal knowledge, record made timely, and foundation testimony or certification—then the burden is on the opponent to show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. It is appropriate to impose this burden on opponent, as the basic admissibility requirements

are sufficient to establish a presumption that the record is reliable.

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point. A determination of untrustworthiness necessarily depends on the circumstances.

Subdivision (7) The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception—set forth in Rule 803(6)—then the burden is on the opponent to show that the possible source of the information or other circumstances indicate a lack of trustworthiness. The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

Subdivision (8) The Rule has been amended to clarify that if the proponent has established that the record meets the stated requirements of the exception—prepared by a public office and setting out information as specified in the Rule—then the burden is on the opponent to show that the source of information or other circumstances indicate a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. Public records have justifiably carried a presumption of reliability, and it should be up to the opponent to "demonstrate why a timetested and carefully considered presumption is not appropriate." Ellis v. International Playtex, Inc., 745 F.2d 292, 301 (4th Cir. 1984). The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point. A determination of untrustworthiness necessarily depends on the circumstances.