WEISSENBERGER'S FEDERAL EVIDENCE

2021
Cumulative Supplement

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Library of Congress Card Number: 2011041534

ISBN: 978-1-5934-5814-0 (print)

Cite this publication as:
Weissenberger's Federal Evidence, § [0:000] (Matthew Bender, 7th ed. & 2021 Supp.)
Example:
Weissenberger's Federal Evidence, § 410.4 (Matthew Bender, 7th ed. & 2021 Supp.)
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(9/2021–Pub.4341)

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.

(15) ***Statements in Documents That Affect an Interest in Property.***

Page 16: Replace subdivision (16) with the following:

(16) ***Statements in Ancient Documents.*** A statement in a document that was prepared before January 1, 1998, and whose authenticity is established.

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; 12-1-17

ARTICLE IX.

AUTHENTICATION AND IDENTIFICATION

Rule 902. Evidence That Is Self- Authenticating

(12) ***Certified Foreign Records of a Regularly Conducted Activity.***

Page 20: Add at end of Rule 902:

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

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

Page 20: Add to the amendment history as follows:
; 12-1-17)

ARTICLE I.
GENERAL PROVISIONS

Chapter 102
Rule 102. Purpose

§ 102.2 Interpretation and Construction

Page 32: Add to footnote 23:

[23] *See also* Daniel v. Cook County, 833 F.3d 728 (7th Cir. 2016) (the Committee Notes are entitled to respectful consideration but they are not always accurate, and are not binding upon the federal courts in the interpretation of the Rules of Evidence).

Chapter 103
Rule 103. Rulings on Evidence

§ 103.1 Rulings on Evidence—In General

Page 34: Add to footnote 2:

[2] Lane v. D.C., 887 F.3d 480 (D.C. Cir. 2018) (when a pretrial ruling was not erroneous on the basis of the evidence before the court at that time, but the ruling is arguably proved erroneous in light of subsequent evidence offered at trial, the pretrial ruling will not be reversed on appeal unless the objecting party renewed its objection at trial).

§ 103.2 Degrees of Error in Evidentiary Rulings

Page 36: Add to footnote 15:

[15] United States v. Diaz, 951 F.3d 148 (3d Cir. 2020) (where improper evidence is admitted without an objection, it is less likely to impact the integrity or public reputation of the proceedings, and therefore less likely to serve as a basis for plain error, if the prosecutor did not rely on or mention the testimony in summation);

§ 103.3 Requirements for Preservation of Error for Appeal

Page 37: Add to footnote 18:

[18] United States v. Hawkins, 934 F.3d 1251, 1264 (11th Cir. 2019) ("tepid objections" are not sufficient to preserve an issue for appeal; defense counsel failed to preserve an objection when the record contained only "rumblings of concern about the phrasing of questions," and he neither persisted in objecting nor moved to strike any of the problematic testimony when it was given); *In re* Deepwater Horizon, 824 F.3d 571 (5th Cir. 2016) (a general objection to all of the evidence offered by an opposing party "to the extent that it is hearsay" is insufficient to preserve the issue for appeal; a loosely formulated and imprecise objection will not preserve error); 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 19:

[19] United States v. Cummings, 858 F.3d 763 (2d Cir. 2017) (after witness denied that he heard anything directly from the defendant, and the prosecutor asked whether he had heard anything "indirectly," the defendant's immediate one-word "objection," although general, was adequate to preserve his hearsay objection for appeal, since that ground for the objection was clear from the context); United States v. Gordon, 875 F.3d 26 (1st Cir. 2017) ("although surrounding circumstances sometimes may dress an otherwise bare objection and make the reason for the objection obvious," that principle does not apply where "the record suggests a multitude of possible grounds for the objection");

Page 38: Add to footnote 20:

[20] United States v. Graham, 981 F.3d 1254 (11th Cir. 2020) (even if the District Court did not ask for the defendant's response before sustaining a government objection, the defendant must make an effort to provide the court with an offer of proof concerning the excluded evidence, and must both describe the evidence and identify the grounds for its admission, so the Court of Appeals can examine both the propriety and the harmfulness of the ruling); United States v. Morrison, 833 F.3d 491 (5th Cir. 2016) (when district court refused to allow defense counsel more time to question the accused after nearly two hours of direct examination, defense counsel's failure to make a contemporaneous offer of proof as to what questions he still needed to ask failed to preserve whatever objection he had to the alleged violation of defendant's constitutional right to testify); 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 39: Add to footnote 23:

[23] United States v. Altvater, 954 F.3d 45 (1st Cir. 2020) (the rule requiring an offer of proof applies even on cross-examination; when the defendant made no offer of proof concerning the details that he sought to admit through cross-examination of a prosecution witness, it was not possible to determine whether the adverse ruling prejudiced his defense or constituted reversible error);

Page 40: Add to footnote 24:

[24] United States v. Willis, 826 F.3d 1265 (10th Cir. 2016) (when defense counsel merely stated "objection" to a question, that general objection was not sufficient to preserve for appeal his claim that the question asked a government agent to vouch for the credibility of a prosecution witness, and such a claim would therefore be reviewed only for plain error);

Page 40: Add to footnote 27:

[27] United States v. Saunders, 826 F.3d 363 (7th Cir. 2016) (an objection on relevance grounds does not preserve a claim that the prejudicial effect of the evidence outweighs its probative value); 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 42: Add to footnote 32:

White v. Hefel, 875 F.3d 350 (7th Cir. 2017) (a party cannot seek reversal based on the erroneous admission of evidence he asked the trial judge to admit. "A party who invites error cannot later complain of it, even if the error is plain.");

Page 42: Add to footnote 33:

[33] *See also* United States v. Williams, 930 F.3d 44 (2d Cir. 2019) (the appeals court has discretion to correct plain errors that were forfeited because not timely raised in the district court, but no such discretion applies when there has been true waiver; waiver extinguishes the claim altogether).

Page 43: Add to footnote 34:

[34] United States v. LeBeau, 949 F.3d 334 (7th Cir. 2020) (when prosecution evidence is admitted with no objection, a defendant seeking reversal based upon plain error must show that the evidence was so obviously and egregiously prejudicial that the trial court should have excluded it even without any request from the defense, and that no reasonable person could argue for its admissibility); United States v. Graham, 981 F.3d 1254 (11th Cir. 2020) (when a party tries to admit evidence for one purpose, it cannot be plain error for the district court not to admit it for another purpose never named by the party);

Page 43: Add to footnote 37:

[37] Walker v. Groot, 867 F.3d 799 (7th Cir. 2017) (plain error requires extraordinary circumstances resulting in a miscarriage of justice, and such instances are rare in civil cases, at least where liberty is not at stake and the public interest is minimal);

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] Pittman by and through Hamilton v. County of Madison, Illinois, 970 F.3d 823 (7th Cir. 2020) (pretrial ruling was sufficiently definitive to preserve the point for appeal, even though it contained passing boilerplate reference to the fact that rulings on motions in limine are "subject to change," because the judge never invited the defendant to renew his challenge during the trial, and made it plain that he thought the evidence was "clearly inadmissible"); City of Pomona v. SQM N.A. Corp., 866 F.3d 1060 (9th Cir. 2017) (even though district judge said his in limine evidentiary rulings were "quasi tentative, depending on how the evidence comes in," the losing party was not required to renew his objection at trial to preserve the point for appeal, because no facts or circumstances had arisen by that point in the trial that might have warranted reversal of the pretrial ruling, and because the District Court promptly denied a request to voir dire the witness at the point the evidence was offered); 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 45:

[45] United States v. Bradford, 905 F.3d 497 (7th Cir. 2018) (when a district judge makes a confusing pretrial ruling on a defendant's motion in limine that "appears to simultaneously accept the government's argument and punt the whole issue over to trial," the ruling is not definitive, and the defendant must therefore renew that objection at trial to preserve the point for appeal);

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 62: 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.); *but see* United States v. LeBeau, 867 F.3d 960 (8th Cir. 2017) (defendant was properly precluded from offering evidence that police officers falsified his signature on a form consenting to the search; whether he voluntarily consented to the search was a matter for the court to decide, not the jury, and had no direct connection to whether he was guilty of cocaine possession).

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 71: Add to footnote 2:

[2] United States v. Altvater, 954 F.3d 45 (1st Cir. 2020) (after the government offered portions of the defendant's testimony at a deposition, he was properly prevented under the hearsay rule from offering the other parts of his own testimony; Rule 106 and the rule of completeness ordinarily come into play only to clarify a misunderstanding or a distortion that can only be prevented by introducing the full text of the statement); United States v. Santos, 947 F.3d 711 (11th Cir. 2020) (under Rule 106, the exculpatory portions of a defendant's post-arrest statement are not admissible at his request merely because the court has admitted a portion of his statement, but only if the additional material is necessary to explain or clarify the portion that has been introduced); United States v. Thiam, 934 F.3d 89 (2d Cir. 2019) (after the prosecutor played excerpts of the defendant's post-arrest interview with the FBI, the defendant had no right to play other portions of the recording under the "rule of completeness." Rule 106 provides that an omitted portion of a statement must be admitted if necessary to explain the admitted portion, to place it in context, to avoid misleading the jury, or to ensure fair understanding of the admitted portion, but only when where admission of the statement in redacted form distorts its meaning or excludes information substantially exculpatory of the declarant); United States v. Williams, 930 F.3d 44 (2d Cir. 2019) (although prosecutor offered evidence that the defendant admitted to knowing possession of a gun found in his vehicle, the court was not required to admit evidence of an earlier portion of the interview in which the defendant originally denied knowledge of the gun. To justify admission under the doctrine of completeness, defendant had to demonstrate that admission of his initial statements denying ownership of the gun was necessary to explain his later statements that the gun was his, to place these statements in context, and to avoid misleading the jury; the mere fact that a suspect denies guilt before admitting it does not—without more—mandate the admission of his self-serving denial; his confession was simply a reversal of his original position);

Page 72: Add to footnote 5:

[5] United States v. Sanjar, 876 F.3d 725 (5th Cir. 2017) (after a federal agent testifies about incriminating statements made by the defendant after his arrest, defense attorney is not allowed on cross examination to ask the agent to confirm other exculpatory statements made by the defendant in that same interview. The other statements, including assertions of innocence, were not needed to qualify, explain, or place into context the statements made by the agent on direct examination); United States v. Williston, 862 F.3d 1023 (10th Cir. 2017) (after a portion of a video has been played for a jury, the rule of completeness does not give the opposing party the right to play other portions of the recording containing inadmissible hearsay merely because the portions played for the jury were incomplete or did not tell the entire story; the rule only applies where the additional portions of the recording would be necessary to clarify or explain

segments that would otherwise be potentially misleading);

Page 73: Add to footnote 9:

[9] United States v. Williams, 930 F.3d 44 (2d Cir. 2019) (a party cannot circumvent the hearsay rule simply by invoking the doctrine of completeness so as to render otherwise inadmissible evidence admissible for its truth, but when the omitted portion of a statement is properly introduced to correct a misleading impression or place in context that portion already admitted, it is not hearsay, because it is being used not for its truth but to explain and ensure a fair understanding of the evidence that has already been introduced by placing it in its proper context);

Page 73: Add to footnote 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. Oloyede, 933 F.3d 302 (4th Cir. 2019) (Rule 106 applies only to writings and recorded statements, and "we doubt that a residual common law rule of completeness survives Rule 106's codification." But any such common law rule cannot be used to justify the admission of inadmissible hearsay; after admitting a portion of defendant's incriminating oral statement to the police, the district court therefore did not abuse its discretion by refusing to admit his entire post-arrest statement); 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);

Page 74: Add to footnote 12:

[12] United States v. Williams, 930 F.3d 44 (2d Cir. 2019) (although Rule 106 is limited to writings and recorded statements and does not apply to oral conversations, the common law rule of completeness, as now reflected in Rule 611(a), is substantially broader than Rule 106, covering not only writings taken out of context, but also the truncated use of acts, declarations, and conversations, and obligates district courts to require a party offering testimony as to an utterance to present fairly the substance and context of that statement);

ARTICLE II.
JUDICIAL NOTICE

Chapter 201

Rule 201. Judicial Notice of Adjudicative Facts

§ 201.1 Judicial Notice of Adjudicative Facts—In General

Page 78: Add to footnote 3:

[3] White v. Hefel, 875 F.3d 350 (7th Cir. 2017) (in a civil suit for illegal search of plaintiff's home during police pursuit of a man into the house, it was improper for the trial court to take judicial notice of the facts that were admitted by the intruder in the transcript of his guilty plea hearing, since such facts were not established as true beyond all dispute).

§ 201.2 "Adjudicative" versus "Legislative" Facts

Page 79: Add to footnote 5:

[5] Robinson v. Liberty Mut. Ins. Co., 958 F.3d 1137 (11th Cir. 2020) (in deciding the ordinary meaning of terms contained in a contract or a statute, a district court may take judicial notice of dictionary definitions without first affording the parties a hearing; Rule 201 requires hearing only when taking notice of the adjudicative facts that are developed in a particular case, as opposed to legislative facts, which are established truths and facts that do not change from case to case but apply universally);

§ 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] United States v. Garcia, 855 F.3d 615 (4th Cir. 2017) (trial court properly took judicial notice of details on federal government website explaining the naturalization process; courts routinely take judicial notice of information found on state and federal government websites); 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 11:

[11] Estate of Lockett v. Fallin, 841 F.3d 1098 (10th Cir. 2016) (when courts take judicial notice of the

contents of news articles, they do so only for proof that something is publicly known, not for the truth of the article's assertions; any reasonable doubt as to the propriety of judicial notice must be promptly resolved against taking notice);

Page 81: Add to footnote 12:

[12] *But see* Mays v. Dart, 974 F.3d 810 (7th Cir. 2020) (Court of Appeals would not take judicial notice of the contents of a report by the Centers for Disease Control, because the author of the report was unclear and its contents were not incontrovertible but were arguably subject to reasonable dispute).

Page 81: Add to footnote 14:

[14] United States v. Compton, 830 F.3d 55 (2d Cir. 2016) (the court took judicial notice that Chateaugay, New York, is on the border between the United States and Canada); 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).

§ 201.6 Hearing in Support or Opposition

Page 84: Add to footnote 23:

[23] In the Matter of Lisse, 905 F.3d 495 (7th Cir. 2018) (Easterbrook, J., in chambers) (the right place to propose or request judicial notice, once case is in court of appeals, is in the appellate brief, rather than by motion; party seeking judicial notice should refer to evidence in brief and explain why it is relevant and subject to judicial notice, and if assertion is questionable, opposing litigant can protest in its own brief); United States v. Brugnara, 856 F.3d 1198 (9th Cir. 2017) (when taking judicial notice, a court must announce that it is doing so on the record to ensure that the parties have an opportunity to be heard upon request, but the failure to do so does not require reversal if there would have been no colorable basis to oppose the taking of judicial notice);

§ 201.7 Time of Taking Judicial Notice

Page 84: Add to footnote 25:

[25] High Desert Relief, Inc. v. U.S., 917 F.3d 1170 (10th Cir. 2019) (Court of Appeals would take judicial notice of IRS Publication outlining IRS audit procedures, even though neither party asked the Court to do so or submitted a copy of that document to the court);

Page 84: Add to footnote 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 87: Add to footnote 32:

[32] Teixeira v. County of Alameda, 873 F.3d 670 (9th Cir. 2017) (Court of Appeals could take judicial

notice of county's population);

Page 88: Add to footnote 38:

[38] Williams v. Employers Mut. Cas. Co., 845 F.3d 891 (8th Cir. 2017) (trial court could take judicial notice that radium is a solid that emits alpha particles, as this information was confirmed in numerous widely available academic sources);

Page 89: Add to footnote 44:

[44] United States v. Lopez, 880 F.3d 974 (8th Cir. 2018) (after the government proved criminal acts were committed in Sioux City, the District Court properly took judicial notice that Sioux City lies within the geographic bounds of the Northern District of Iowa; venue as a jurisdictional fact is a proper subject for judicial notice); United States v. Compton, 830 F.3d 55 (2d Cir. 2016) (the court took judicial notice that Chateaugay, New York, is on the border between the United States and Canada);

Page 89: Add to footnote 45:

[45] Wilding v. DNC Services Corp., 941 F.3d 1116 (11th Cir. 2019) (Court of Appeals would take judicial notice that United States Senator Bernie Sanders endorsed Secretary Hillary Clinton as the Democratic Party's presidential nominee on July 12, 2016; courts may take judicial notice of undisputed historical and political facts); *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 89: Add to footnote 45:

[46] Wilding v. DNC Services Corp., 941 F.3d 1116 (11th Cir. 2019) (Court of Appeals would take judicial notice that United States Senator Bernie Sanders endorsed Secretary Hillary Clinton as the Democratic Party's presidential nominee on July 12, 2016; courts may take judicial notice of undisputed historical and political facts); *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 89: Add to footnote 50:

[50] Garcia v. Salvation Army, 918 F.3d 997, 999(9th Cir. 2020) (courts may take judicial notice of records and reports of administrative bodies, including the Salvation Army's nonprofit status, as reflected in the publicly available IRS determination letters);

Page 90: Add to footnote 51:

[51] Paez v. Sec., Fla. Dept. of Corrections, 947 F.3d 649 (11th Cir. 2020) (in dismissing habeas corpus petition, a federal judge could properly take judicial notice from online state court records of the dates of relevant events concerning the procedural history of the criminal prosecution in state court);

Page 90: Add to footnote 51:

But see Tobey v. Chibucos, 890 F.3d 634 (7th Cir. 2018) (a court may generally take judicial notice of public records, but only if they are not subject to reasonable dispute; court records, like any other documents, may contain erroneous information, and it would be improper to take judicial notice of the date on which an individual was arrested based upon court records that were contradicted under oath by the arrestee's sworn insistence that the court records to the contrary were incorrect or falsified).

Page 90: Add to footnote 52:

[52] Hurd v. D.C., Govt., 864 F.3d 671 (D.C. Cir. 2017) (a federal court may take judicial notice of judicial filings from other cases, even in other courts, as a record of what was said in those documents, but cannot rely on judicial notice to establish the truth of what was asserted in those documents; a court cannot take judicial notice of the truth of a document simply because somebody put it in a court file); *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);

Page 90: Add to footnote 53:

[53] Estate of Lockett v. Fallin, 841 F.3d 1098 (10th Cir. 2016) (in civil action seeking damages for inmate's execution, the court would not take judicial notice of details concerning his execution that were set forth in the dissenting opinion of a Supreme Court justice; when a court takes judicial notice of another court's opinion, it may do so only concerning the existence of the opinion, and not for the truth of the facts recited in that opinion);

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] United States v. West, 877 F.3d 434 (1st Cir. 2017) (as a precursor to admissibility, the government must present extrinsic evidence of guilt sufficient to support an inference that the defendant's flight was not merely an episode of normal travel, but the product of a guilty conscience related to the crime alleged, so that a jury does not infer guilt based solely on defendant's meanderings. The District Court properly allowed the jury to view an eight-minute video of the defendant attempting to elude the police after he was pulled over by a police officer).

Page 114: Add to footnote 3:

Adams v. Toyota Motor Corp., 867 F.3d 903 (8th Cir. 2017) (in products liability litigation, evidence of other accidents involving the same device may be relevant to prove the defendant's notice of defects, its ability to correct known defects, the magnitude of the danger, the product's lack of safety for its intended uses, or causation, as long as the accidents occurred under substantially similar circumstances, even if they did not occur in precisely the same manner).

Page 114: Add to footnote 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);

Page 115: Add to footnote 3:

A criminal defendant is also generally entitled to offer evidence that someone else may have committed the charged crime. United States v. Espinoza, 880 F.3d 506 (9th Cir. 2018) (in prosecution for importing methamphetamine that was concealed in her car, defendant should have been allowed to offer circumstantial evidence to support her theory that her neighbor in Mexico—who had the motive, knowledge, and opportunity to do so—set her up as a "blind mule" to transport methamphetamine into the United States on his behalf).

§ 401.3 Standard of Relevance

Page 115: Add to footnote 6:

[6] United States v. Hendricks, 921 F.3d 320 (2d Cir. 2019) (in bank robbery prosecution, government was properly allowed to ask bank tellers how they felt after the robbery and how they were unable to return to work, because such "victim impact" testimony was relevant to show that they were "intimidated" at the time of the robbery, which was an essential element of the offense); United States v. Lopez, 913 F.3d 807 (9th Cir. 2019) (criminal defendant raising defense of duress should be allowed to offer expert testimony on battered woman syndrome to help dispel the ordinary lay person's perception that a woman in a battering relationship is free to leave at any time, and to provide jury with an understanding of why victims of abuse sometimes make inconsistent statements or act in ways that appear counterintuitive to a layperson); United States v. Oloyede, 933 F.3d 302 (4th Cir. 2019) (when fraud defendants failed to disclose substantial sums flowing through their bank accounts on their tax returns, bankruptcy filings, and food stamp applications, those facts were relevant and admissible to prove that the funds were ill-gotten and that they knew that the funds coming through the account were illegitimate; such evidence was not being offered merely to show that the defendants were guilty of other crimes such as tax evasion); 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);

Page 116: Add to footnote 9:

[9] Doornbos v. City of Chicago, 868 F.3d 572 (7th Cir. 2017) (in civil suit against police officer for excessive force, evidence that plaintiff possessed marijuana at the time of his arrest was relevant, even though the officer did not know that fact at the time of the arrest, because it could help explain why the plaintiff might have reacted in the way the arresting officers alleged);

§ 401.6 Relevance and Materiality

Page 118: Add to footnote 14:

[14] United States v. Wardlow, 830 F.3d 817 (8th Cir. 2016) (in prosecution for transportation of a minor for prostitution, the consent or willing participation of a minor is insignificant and irrelevant; when sexual assaults are committed upon children, consent is not a defense, because such victims, because of ignorance or deceit, do not understand what is happening to them);

Page 118: Add to footnote 15:

[15] United States v. Buendia, 907 F.3d 399 (6th Cir. 2018) (school principal charged with bribery had no right to offer evidence that she used the money to fix a leaky roof and otherwise benefit the school; "even if a defendant spent ill-gotten funds for commendable purposes, that is simply not a defense to this kind of bribery offense"); United States v. Fifer, 863 F.3d 759 (7th Cir. 2017) (in prosecution for producing pornographic images of 16-year-old victim, the trial court properly prevented the defendant from offering evidence that he misjudged her age and that the two had a loving relationship; defendant's knowledge of the victim's age is not an element of the offense of producing child pornography, and the government need not prove that sexual contact between the defendant and the victim was caused solely by a desire to create illegal visual depictions); 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);

§ 401.9 Relevance Compared with Weight and Sufficiency of the Evidence

Page 120: Add to footnote 20:

[20] United States v. Espinoza, 880 F.3d 506 (9th Cir. 2018) (a criminal defendant may offer any evidence that logically tends to prove that some other party may have committed the crime for which the defendant is on trial, and the district judge may not exclude the evidence merely because he believes that the defendant's theory seems speculative or fanciful); *see also*

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).

Page 126: Add to footnote 3:

[3] In weighing the probative value of the evidence, however, the trial judge may not exclude testimony merely because of his doubts as to its reliability; that is an issue for the jury to decide. United States v. Hano, 922 F.3d 1272 (11th Cir. 2019) (Rule 403 does not permit exclusion of evidence because the judge does not find it credible, or give the district court the authority to "protect" the jury from a witness's allegedly suspect testimony, unless the testimony is "incredible as a matter of law," meaning that it is unbelievable on its face—testimony as to facts the witness physically could not have possibly observed or events that could not have occurred under the laws of nature); United States v. Scully, 877 F.3d 464 (2d Cir. 2017) (at a criminal fraud trial, the district court abused its discretion in refusing to allow the defendant to testify how he relied upon the advice of an attorney that his business plans were legal; such evidence was relevant to his advice of counsel defense and posed no real risk of unfair prejudice to the government, despite the government's fears that such self-serving testimony might be false. The possibility that

testimony might be false or misleading is for the jury to decide, and is not a factor to be weighed by the judge against the receipt of otherwise admissible evidence).

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

Page 127: Add to footnote 9:

[9] United States v. Novak, 866 F.3d 921 (8th Cir. 2017) ("Given the rigor of Rule 403 analysis and the broad discretion afforded the district court to admit probative evidence even when prejudicial, it is nearly impossible for a district court's admission of relevant evidence without a Rule 403 objection to be plain error").

Page 127: Add to footnote 11:

[11] United States v. Blake, 868 F.3d 960 (11th Cir. 2017) (in child sex trafficking prosecution, it was permissible for the alleged victim to describe the abuse she suffered as a child; the evidence was relevant because it explained her motive for running away from home, and was not unfairly prejudicial because it was clear that the abuse was not inflicted by the defendants); United States v. Cummings, 858 F.3d 763 (2d Cir. 2017) (the unfairly prejudicial effect of evidence is mitigated where the evidence is no more sensational or disturbing than the crimes for which the defendant is on trial);

Page 129: Add to footnote 14:

[14] United States v. Jefferson, 975 F.3d 700 (8th Cir. 2020) (when defendant refused to stipulate that he was at a home when officers executed a search warrant, it was not unfairly prejudicial to admit a photograph of him sitting handcuffed on a sofa during the search, when the court cautioned the jury that the fact he was handcuffed was not evidence of guilt and was merely for the safety of the officers); United States v. Garcia-Lagunas, 835 F.3d 479 (4th Cir. 2016) (in drug conspiracy prosecution, evidence that defendant was an alien illegally in the United States was not properly admitted as evidence of his "identity" despite government evidence that the cocaine was being distributed in that area by a Mexican man; the probative value of that evidence was substantially outweighed by its unfair prejudice, because the government obviously could have offered proof of his Mexican nationality without mentioning his criminal status as an illegal alien); 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] *See also* United States v. Green, 873 F.3d 846 (11th Cir. 2017) (in a prosecution of a man charged as a felon in possession of a firearm, as long as defendant is willing to stipulate that he has been convicted of a felony, it is normally an abuse of discretion to admit evidence that he was convicted of more than one felony; evidence of such additional convictions is cumulative and unfairly prejudicial). *But see* United States v. Ross, 837 F.3d 85 (1st Cir. 2016) (even though defendant stipulated that his computer contained images of child pornography, the District Court still properly admitted evidence of a limited number of the images, solely for the purpose of demonstrating his knowledge and that he could not have somehow stumbled upon them without immediately realizing their graphic content); 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. Bailey, 840 F.3d 99 (3d Cir. 2016) (a court ruling upon an objection under Rule 403 must provide a detailed explanation of reasons on the record for its ruling; if the court fails to do so, the appeals court will not afford that ruling the deferential abuse of discretion standard of review); 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. Smith, 967 F.3d 1196 (11th Cir. 2020) (in robbery prosecution, the government was properly allowed to show the jury a YouTube video created by the defendant in which he was shown brandishing a pistol and glorifying violence; the risk that the jury would view him as a violent criminal was outweighed by the significant probative value of the video, which corroborated the testimony of the victim that he had shown her the same video before he robbed her); United States v. Guzmán-Montañez, 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. Portillo, 969 F.3d 144 (5th Cir. 2020) (it is highly improper to taint a defendant's character through guilt by association, or by proving that he associates with unsavory characters who have been the subject of a criminal conviction, unless those other individuals are connected to the defendant because of their alleged participation in a conspiracy, in which case the criminality of the others in connection with the conspiracy is highly relevant); 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. Woods, 978 F.3d 554 (8th Cir. 2020) (even though an FBI agent was undisputedly guilty of wrongful destruction of data on a laptop computer, and such facts might have been potentially helpful to the defense, the trial court did not abuse its discretion in excluding evidence of the agent's "bad acts" when they were only tangential and carried the risk that the jury might not carefully consider the evidence of guilt out of a desire to punish the government); United States v. Baker, 928 F.3d 291 (3d Cir. 2019) (in prosecution for stealing public property, trial court properly prevented the defendant's wife from testifying about her breast cancer and related medical expenses; even though such evidence would have some marginal relevance in demonstrating that defendant had not stolen for the purpose of home improvement, it would have carried an unacceptable risk of unfair prejudice by appealing to the jury's sense of pity and sympathy); United States v. Martinez, 923 F.3d 806 (10th Cir. 2019) (in prosecution for attempting to entice a minor into sexual activity, the district court properly prevented the defendant from evidence about his extensive history of mental health problems; although is generally appropriate to humanize a witness by letting the witness tell the jury a few things about himself, courts must be cautious about admitting marginally relevant mental-health evidence because the jury may think that it provides an

excuse for misconduct or it may otherwise generate sympathy for the defendant); Smith the Baltimore City Police Department, 840 F.3d 193 (4th Cir. 2016) (in civil action against police officers for illegal arrest, evidence that the plaintiff had been arrested on three other occasions was unfairly prejudicial and improperly admitted; its minimal probative value on the question of damages—to suggest that yet another arrest would not have been unduly upsetting to her—was outweighed by the risk the jury would treat it as evidence of her criminal character or tendency to break the law); United States v. Schneider, 801 F.3d 186 (3d Cir. 2015) (evidence 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).

Page 131: Add to footnote 22:

[22] United States v. Bailey, 840 F.3d 99 (3d Cir. 2016) (in a criminal drug trafficking conspiracy case, the government was properly allowed to offer testimony about the commission of a murder by some of the gang's associates, despite the stipulation by the defendants, but the admission of a graphic video of the murder was an abuse of discretion, because it was unfairly prejudicial and had minimal probative value in depicting an event that had already been thoroughly proven by the testimonial evidence);

Page 131: Add to footnote 23:

[23] United States v. Roberts, 919 F.3d 980 (6th Cir. 2019) (in prosecution for selling stolen military equipment on eBay, defendant was properly precluded from proving that others had also illicitly sold stolen goods over the internet, to support his claim that he may have thought that his conduct was lawful; the evidence more likely would have confused the issues and convinced the jury to acquit on the improper basis that others had committed the same offense with impunity);

§ 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] Barranco v. 3D Sys. Corp., 952 F.3d 1122 (9th Cir. 2020) (district court did not abuse its discretion in refusing to admit findings by an arbitrator who concluded that the defendant was guilty of bad faith; it can be unfairly prejudicial for a jury to learn that some professional factfinder has made findings and determinations to which the jurors might be tempted to defer rather than determining the issues for themselves); United States v. Benjamin Brandon Grey, 891 F.3d 1054 (D.C. Cir. 2018) (at a criminal trial, a judgment from a related civil case should ordinarily be excluded under Rule 403, because of the jury's difficulty in weighing its probative value and the danger that the jury will give it exaggerated weight or improperly regard it as decisive); 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. Wallace, 852 F.3d 778 (8th Cir. 2017) (after criminal defendant chose to testify, trial

judge had the discretion to preclude her from playing a videotaped statement given by the defendant to a government investigator only one hour after the commission of the alleged offense, even though she wanted the jury to consider her credibility one hour after the event rather than four years later, because the evidence was unnecessary and cumulative of her trial testimony); 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

Page 137: Add at beginning of Chapter 404:

Editor's Note: Rule 404 was amended April 27, 2020, effective December 1, 2020. Set forth below is a redline version of the amended rule. The explanatory Advisory Committee Note is also set forth below.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 404. Character Evidence; Other Crimes, Wrongs or ~~Other~~ Acts

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(b) Other Crimes, Wrongs, or ~~Other~~ Acts.

(1) ***Prohibited Uses.*** Evidence of ~~a~~ any other crime, wrong, or ~~other~~ act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) ***Permitted Uses; ~~Notice in a Criminal Case~~.*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. ~~On request by a defendant in a criminal case, the prosecutor must:~~

[1] New material is underlined; matter to be omitted is lined through.

2 FEDERAL RULES OF EVIDENCE

(3) ***Notice in a Criminal Case.*** In a criminal case, the prosecutor must:

(A) provide reasonable notice ~~of the general nature~~ of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it; ~~and~~

(B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and

(C) do so in writing before trial—or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

Committee Note

Rule 404(b) has been amended principally to impose additional notice requirements on the prosecution in a criminal case. In addition, clarifications have been made to the text and headings.

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The notice provision has been changed in a number of respects:

- The prosecution must not only identify the evidence that it intends to offer pursuant to the rule but also articulate a non-propensity purpose for which the evidence is offered and the basis for concluding that the evidence is relevant in light of this purpose. The earlier requirement that the prosecution provide notice of only the "general nature" of the evidence was understood by some courts to permit the government to satisfy the notice obligation without describing the specific act that the evidence would tend to prove, and without explaining the relevance of the evidence for a non-propensity purpose. This amendment makes clear what notice is required.

- The pretrial notice must be in writing—which requirement is satisfied by notice in electronic form. *See* Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually provided.

- Notice must be provided before trial in such time as to allow the defendant a fair opportunity to meet the evidence, unless the court excuses that requirement upon a showing of good cause. *See* Rules 609(b), 807, and 902(11). Advance notice of Rule 404(b) evidence is important so that the parties and the court have adequate opportunity to assess the evidence, the purpose for which it is offered, and whether the requirements of Rule 403 have been satisfied—even in cases in which a final determination as to the admissibility of the evidence must await trial. When

notice is provided during trial after a finding of good cause, the court may need to consider protective measures to assure that the opponent is not prejudiced. *See*, e.g., *United States v. Lopez-Gutierrez,* 83 F.3d 1235 (10th Cir. 1996) (notice given at trial due to good cause; the trial court properly made the witness available to the defendant before the bad act evidence was introduced); *United States v. Perez-Tosta,* 36 F.3d 1552 (11th Cir. 1994) (defendant was granted five days to prepare after notice was given, upon good cause, just before voir dire).

- The good cause exception applies not only to the timing of the notice as a whole but also to the timing of the obligations to articulate a non-propensity purpose and the reasoning supporting that purpose. A good cause exception for the timing of the articulation requirements is necessary because in some cases an additional permissible purpose for the evidence may not become clear until just before, or even during, trial.

- Finally, the amendment eliminates the requirement that the defendant must make a request before notice is provided. That requirement is not found in any other notice provision in the Federal Rules of Evidence. It has resulted mostly in boilerplate demands on the one hand, and a trap for the unwary on the other. Moreover, many local rules require the government to provide notice of Rule 404(b) material without regard to whether it has been requested. And in many cases, notice is provided

when the government moves *in limine* for an advance ruling on the admissibility of Rule 404(b) evidence. The request requirement has thus outlived any usefulness it may once have had.

As to the textual clarifications, the word "other" is restored to the location it held before restyling in 2011, to confirm that Rule 404(b) applies to crimes, wrongs and acts "other" than those at issue in the case; and the headings are changed accordingly. No substantive change is intended.

§ 404.3 Definitions

Page 138: Add to footnote 6:

[6] United States v. Williams, 900 F.3d 486 (7th Cir. 2018) (in sex trafficking prosecution, expert testimony by FBI agent was not forbidden evidence about the character of the defendant, because it was not offered to show that the defendant's flawed character predisposed him to human trafficking, but merely to explain how his actions were consistent with the management of a sex-trafficking scheme. Character

evidence refers to elements of one's disposition, such as honesty, temperance, or peacefulness, which shows a propensity to act a certain way in a certain situation, or evidence of a personality or psychological propensity to prove what the person did).

§ 404.4 Exclusionary Rule as to Character Evidence

Page 140: Add to footnote 18:

[18] This rule therefore does not forbid the admission of evidence of a person's character unless it is used as proof of his alleged conduct. United States v. Williams, 974 F.3d 320 (3d Cir. 2020) (when several government witnesses knew the defendant only by his nickname of "killer," evidence concerning his use of that alias was not unfairly prejudicial, because it was used only to identify him, and not as extrinsic evidence that he had ever committed murder).

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);

Page 140: Add to footnote 21:

[21] Mulligan v. Nichols, 835 F.3d 983 (9th Cir. 2016) (in civil case charging police officer with excessive force when arresting the plaintiff, evidence that the officer had sexually assaulted vulnerable women on other occasions was inadmissible evidence of his prior bad acts that had nothing to do with the excessive force claim).

Page 141: Add to footnote 22:

[22] The low probative value of character evidence is also reflected in the fact that the rule also excludes evidence of the character of persons who are not parties to the case, and who therefore face no real risk of unfair prejudice. United States v. White Plume, 847 F.3d 624 (8th Cir. 2017) (in child abuse prosecution, defendant could not try to prove that his wife was likely to have committed the act by offering evidence that she had abused other children in the past, because that would involve a forbidden use of propensity evidence).

§ 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);

Page 143: Add to footnote 32:

[32] United States v. Wells, 879 F.3d 900 (9th Cir. 2018) (expert testimony that a defendant fits an alleged criminal profile—for example, as a battering parent, pedophile, rapist, or drug courier—may not be offered by the Government in its case-in-chief as substantive evidence of guilt, for such evidence has low probative value, a high potential for unfair prejudice, and is little more than forbidden evidence of the defendant's criminal propensity);

Page 144: Add to footnote 40:

[40] But any character evidence offered by the prosecution on rebuttal must be pertinent to the same character trait raised by the defense evidence. United States v. Hazelwood, 979 F.3d 398 (6th Cir. 2020) (even though a fraud defendant offered character evidence to suggest that he had good business judgment

and would not engage in risky behavior, it was error to allow the government on rebuttal to offer evidence of his deeply offensive racist and misogynistic views; the evidence was not pertinent to the relevant character trait, and extrinsic evidence could not be used for that purpose).

§ 404.10 Character in Issue—Test for Application

Page 152: Add to footnote 69:

[69] United States v. Young, 916 F.3d 368 (4th Cir. 2019) (In prosecution of defendant for attempting to provide material support to a foreign terrorist organization, evidence of Nazi and white supremacist paraphernalia seized from defendant's home was relevant, given that defendant, by asserting entrapment defense, had raised question of his predisposition to commit the offense charged, and that given that Nazism and militant Islamism share common ground—specifically, radical, anti-Semitic viewpoints, so the evidence was probative of his predisposition to support such viewpoints); 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);

§ 404.11 Other Crimes, Wrongs, or Acts—In General

Page 154: Add to footnote 73:

[73] United States v. King, 865 F.3d 848 (6th Cir. 2017) (in money-laundering prosecution, it was improper to offer evidence that the defendant had once been arrested for cocaine possession, which was relevant to nothing but the forbidden purpose of suggesting that he had a propensity to commit crime or break the law).

Page 154: Add to footnote 75:

[75] United States v. Fattah, 914 F.3d 112 (3d Cir. 2019) (although Rule 404(b) determinations are usually in response to attempts to introduce "bad" acts evidence, a defendant's attempt to introduce "good" acts of gift-giving is properly analyzed under the same rule; in bribery prosecution in which defendant paid university tuition for an employee of a Congressmen, defendant's evidence of his financial assistance to students at a different university was properly excluded).

Page 154: Add to footnote 76:

[76] United States v. Jackson, 913 F.3d 789 (8th Cir. 2019) (Facebook videos showing defendant displaying and firing gun he used during bank robbery and indicating that they were going to rob bank constituted intrinsic evidence in defendant's prosecution for armed bank robbery, and thus were admissible as integral part of immediate context of charged crimes); United States v. Recio, 884 F.3d 230 (4th Cir. 2018) (statement by the accused tending to suggest that he "always" carried a gun in his waistband was not impermissible character evidence, because it did not invite the jury to draw any improper inference from what he did on other occasions; rather, the statement amounted to an admission that he carried the gun on many occasions, including the date of his alleged offense, and it therefore was not evidence of "other acts" from which the jury had to infer his character but was evidence of the charged crime itself); United States v. Buckner, 868 F.3d 684 (8th Cir. 2017) (Rule 404(b) applies only to extrinsic evidence;

where evidence of other wrongful conduct is offered for the purpose of providing the context in which the charged offense occurred or to prove an element of that crime, it is properly considered intrinsic evidence and is admissible subject only to the standards of Rule 403); United States v. Buckner, 868 F.3d 684 (8th Cir. 2017) (when the prosecutor tries to prove that the defendant had constructive possession of a firearm found in his vehicle, evidence of his possession of that same firearm on another occasion is highly probative and direct evidence of his later knowing possession of the gun; such evidence is intrinsic evidence, and not subject to Rule 404); United States v. Skarda, 845 F.3d 370 (8th Cir. 2016) (threats and intimidation by the accused against government witnesses are admissible to show his consciousness of guilt of the crime charged; they are therefore direct evidence of the crime and not subject to a Rule 404(b) analysis. The evidence is not used to imply that the jury should convict the accused because of his bad character, but because he was guilty of the charged crime);

Page 155: Add to footnote 76:

See also United States v. Cook, 842 F.3d 597 (8th Cir. 2016) (in a prosecution for a man charged as a felon in possession of a firearm, evidence that he stole the gun from another man and used it to kill that same man three days earlier was admissible because it was highly probative of his possession of the weapon; other crimes that logically prove an element of the crime charged are admissible as an integral part of the immediate context of the crime charged and are therefore not governed by Rule 404(b)) (the ruling seems extremely questionable, because the government presumably could have proved that the defendant had stolen the gun from another man without telling the jury that he then used the gun to kill that man).

§ 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 87:

[87] *See also* United States v. Rosemond, 958 F.3d 111 (2d Cir. 2020) (evidence of previous criminal activity involving the defendant and his alleged conspirators may be admitted to illustrate why he was comfortable trusting and involving those individuals in the commission of a crime where a conviction could lead a life imprisonment or death; the evidence was not unfairly prejudicial, especially because it was far less sensational or disturbing than the crime for which he was on trial); United States v. Cordero, 973 F.3d 603 (6th Cir. 2020) (evidence that defendant engaged in attempted spoliation of evidence against him, including threats or attempted acts of violence against government witnesses, is admissible to show his consciousness of guilt without any forbidden inference as to the character of the defendant); United States v. Washington, 962 F.3d 901 (7th Cir. 2020) (to prove defendant's possession of a gun, the government could properly show the jury photos from his apparent possession of the same gun in a YouTube video several months earlier; "Because the evidence involved possession of the same gun, its relevance did not depend on an inference about Washington's propensity to possess firearms in general or any other forbidden inference about his character").

Page 157: Add to footnote 88:

[88] United States v. Hall, 858 F.3d 254 (4th Cir. 2017) (evidence of a defendant's bad acts is admissible only if the government can identify each proper purpose for which it will use the other acts evidence and explain how that evidence fits into a permissible chain of inferences—a chain that connects the evidence to each proper purpose, no link of which is a forbidden propensity inference).

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 158: Add to footnote 92:

[92] United States v. Willis, 844 F.3d 155 (3d Cir. 2016) (to be admissible under Rule 404(b), prior act evidence must fit into a chain of logical inferences, no link of which may be the inference and that the defendant has the propensity to commit the crime charged).

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);

Page 159: Add to footnote 96:

[96] United States v. Asher, 910 F.3d 854 (6th Cir. 2018) (in criminal assault prosecution, it was error to admit evidence that the defendant had committed a similar assault on a past occasion merely to prove his intent; the probative value of such evidence is only minimal, and is often easily outweighed by the risk of unfair prejudice, where the defendant is on trial for alleged conduct which, if believed by the jury, could

not have possibly been unintentional); United States v. Hall, 858 F.3d 254 (4th Cir. 2017) (defendant's convictions for possession and distribution of marijuana were not admissible to prove his intent to possess marijuana found in a deadbolt-locked bedroom in an apartment he shared with three other individuals; such evidence did not tend to prove his knowledge or possession of the items in that room, even though smell of marijuana pervaded the apartment, especially because he was willing to stipulate that he was familiar with the smell of marijuana);

§ 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 114:

[114] United States v. Benford, 875 F.3d 1007 (10th Cir. 2017) (in case where defendant was charged with possession of a gun found in a bedroom he shared with his girlfriend, evidence that he possessed another gun several weeks earlier was admissible to show his knowledge of the gun's presence in his apartment); United States v. Buckner, 868 F.3d 684 (8th Cir. 2017) (to support the charge that defendant had constructive possession of a firearm found in his vehicle, evidence of his possession of another firearm on another occasion was admissible under 404(b) to prove his knowing possession on a later occasion, and that such possession was not mistaken or accidental);

Page 162: Add to footnote 115:

[115] United States v. Banks, 884 F.3d 998 (10th Cir. 2018) (in drug distribution prosecution, evidence of defendant's three earlier drug-related convictions were admissible to show his "knowledge that he possessed distributable quantities of cocaine base on more than one occasion, knowledge that he participated in a drug conspiracy, and knowledge that he laundered drug proceeds for [a] drug-trafficking organization"); 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. Merritt, 961 F.3d 1105 (10th Cir. 2020) (to prove that defendant in drunk driving homicide case acted with "malice aforethought," evidence of his earlier convictions was admissible to prove that he was clearly aware of the danger that he posed to others when he drove while intoxicated); 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. Smith, 978 F.3d 613 (8th Cir. 2020) (when defendant charged with unlawful firearms possession denied that he touched or threw the gun that was found near his vehicle, evidence of his earlier conviction for firearms possession was properly admitted to show his knowledge of the gun and his intent to possess the gun; trial judge correctly told the jury that the other convictions were admitted only to show his "knowledge, absence of mistake, or lack of accident" and could not be used to show his propensity); United States v. Blanchard, 867 F.3d 1 (1st Cir. 2017) (after a defendant testifies that he was merely present and an innocent passenger while others engaged in acts of prostitution on a road trip, the government was allowed under Rule 404(b) to offer evidence of his participation in similar offenses on other occasions after the date of the charged offense, to rebut his defense of innocent involvement and to prove that he was not merely an innocent bystander); 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 120:

[120] One Circuit has held that a close similarity between the past offense and the current charge will increase the probative value of the evidence despite the passage of a considerable amount of time. United States v. Patino, 912 F.3d 473 (8th Cir. 2019) (although evidence of a prior crime must not be overly remote in time to the charged crime, when the prior conviction was for conduct extremely similar to the crime at issue, evidence of the act will usually be rendered irrelevant only by an enormous lapse of time; because the accused was convicted of the same crime charged in the present case, the earlier conviction from 16 years before the current offense was not so remote in time as to render it inadmissible).

Page 163: Add to footnote 122:

[122] United States v. Garner, 961 F.3d 264 (3d Cir. 2020) (in prosecution of passenger for trafficking in heroin and cocaine found during traffic stop in rental car in which he was seated, evidence of his conviction, more than a decade earlier, of trafficking in cocaine was admissible to prove his "knowledge" of narcotics found in car; his knowledge of the drug trade makes it less likely that he was in the wrong place at the wrong time); United States v. Welch, 951 F.3d 901 (8th Cir. 2020) (at prosecution of man for illegal possession of a gun found in a house where he was arrested and where synthetic marijuana was also found, evidence that he was found in his car with synthetic marijuana was not evidence of criminal propensity, but was admissible to show his motive for possession of the gun, and also to refute his defense that he was not involved with the guns and the same unique kind of marijuana found at the house); United States v. Jackson, 856 F.3d 1187 (8th Cir. 2017) (Evidence of prior drug dealings, including both sales and personal use, is relevant to whether the defendant had requisite intent to enter into conspiracy to distribute drugs; in prosecution for conspiracy to distribute heroin, evidence that defendant had sold and used heroin in the past was admissible as to his "mental state," and could be considered for the purpose of showing his "plan, knowledge, and intent" to join the charged conspiracy); United States v. LeBeau, 867 F.3d 960 (8th Cir. 2017) (in prosecution for conspiracy to distribute cocaine, evidence of defendant's conviction 12 years on earlier identical charge was not unfairly prejudicial, and was properly admitted to prove his intent to commit the charged offense; evidence of a drug conviction can be used to prove his intent to commit a subsequent offense, even if he has not asserted a defense of mistake, or coercion, that puts his state of mind at issue); United States v. Henry, 848 F.3d 1 (1st Cir. 2017) (in prosecution for possession of crack cocaine with intent to distribute, defendant's earlier conviction for the same offense was admissible to prove his intent, where the trial court gave the jury a limiting instruction that the evidence did not prove that he committed the charged crime); United States v. Davis, 867 F.3d 1021 (8th Cir. 2017) (in prosecution of defendant for conspiracy to distribute methamphetamine, his prior convictions for simple possession were admissible to prove his knowledge of drugs and his intent to commit drug offenses; the convictions were only eight years old time of trial, and therefore close enough in time to the charged conspiracy); United States v. Wilchombe, 838 F.3d 1179 (11th Cir. 2016) (after defendant offered evidence that he was merely a stowaway on a vessel and had no knowledge there were drugs on the boat or the intent to smuggle them, the court properly allowed evidence that the defendant had been arrested several years earlier when he was the captain of a vessel found carrying cocaine and marijuana; "The fact that he was previously arrested for captaining a boat used to smuggle drugs makes his defense less plausible, because it makes it more likely that [he] could recognize when a boat is smuggling drugs"); *but see* United States v. Hall, 858 F.3d 254 (4th Cir. 2017) (defendant's convictions for possession and distribution of marijuana were not admissible to prove his intent to possess marijuana found in a deadbolt-locked bedroom in an apartment he shared with three other individuals; such evidence did not tend to prove his knowledge or possession of the items in that room, even though smell of marijuana pervaded the apartment, especially because he was willing to stipulate that he was familiar with the smell of marijuana); United States v. Sheffield, 832 F.3d 296 (D.C. Cir. 2016) (a defendant's hands-on experience in the drug trade cannot alone prove that he possessed drugs on any given occasion, although it can be used to show that he knew how to get drugs, what they looked like, or where to sell them. But in case where defendant was charged with possession of PSP found in his armrest console, evidence of his conviction for selling PCP a decade earlier, because of its age, had little probative value on the question of his knowledge ten years later as to how to acquire or market that drug, and its admission was an abuse of discretion). 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 163: Add to footnote 123:

[123] United States v. Riepe, 858 F.3d 552 (8th Cir. 2017) (in prosecution for enticement of a minor to engage in sexual activity, it was permissible for government to offer testimony of two other teenage girls that defendant had contacted them and had continued to do so over their objection; even though the defendant never discussed the topic of sex with those two girls, his conduct gave rise to an inference that he intended to do so, and was therefore admissible to prove his planning and preparation for the contact with his victim in the charged case).

Page 164: Add to footnote 128:

[128] United States v. Fang, 844 F.3d 775 (8th Cir. 2016) (in prosecution for possession of methamphetamine with intent to distribute, the defendant's two earlier convictions for methamphetamine possession were properly admitted to prove that the defendant "knew that it was a controlled substance"; since he made only a general denial of the charged crime, he put his state of mind at issue);

Page 164: Add to footnote 129:

[129] United States v. Arena, 844 F.3d 681 (7th Cir. 2016) (in prosecution for illegal reentry after being deported, the government was properly allowed to prove that the defendant had been deported from the country seven times, for the non-propensity purpose of proving that he knew he was not allowed to be in the country. Even though knowledge was not an element of the offense, such evidence was properly admitted to rebut the defense suggestion that he might not have known that fact);

Page 164: Add to footnote 130:

[130] United States v. Fortier, 956 F.3d 563 (8th Cir. 2020) (when defendant charged with production of child pornography testified that he accidentally recorded his sexual contact with two underage girls on his cell phone, testimony by his former girlfriend of how he had also recorded their sexual contact without her consent was admissible to rebut his claim that he recorded the events by accident); United States v. Henthorn, 864 F.3d 1241 (10th Cir. 2017) (in prosecution of man for the murder of his second wife at her supposedly accidental death, prosecutor was allowed to offer evidence of two incidents in which his first wife was also killed and his second wife almost killed in apparent accidents; given the similarity between the three events, which all took place while the couples were alone in remote locations, the evidence was admissible to prove that the death of his second wife was no accident, and to show his intent and plan in causing her death); 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] Booker v. Graham, 974 F.3d 101 (2d Cir. 2020) (in an action by prisoner who alleged he was punished in retaliation for exercise of First Amendment rights, reports of his gang affiliation and his criminal and disciplinary history were not impermissible character evidence, because they were not admitted for their truth but only to explain the appropriate motivation behind the defendant's actions); United States v. Berckmann, 971 F.3d 999 (9th Cir. 2020) (in prosecution for the defendant's assaulting his wife with a deadly weapon, trial court properly admitted evidence of his other acts of abuse against her; "other acts of domestic violence involving the same victim are textbook examples of evidence admissible under Rule 404(b)," and may be admitted either to show the defendant's motive or intent); United States v. Williston, 862 F.3d 1023 (10th Cir. 2017) (at trial of a man charged with the abuse and murder of his girlfriend's daughter, evidence of his harsh and angry discipline of the child on other occasions was admissible to prove his animosity toward the child and therefore his motive to commit the crime); 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 133:

[133] United States v. Mandoka, 869 F.3d 448 (6th Cir. 2017) (in prosecution for sexual abuse of defendant's two minor relatives, evidence that he physically abused his wife in their presence was admissible to explain why victims did not report abuse to authorities, rather than to show a propensity for violence or to imply that defendant must have been guilty because he abused his wife);

Page 166: Add to footnote 134:

[134] United States v. Sabean, 885 F.3d 27 (1st Cir. 2018) (at the trial of a doctor charged with tax evasion and fraud, evidence that he had sexually abused his adult daughter for many years was admissible to prove his motive in paying her millions of dollars and giving her illegal prescriptions to buy her silence);

Page 166: Add to footnote 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] United States v. Brewer, 915 F.3d 408 (7th Cir. 2019) (in prosecution for Indiana bank robbery, the district court properly admitted evidence that the defendant lingered around banks in Ohio and California just before they were robbed by a person clothed head to toe, who used a stick and a give-me-the-cash note; such evidence of a modus operandi made it more likely that he was the individual recorded at the Indiana banks, not because he had a propensity for committing crimes, or even bank robberies, but because he and his partner had established an idiosyncratic way of doing so. Modus operandi means a distinctive—not identical—method of operation, and slightly different tactics do not necessarily undermine an otherwise distinct resemblance among the offenses);

Page 166: Add to footnote 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).

§ 404.22 Limiting Instruction

Page 172: Add to footnote 165:

[165] United States v. Morgan, 929 F.3d 411 (7th Cir. 2019) (when evidence of other acts is admitted under Rule 404(b), it is not sufficient for the court to instruct the jury of the purposes for which the evidence is admitted and to merely assert that the evidence may not be used for "other purposes." An adequate instruction must specifically explain to the jurors that they must not use the other-act evidence to infer that the defendant has a certain character and acted "in character" in the present case, because it does not follow from the defendant's past acts that he committed the particular crime charged in the case. The jurors should be reminded that the government's duty is to prove beyond a reasonable doubt every element of the specific crime charged, and it cannot discharge its burden by inviting an inference that the defendant is a person whose past acts suggest a willingness or propensity to commit crimes).

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. Hazelwood, 979 F.3d 398 (6th Cir. 2020) (even though a fraud defendant offered character evidence to suggest that he had good business judgment and would not engage in risky behavior, it was error to allow the government on rebuttal to offer evidence of his deeply offensive racist and misogynistic views; the evidence was not pertinent to the relevant character trait, and extrinsic evidence could not be used for that purpose); United States v. Graham, 981 F.3d 1254 (11th Cir. 2020) (defendant charged with trying to defraud the IRS could not offer evidence of his efforts at compliance on other occasions; evidence of the defendant's specific acts of law-abiding conduct is not admissible to negate criminal intent or to prove that he acted in conformity with his good character on this occasion); 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 407

Rule 407. Subsequent Remedial Measures

§ 407.2 Scope of Rule 407

Page 188: Add to footnote 5:

[5] *But see* Novick v. Shipcom Wireless, Inc., 946 F.3d 735 (5th Cir. 2020) (in an action for failure to make required overtime payments, an investigation or internal audit conducted by the employer after the alleged violation was not excluded by Rule 407, because the audit, standing alone, did not make the alleged injury less likely to occur, even if it led to a reclassification of various employees in ways that would make such violations less likely to occur in the future).

§ 407.4 Admissible Remedial Actions

Page 192: Add to footnote 25:

[25] Abernathy v. E. Illinois R.R. Co., 940 F.3d 982 (7th Cir. 2019) (when a defendant railroad offered testimony that it had not made a tie crane available before the plaintiff's injury because the cost would be

prohibitively high, the defendant had effectively contested the feasibility of such safety measures, and therefore opened the door for the plaintiff to offer evidence that the railroad had in fact adopted such measures after the plaintiff's injury);

Chapter 408

Rule 408. Compromise Offers and Negotiations

§ 408.3 Scope of Rule 408

Page 198: Add to footnote 12:

[12] Sheng v. M&T Bank Corp., 848 F.3d 78 (2d Cir. 2017) (although an unconditional offer cannot be construed as an offer to settle or compromise subject to Rule 408, a settlement offer by a defendant who proposes all relief believed to be demanded, absent express reservations to the contrary, is almost universally understood as carrying an unstated expectation of some sort of a release—which renders the offer conditional and subject to exclusion under Rule 408);

Page 198: Add to footnote 14:

[14] Sheng v. M&T Bank Corp., 848 F.3d 78 (2d Cir. 2017) (in employment litigation, defendant could not offer evidence that it had already offered to reinstate the plaintiff as a means of suggesting that there was no reason for the case to be in court).

Page 199: Add to footnote 17:

[17] Macsherry v. Sparrows Point, LLC, 973 F.3d 212 (4th Cir. 2020) (efforts to compromise a disputed claim are protected and inadmissible even if they were made before the dispute had crystallized to the point of threatened implication, as long as one of the parties had already communicated an actual dispute or difference of opinion regarding a party's liability for or the amount of a claim);

§ 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);

Page 215: Add at the end of footnote 30:

See also United States v. Green, 842 F.3d 1299 (11th Cir. 2016) (it is uncertain whether Rule 410 merely requires exclusion of evidence that someone entered a colo contendere plea, or whether it would also require exclusion of evidence that he was convicted on the basis of that plea, but the question is often academic, since Rule 803(22) requires the exclusion of the conviction on hearsay grounds it is offered as proof that he was guilty of that offense).

§ 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. Bauzó-Santiago, 867 F.3d 13 (1st Cir. 2017) (letter written by defendant to the judge before trial—in which he stated that he had "always accepted my responsibility as to guilt for the weapons law crime"—was admissible against him; Rule 410 only applies to communications with the prosecutor, not with the judge, who is forbidden from participating in plea discussions); United States v. Mathurin, 868 F.3d 921 (11th Cir. 2017) (Rule 410 only applies to statements made when the defendant had an actual expectation of negotiating a plea that was objectively reasonable under the circumstances; the rule does not exclude statements made at a meeting where defendant was advised that no promises or negotiations would be made); 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. Lyle, 919 F.3d 716 (2d Cir. 2019) (After the accused signed a proffer agreement that contained a waiver that allowed his statements to come in "to rebut any evidence or arguments offered by or on [his] behalf," and his counsel stated in opening statement that he was not a "dealer" of methamphetamine, the prosecutor was properly allowed to offer evidence of statements made by the defendant during his pretrial settlement negotiations; although a defense argument does not trigger a waiver if it simply challenges the sufficiency of the Government's proof, such a waiver provision is triggered by a statement of fact in a defense opening, such as a statement unequivocally identifying someone other than defendant or an affirmative assertion of the defendant's innocence); 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);

Page 220: Add at the end of footnote 49:

But see United States v. Rosemond, 841 F.3d 95 (2d Cir. 2016) (a defendant may make a valid prospective waiver of his rights under Rule 410 by agreeing that his statements during a plea negotiation may be admissible against him to rebut "any evidence offered or elicited, or factual assertions made, by or on behalf" of him at trial. But such waiver provisions are not triggered merely because the defense pleads not guilty, or offers evidence or argument at trial to suggest that the government has not met its burden of proof, or merely by trying to impeach a prosecution witness).

Chapter 412

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

§ 412.1 Legislative History

Page 230: Add to footnote 2:

[2] United States v. Lockhart, 844 F.3d 501 (5th Cir. 2016) (Rule 412 is not limited to rape and sexual assault cases, but also applies to cases charging that the defendant forced minor victims into prosecution, a charge which "undoubtedly involves sexual misconduct").

§ 412.2 Scope

Page 234: Add to footnote 24:

[24] United States v. Lockhart, 844 F.3d 501 (5th Cir. 2016) (although convictions are normally admissible to impeach a witness under Rule 609, that general rule is trumped by Rule 412 when the previous convictions are for prostitution and the testifying witness is the alleged victim of the defendant's sexual misconduct).

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. Kettles, 970 F.3d 637 (6th Cir. 2020) (not all evidence implicating a victim's past sexual activity falls within Rule 412; that rule does not prevent a defendant in a sex trafficking case from cross-examining the alleged victim with questions intended to impeach her credibility by showing that she had been dishonest with the police and counselors about past allegations of sexual assault); 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)).

§ 412.3 General Exclusionary Rule

Page 235: Add to footnote 30:

[30] United States v. Lockhart, 844 F.3d 501 (5th Cir. 2016) (although earlier convictions are normally admissible to impeach a witness under Rule 609, that general rule is trumped by Rule 412 when the previous convictions are for prostitution and the testifying witness is the alleged victim of the defendant's sexual misconduct).

Page 235: Add to footnote 32:

[32] *See also* United States v. Lockhart, 844 F.3d 501 (5th Cir. 2016) (in criminal prosecution charging that defendant forced minors into prostitution, evidence that they engaged in other acts of prosecution before and after his indictment was "other sexual behavior" barred by this rule. Such evidence was not relevant, because the law forbids compelling a victim to perform "or to continue performing" sexual

activity, and so such evidence merely proved that other individuals may have also been guilty of similar offenses against those victims).

Page 235: Add to footnote 34:

[34] The Rule is not limited, however, to situations where the evidence is offered against the alleged victim under circumstances that might cause her embarrassment, and therefore applies even when the victim wishes to testify for the defense and to waive her privacy interests surrounding her sexual history. United States v. Haines, 918 F.3d 694 (9th Cir. 2019) (in prosecution for sex trafficking of a minor, even after the alleged victim surprisingly agreed to testify as a witness for the defense and wanted to testify as to how she had agreed to engage in acts of prostitution on other occasions without a pimp, such evidence of her other sexual activity was properly excluded, even though she was evidently willing to waive its protection for her privacy; Rule 412 rests on considerations of jury confusion as well as privacy, and so its applicability is not altered by the alleged victim's desire to testify as a witness hostile to government about her sexual behavior or sexual predisposition).

§ 412.5 Exception: Physical Evidence

Page 236: Add to footnote 36:

[36] Such evidence about the victim's sexual history is not admissible, however, to explain physical or psychological injuries that were never disclosed to the jury by the prosecution. United States v. Hawkghost, 903 F.3d 774 (8th Cir. 2018) (defendant accused of sexually abusing a minor was properly prevented from questioning her about sexual abuse committed against her by two other men in an unrelated molestation at about the same time; because the government offered no evidence at trial that the victim had been exhibiting any unusual behavioral characteristics, there was no need for the accused to present evidence that might have provided an alternative explanation for such behavior); 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. Young, 955 F.3d 608 (7th Cir. 2020) (defendant charged with sexual trafficking of minors had no constitutional right to offer evidence of their past sexual conduct, including that they had engaged in prostitution before they met him, to prove that he had not coerced them in the sexual activity, because such evidence had no bearing on whether he harbored or transported the victims, and coercion was irrelevant because the victims were minors); United States v. Betts, 911 F.3d 523 (8th Cir. 2018) (in prosecution for trafficking minors for sex, defendant could not offer evidence that his minor victims engaged in other acts of prostitution after he was arrested; whether the children engaged in acts of prostitution before or after their encounters with the defendant is irrelevant, since they were legally incapable of consent, and such evidence would only prove that other people were guilty of similar offenses against the same victims); United States v. Carson, 870 F.3d 584 (7th Cir. 2017) (sex trafficking defendant

had no constitutional right to offer evidence of earlier acts of prostitution by his alleged victims; their willingness to engage in consensual acts of prostitution could not have possibly supported his defense that they worked for him voluntarily, in light of the overwhelming evidence of his coercion and violence against them); 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 2:

[2] United States v. Delorme, 964 F.3d 678 (8th Cir. 2020) (the notice requirements of Rules 413 and 414 only require the Government to disclose to the defendant the nature of the evidence in its possession about his other episodes of sexual assault or child molestation; they do not require the government to explicitly notify the defendant 15 days before trial of its intention to use the evidence).

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");

§ 413.3 Relationship to Rule 403

Page 245: Add to footnote 13:

[13] United States v. Willis, 826 F.3d 1265 (10th Cir. 2016) (in sexual assault prosecution, evidence of two earlier sexual assaults by the defendant were admissible against him, even though they occurred more than five years earlier while he was still a juvenile, because the earlier assaults involve similar circumstances to the charged offense);

Page 246: Add to footnote 14:

[14] *See also* United States v. Arias, 936 F.3d 793 (8th Cir. 2019) (Rule 413 embodies a strong legislative judgment that evidence of prior sexual offenses should ordinarily be admissible).

Chapter 414

Rule 414. Similar Crimes in Child-Molestation Cases

§ 414.2 Relationship to Rules 403 and 404

Page 248: Add to footnote 4:

[4] United States v. Splettstoeszer, 956 F.3d 545 (8th Cir. 2020) (in prosecution for possession of child pornography, evidence that the defendant had sexually molested two daughters more than 20 years earlier was not unfairly prejudicial and was admissible to show his propensity to be sexually interested in minors); United States v. Spoor, 904 F.3d 141 (2d Cir. 2018) (in prosecution for production and possession of child pornography, evidence that the defendant had recently abused other young boys was probative and admissible to show his attraction to children, thus providing evidence of his motive to make pornography, and also to prove his knowing possession of the pornography found on his computer; "the fact that Spoor had recently been convicted of molesting children makes it less likely that, by sheer coincidence, he also unwittingly possessed child pornography downloaded by others");

Page 249: Add to footnote 6:

[6] United States v. Al-Awadi, 873 F.3d 592 (7th Cir. 2017) (in prosecution for production of child pornography, evidence that accused also molested the victim was admissible to prove he had the requisite intent for a conviction and to rebut his allegation that he did not take photographs of the victim's genitals with any sexual or improper intent); United States v. Oldrock, 867 F.3d 934 (8th Cir. 2017) (in prosecution for sexual abuse of a child, testimony of another victim was admissible to show the defendant's "propensity to touch young females inappropriately while they sleep"); United States v. Fifer, 863 F.3d 759 (7th Cir. 2017) (in prosecution for producing child pornography, even though the trial judge initially excluded evidence of the defendant's conviction for sexual assault of a minor on the basis of its potential for unfair prejudice, the trial court properly reversed that ruling after the accused testified that he produced these videos to build a better relationship with his alleged victim; that defense increased the probative value of the earlier conviction, which tended to undermine his allegedly pure motivations by establishing his sexual interest in children); United States v. Furman, 867 F.3d 981 (8th Cir. 2017) (in prosecution for production and possession of child pornography, evidence that accused had sexually assaulted his ten-year-old daughter more than 10 years earlier was admissible as evidence of his sexual interest in, and his propensity to sexually assault, prepubescent female family members); United States v. Underwood, 859 F.3d 386 (6th Cir. 2017) (in prosecution for sexual abuse of the defendant's step-granddaughter, his daughter was properly allowed to testify that she had also been abused by the defendant more than 20 years earlier; the probative value of the earlier episode was significant, because both events involved young female family members he had been able to isolate at a time of vulnerability); United States v. Luger, 837 F.3d 870 (8th Cir. 2016) (in prosecution for aggravated sexual abuse of child in Indian country, evidence of prior sexual assaults by defendant was admissible even though they occurred more than 25 years prior to trial, and even though both victims testified that defendant had raped them, which was more serious than touchings charged in current case; sexual assaults all occurred when victims were between 13 and 16 years old, defendant was in relative position of power or authority over his victims, current victim and one other witness were both assaulted while sleeping in home to which defendant had access, and defendant

restrained all three victims while he assaulted them); United States v. Emmert, 825 F.3d 906 (8th Cir. 2016) (in prosecution for possession of child pornography, evidence of the defendant's sexual abuse of two female victims was relevant and admissible to prove his interest in underage girls, and to show his propensity for exploiting young girls and to show his connection to the pornographic images found on his hard drive, even though those offenses took place up to 20 years earlier); 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).

§ 501.3 The Theory and the Parameters of Privilege Law

Page 264: Add to footnote 41:

[41] United States v. Portillo, 969 F.3d 144 (5th Cir. 2020) (even though prosecution witness testified about her drug use and medical history, she did not waive her psychotherapist-patient privilege and trial court properly denied defendant's motion for access to her medical records; she only testified about the facts of her medical diagnoses and medication history, but did not disclose any details about her conversations with her doctor);

§ 501.5 Attorney-Client Privilege

Page 268: Add to footnote 64:

[64] The courts will overlook a client's reasonable mistake of fact (for example, mistakenly believing that someone is a licensed attorney), but are much less forgiving of parties who make even a reasonable mistake about the law. United States v. Merida, 828 F.3d 1203 (10th Cir. 2016) (when a corporate officer speaks with an attorney who represents the corporation, any attorney-client privilege protecting that communication is held only by the corporation and may not be asserted by the officer if the corporation is willing

to waive it; the officer has no personal privilege merely because he "reasonably believed" that he was represented by corporate counsel).

Page 269: Delete sentence in text preceding footnote 66 and substitute:

Although the courts have generally not been willing to recognize a privilege for communications with non-attorney client advocates, a privilege has recently been recognized in patent litigation for communications between clients and non-lawyer patent agents.

Page 269: Delete text in footnote 66 and substitute:

[66] *In re* Queen's University at Kingston, 820 F.3d 1287 (Fed. Cir. 2016) (despite the general presumption against the recognition of new privileges, and the consistent refusal of the courts to recognize a privilege for communications with non-attorney client advocates such as accountants and jailhouse lawyers, the unique role played by patent agents in modern litigation justifies the recognition of a privilege to protect communications between a client and a non-attorney patent agent).

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 70:

[70] EEOC v. BDO USA, L.L.P., 876 F.3d 690 (5th Cir. 2017) (trial court erred in assuming that all communications between a company and its lawyers were necessarily protected by attorney-client privilege; privilege only protects confidential communications made for the purpose of legal advice, not business advice, and not all documents sent from one corporate officer to another are privileged merely because a copy is also sent to counsel);

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 274: Add to footnote 97:

[97] United States v. Krug, 868 F.3d 82 (2d Cir. 2017) (criminal codefendant who turned Government witness could testify to statements that were made to him by his former codefendant; these statements were not covered by the "joint defense privilege"—an extension of the attorney-client privilege—because the statements were not made for the purpose of obtaining legal advice from a lawyer, did not share among defendants advice given by a lawyer, or seek to facilitate a communication with a lawyer. The mere fact that the communications were among co-defendants who had a joint defense agreement is not sufficient to bring such statements within the attorney-client privilege).

Page 276: Add to footnote 107:

[107] United States v. Murra, 879 F.3d 669 (5th Cir. 2018) (alleged victims of human trafficking who sought legal services did not waive their attorney-client privilege merely because they publicly disclosed some of the facts surrounding the case, because they never disclosed any portion of their confidential communications with their attorneys about those facts);

Page 276: Add to footnote 109:

[109] United States v. Ivers, 967 F.3d 709 (8th Cir. 2020) (even though the first portion of the defendant's conversation with his lawyer was clearly protected by the attorney-client privilege, his extended rant at the end of the conversation about his intent to kill the judge in the case was not privileged because it was not a communication for the purpose of receiving legal advice, and it was therefore admissible against the client in a prosecution for threatening to murder the judge); *In re* Grand Jury Investigation, 810 F.3d 1110 (9th Cir. 2016) (even if a prosecutor makes a prima facie showing that attorneys were enlisted to commit criminal acts, a district court may not order the blanket production of all documents in the possession of the attorney without first conducting an in camera review to identify precisely which documents reflect communications made in furtherance of that crime or fraud); *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 279: Add to footnote 125:

[125] United States v. Fomichev, 909 F.3d 1078 (9th Cir. 2018) (under the "sham marriage exception" to the spousal testimonial privilege, a witness may not refuse to testify against her spouse if the parties were married for the purpose of allowing her to invoke the privilege, but this narrow exception is limited to cases in which the wedding was only a few days before the anticipated trial, and this exception does not apply to the separate marital privilege for confidential communications);

Page 282: Add to footnote 137:

[137] There are now at least three circuits that have rejected the Seventh Circuit's proposed recognition of this exception. United States v. Pineda-Mateo, 905 F.3d 13, 26 (1st Cir. 2018) (unlike the marital privilege for confidential communications, the spousal testimonial privilege is not abrogated merely because the defendant and his spouse were joint participants or conspirators in the commission of some criminal offense; the Government's interest in having the ability to compel the testimony of a defendant's conspiring spouse is outweighed by the significant concerns underlying the privilege, which is designed to foster marital harmony);

Page 284: Add to footnote 145:

[145] United States v. Pugh, 945 F.3d 9 (2d Cir. 2019) (defendant's draft letter to his wife found on his laptop was not "communication" subject to marital privilege; there was no evidence that he intended to send draft, that wife had access to defendant's computer where letter was found, or that he ever typed his messages in another format before sending them via social media website, and letter had not yet been translated into the language his wife spoke);

Page 284: Add to footnote 146:

[146] United States v. Fomichev, 909 F.3d 1078 (9th Cir. 2018) (the marital communications privilege protects statements or actions that are intended as confidential communications between spouses, made during the existence of a valid marriage, unless the marriage had become irreconcilable when the statements were made);

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);

Page 285: Add to footnote 152:

[152] *But see* United States v. Underwood, 859 F.3d 386 (6th Cir. 2017) (under child-abuse exception to marital privilege, there is no privilege for confidential communications between spouses concerning a crime committed by either one against a minor relative of either who was residing in their home; defendant's wife could therefore testify about his confidential admissions to her concerning abuse of the wife's granddaughter in the defendant's "sleeper truck," the functional equivalent of his home as it had sufficient living quarters and he would stay in the truck during his overnight trips).

§ 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] *In re* Queen's University at Kingston, 820 F.3d 1287 (Fed. Cir. 2016) (despite the general presumption against the recognition of new privileges, and the consistent refusal of the courts to recognize a privilege for communications with non-attorney client advocates such as accountants and jailhouse lawyers, the unique role played by patent agents in modern litigation justifies the recognition of a privilege to protect communications between a client and a non-attorney patent agent);

Page 293: Add at the end of footnote 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 to footnote 208:

[208] *See also* Hamdan v. Indiana U. Health N. Hosp., Inc., 880 F.3d 416 (7th Cir. 2018) (although some states have recognized a peer review privilege to bolster the effectiveness of a hospital's peer-review committees in improving patient care by protecting the proceedings and reports of the committees from disclosure, federal courts in cases arising under federal law have declined to recognize a peer review privilege, on the grounds that the need for the truth outweighs the state policies behind such privileges).

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).

Chapter 502

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

§ 502.2 Waiver through Inadvertent Disclosure

Page 300: Add to footnote 18:

[18] Carmody v. Bd. of Trustees of U. of Illinois, 893 F.3d 397 (7th Cir. 2018) (when a party produces hundreds of documents in discovery and apparently only one privileged item was disclosed, that fact supports a finding that the disclosure was inadvertent and excusable; a "single slip indicates an unfortunate but inadvertent mistake rather than a casual, produce-first, review-later approach").

§ 502.3 The Scope of Waiver

Page 303: Add to footnote 32:

[32] *See* Knox v. Roper Pump Co., 957 F.3d 1237 (11th Cir. 2020) (under the doctrine of waiver by implication, a party may not disclose some selected privileged communications for self-serving purposes but use the privilege to protect against disclosure of other related communications; there is no waiver by a defendant who does not assert that he relied on the advice of counsel or reveal the substance of his communications with his lawyers).

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).

§ 601.6 Application of State Law

Page 317: Add to footnote 29:

[29] Coleman v. United States, 912 F.3d 824 (5th Cir. 2019) (where liability for claim under some federal statute requires federal courts to apply state substantive law, as in the case of a malpractice claim brought under the Federal Tort Claims Act, federal courts must apply state evidence rules respecting the competence of expert witnesses to testify).

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);

§ 602.2 Foundation as to Personal Knowledge

Page 320: Add to footnote 3:

[3] Walsh v. New York City Housing Authority, 828 F.3d 70 (2d Cir. 2016) (a plaintiff's testimony about a statement she claims to have heard, if otherwise relevant and admissible, may not be excluded by the judge merely because the only evidence to support that claim was the plaintiff's self-serving testimony);

Chapter 605

Rule 605. Judge's Competency as a Witness

§ 605.4 When the Judge Implicitly Testifies in Violation of Rule 605

Page 334: Add to footnote 22:

[22] United States v. Brugnara, 856 F.3d 1198 (9th Cir. 2017) (at trial for making a false declaration, the district judge's statement to the jury that the defendant's allegedly false declaration had in fact taken place during a prior proceeding in the case was not competent evidence to support the conviction, because such information was tantamount to testimony by the judge);

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, 574 U.S. 40, 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, 574 U.S. 40, 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 340: Add to footnote 26:

[26] In a recent landmark constitutional ruling, however, the Supreme Court of the United States has created an important new exception to Rule 606(b) for cases in which a juror comes forward after the jury is discharged with "compelling evidence that another juror made clear and explicit statements indicating that racial animus was a significant motivating factor in his or her vote to convict." Peña-Rodriguez v. Colorado, 137 S.Ct. 855 (2017) (rules such as Federal Rule 606 restricting juror testimony to impeach a

verdict are subject to an exception required by the Sixth Amendment in such cases). *But see* United States v. Robinson, 872 F.3d 760 (6th Cir. 2017) (Sixth Amendment did not override the limitations of Rule 606(b) so as to require a district court to consider affidavits from jurors to prove that a white foreperson commented, after two black jurors hesitated to convict, that it was "strange that the colored women are the only two that can't see," and that they were protecting the defendants because they felt they "owed something" to their "black brothers." Although the statements clearly indicated racial bias or hostility, they did not amount to a clear statement suggesting that racial animus was a significant motivating factor in her vote to convict).

Page 340: Add to footnote 27:

[27] *But see* Kipp v. Davis, 971 F.3d 866 (9th Cir. 2020) (on post-trial inquiry into the validity of a guilty verdict, the court may consider evidence that a jury member brought a Bible into the jury room, and read and discussed some of the passages with other members of the jury, as this was "extraneous evidence" brought to the jury's attention).

Page 341: Add to footnote 34:

[34] United States v. Norwood, 982 F.3d 1032 (7th Cir. 2020) (when African-American juror called the judge one day after the jury convicted an African-American defendant, to report that she was uneasy with the verdict and did not think it was "right," but made no explicit assertions of racial bias by other members of the jury, the judge was not required to undertake or permit any further inquiry or investigation before denying a motion for a new trial);

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).

§ 606.4 Procedure in Determining Juror Misconduct

Page 344: Add to footnote 49:

[49] Mitchell v. United States, 958 F.3d 775 (9th Cir. 2020) (the Supreme Court holding in *Peña-Rodriguez* did not undermine the permissibility of local rules that forbid lawyers to contact jurors without first obtaining permission from the court and making a showing of good cause);

Page 345: Add to footnote 51:

[51] United States v. Lanier, 870 F.3d 546 (6th Cir. 2017) (a judge has the authority and the duty to investigate the potential prejudice caused by a juror who contacted a friend who was a state prosecutor, because such contact raises the possibility of extraneous prejudicial information improperly brought to the jury's attention or an outside influence improperly brought to bear on the juror);

Page 345: Add to footnote 53:

[53] Tarango v. McDaniel, 837 F.3d 936 (9th Cir. 2016) (when a juror testifies to an improper outside influence that was brought to bear upon him, such as an allegation that he was deliberately tailgated by the police for being a holdout juror, Rule 606 permits the introduction of limited evidence of his fear or other

state of mind, but he may not testify regarding the effect of those mental states on how he actually cast his vote);

Chapter 607

Rule 607. Who May Impeach a Witness

§ 607.1 Impeachment—In General

Page 347: Add to footnote 2:

[2] The Rule has also been cited as authority for the well-settled tradition of allowing a lawyer to preemptively introduce anticipated impeachment evidence during direct examination before the opposing party has the chance to present the same evidence during cross-examination, United States v. Sumlin, 956 F.3d 879 (6th Cir. 2020), although this is technically not an example of a party impeaching his own witness or attacking the credibility of that witness.

§ 607.3 The Court's Power to Prohibit a Party from Impeaching Its Own Witness

Page 352: Add to footnote 29:

[29] United States v. Davis, 845 F.3d 282 (7th Cir. 2016) (prosecution may not call a witness it knew would not give useful evidence just so it can introduce hearsay evidence to impeach the witness, but that prohibition applies only when the prosecution calls the witness in bad faith. Court did not abuse its discretion by allowing government to question government witness about his prior inconsistent statements to law enforcement; government did not know in advance the particular aspects of those statements he would disclaim, he otherwise provided helpful testimony for government, and there was no evidence that government acted in bad faith by calling him as a witness).

§ 607.4 Impeachment by Exposure of Bias or Interest

Page 354: Add to footnote 33:

[33] *But see* United States v. Babb, 874 F.3d 1027 (8th Cir. 2017) (after government witness admitted he had a felony conviction that exposed him to a substantial sentence if he was convicted of drug and firearm offenses that might still be brought against him, it was not an abuse of discretion for the district judge to preclude the cross examiner from proving that the witness had other convictions as well, supposedly to prove his motive in cooperating with the government, since such evidence would have been essentially cumulative in light of the felony conviction that was proved).

§ 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

§ 608.5 Bolstering the Credibility of a Witness with Reputation and Opinion Evidence—When Authorized

Page 366: Add to footnote 18:

[18] United States v. Martinez, 923 F.3d 806 (10th Cir. 2019) (defendant had no right to call character witnesses to offer their opinions of his honesty, because the prosecutor's cross-examination of the defendant was designed not to question his veracity but rather to obtain incriminating admissions to support the government's case; the prosecution was challenging defendant's veracity with respect to a specific issue in the case—his intent—but not his general truthfulness);

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

Page 369: Add to footnote 30:

[30] United States v. Carthen, 906 F.3d 1315 (11th Cir. 2018) (although a defendant could properly impeach a government witness by asking whether he had committed perjury in other judicial proceedings, the defense could not call other witnesses to prove that he had committed such perjury, even if the witness denied it);

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] *See also* Woods v. START Treatment & Recovery Centers, Inc., 864 F.3d 158 (2d Cir. 2017) (it is improper to impeach a witness with evidence that she had been "accused" at some unspecified time of criminal conduct, lying, fabrication, and fraud; accusations have little, if any, probative value, because the innocent and guilty alike can be accused of wrongdoing, and mere accusations do not impeach the integrity or impair the credibility of a witness). *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. O'Neal, 844 F.3d 271 (D.C. Cir. 2016) (Rule 608(b)'s bar against extrinsic evidence does not apply when the evidence is used to contradict a statement made by a witness during her direct examination; the use of extrinsic evidence to 'impeach by contradiction' is subject only to the constraints

of Rule 403); 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);

Page 371: Add to footnote 39:

United States v. Harris, 881 F.3d 945 (6th Cir. 2018) (on cross-examination of government witness, defense counsel should have been allowed to play a recording of an inconsistent statement made by the witness in an interview with an investigator, even though the recording was extrinsic evidence; Rule 608(b) forbids the use of extrinsic evidence only during an attack on the witness's character and general honesty, but Rule 613 expressly allows the use of extrinsic evidence to impeach a witness by showing that he has made an inconsistent statement);

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

Page 371: Add to footnote 41:

[41] Turubchuk v. S. Illinois Asphalt Co., Inc., 958 F.3d 541 (7th Cir. 2020) (after a former lawyer was allowed to testify as an opinion witness, the trial judge abused his discretion in refusing to allow cross-examination about the fact that the witness had resigned his law license in lieu of disbarment for alleged acts of dishonesty, fraud, and deceit); United States v. Smith, 831 F.3d 793 (7th Cir. 2016) (it is proper to ask a witness on cross-examination whether she used falsified military deployment orders to cancel a lease, as such conduct is obviously relevant to her character for truthfulness); 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. Trant, 924 F.3d 83 (3d Cir. 2019) (in firearms possession case, trial court could properly prevent the defense counsel on cross-examination from asking government witness about his own illegal possession of a firearm, because such conduct was not probative of the truthfulness of the witness, and carried the risk of shifting the emphasis of the trial from the accused on trial to the witness); 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");

Page 372: Add to footnote 43:

[43] Glaze v. Childs, 861 F.3d 724 (8th Cir. 2017) (cross examiner had no right to ask a witness to admit that he had once resigned from a position as a correctional officer after he was accused of passing a cigarette to an inmate in violation of institutional policy, because the episode did not involve lying or deceit, and was not probative of the witness's character for truthfulness);

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 376: Add to footnote 4:

[4] United States v. Portillo, 969 F.3d 144 (5th Cir. 2020) (after a defense witness testified that the Hells Angels was simply a "fun-loving motorcycle club," it was permissible to impeach him with evidence of criminal convictions concerning violent acts by members of the club, regardless of whether those convictions were admissible under Rule 609; a conviction may be proved with extrinsic evidence to contradict specific testimony by the witness who explicitly denied the conviction or created a misleading impression that could only be corrected through admission of the conviction).

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] United States v. Walker, 974 F.3d 193 (2d Cir. 2020) (criminal defendant had no right to cross-examine a witness about his felony convictions for assault and domestic violence; such cross-examination is ordinarily limited to convictions that rest on conduct that shed some light on veracity, which is not ordinarily true with crimes of violence); 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 379: Add to footnote 18:

[18] United States v. Ayika, 837 F.3d 460 (5th Cir. 2016) (after defendant at a healthcare fraud trial chose to testify in his own defense, he was properly impeached on cross examination with evidence of his felony

conviction for illegal possession and distribution of drugs);

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. Babb, 874 F.3d 1027 (8th Cir. 2017) (when offered to impeach a witness by attacking his character for honesty, stale convictions more than 10 years old "should be admitted very rarely and only in exceptional circumstances"); 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 610

Rule 610. Religious Beliefs or Opinions

§ 610.1 Religious Beliefs or Opinions as Affecting Credibility of Witness—In General

Page 391: Add to footnote 3:

[3] United States v. Acosta, 924 F.3d 288 (6th Cir. 2019) (on cross examination of drug trafficking defendant, it was improper for the prosecutor to ask him to admit that he prays to an idol of a deity worshiped by traffickers, and that such conduct violates the biblical Commandment that "thou shall not have any god before me");

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);

Page 394: Add to footnote 4:

[4] Hanover Am. Ins. Co. v. Tattooed Millionaire Ent., LLC, 974 F.3d 767 (6th Cir. 2020) (district court had the discretion to limit both sides to two hours when questioning a witness; the court "was acting sensibly to try to rein in and channel lawyers on both sides who were being argumentative, circuitous, or did not have a firm grasp on their case, the Rules of Evidence, and the Rules of Procedure"); United States v. Walker, 917 F.3d 1004 (8th Cir. 2019) (in prosecution for sexual exploitation of a minor, the district court permissibly limited defendant's cross-examination of child victim to ninety minutes; that was four times the length of the Government's direct examination, and most of the cross-examination had been spent cumulatively reading an exhibit containing the texts between the two that had been admitted into evidence and were already available to the jury);

§ 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 396: Add to footnote 19:

[19] Hanover Am. Ins. Co. v. Tattooed Millionaire Ent., LLC, 974 F.3d 767 (6th Cir. 2020) (a trial judge has the discretion to refuse to allow a party to offer an exhibit on redirect examination on the grounds that the exhibit was outside the scope of the cross-examination); United States v. Jeri, 869 F.3d 1247 (11th Cir. 2017) (unlike cross-examination, the availability of recross-examination falls within the trial court's broad discretion; a criminal defendant has no constitutional right to recross-examination unless a new matter is brought out on redirect); United States v. Monteiro, 871 F.3d 99 (1st Cir. 2017) (the scope of redirect examination is discretionary with the trial court and should be reversed only upon a showing of abuse of discretion, and limiting redirect to the "scope of cross" is a permissible exercise of a trial court's discretion); United States v. O'Neal, 844 F.3d 271 (D.C. Cir. 2016) (a party has a right to recross-examination only where new matter is brought out on redirect examination; when counsel seeks to pursue a new line of attack that could have been covered by him earlier on cross examination, recross examination is not a right but a privilege in the discretion of the court);

Page 396: Add to footnote 20:

[20] United States v. Bailey, 973 F.3d 548 (6th Cir. 2020) (at a lengthy trial interrupted for an extended recess because of the illness of one of the defendants, the court did not abuse its discretion in allowing the government to call the same witness three times—the last time as a summary witness—before resting its case);

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. Torres, 894 F.3d 305 (D.C. Cir. 2018) (in prosecution for sexually abusing minor, district court could properly allow the prosecutor to ask the victim a leading question, even though he was 18 at the time of the trial, because the topic was highly sensitive, and victim had proved to be a particularly reserved witness, thus allowing the court to conclude that the question was necessary to develop the testimony); 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 10:

[10] United States v. Lopez, 870 F.3d 573 (7th Cir. 2017) (even when a Government witness admits on cross-examination that he has made a prior inconsistent statement, Rule 613(b) should be read broadly to allow the defense to call another witness or to introduce other extrinsic evidence to emphasize the fact that the witness made the prior statement).

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);

§ 613.6 Rule 613—The Degree of Inconsistency Required for Impeachment

Page 424: Add to footnote 18:

[18] United States v. LaVictor, 848 F.3d 428 (6th Cir. 2017) (in deciding whether to permit the impeachment of the witness with evidence of an inconsistent statement, inconsistency is defined broadly to include not only contradiction, but also trial testimony that reflects limited and vague recall of events, equivocation, and claims of memory loss);

Chapter 614

Rule 614. Court's Calling or Examining Witness

§ 614.1 Court's Calling or Examining a Witness—In General

Page 427: Add to footnote 2:

[2] Hanover Am. Ins. Co. v. Tattooed Millionaire Ent., LLC, 974 F.3d 767 (6th Cir. 2020) (it was not reversible error for a trial court to make a few interruptions for the obvious purpose of trying to assist the attorneys in getting to the point or in introducing evidence; the interventions were either neutral or helpful, and consistent with the proper role of a trial judge);

§ 614.3 Rule 614(b)—Interrogation by Court

Page 429: Add to footnote 9:

[9] United States v. Lefsih, 867 F.3d 459 (4th Cir. 2017) (a trial judge may question witnesses to develop facts or to clarify the presentation of the case, but should not convey to the jury a negative impression of the defendant or his credibility; trial judge committed plain error in prosecution of alien for immigration fraud by repeatedly expressing his disapproval of the Diversity Immigrant Visa Program by which the alien had entered the country, especially since the defendant was not on trial for his method of entry into the United States); 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");

Page 429: Add to footnote 10:

[10] Russell v. Anderson, 966 F.3d 711 (8th Cir. 2020) (trial judge did not commit plain error in commenting three times during the testimony of the plaintiff's expert that the issue of causation was to be decided by the jury and not the expert; even though the comments may have been interpreted as signaling some doubts about the testimony, the judge allowed the witness to give his explanation and explicitly reminded the jury that his comments should not be taken as any reflection of his views on the case);

Chapter 615

Rule 615. Excluding Witnesses

§ 615.1 Rule 615—Excluding Witnesses—In General

Page 432: Add to footnote 3:

[3] United States v. Ricker, 983 F.3d 987 (8th Cir. 2020) (although the Sixth Amendment right to a public trial gives the defendant the right to have his friends and relatives present, that right is not absolute and does not prohibit the sequestration of defendant's friends or relatives who may be called as witnesses, where the Government had a good faith basis for believing it might call the defendant's father on rebuttal after hearing the testimony of the defendant's psychiatrist on his mental health); United States v. Robertson, 895 F.3d 1206 (9th Cir. 2018) (rule governing exclusion of testifying witnesses from the courtroom forbids a witness who has been excluded from a pretrial hearing from reading transcripts of the testimony given by other witnesses at that hearing; "An exclusion order would mean little if a prospective witness could simply read a transcript of prior testimony he was otherwise barred from hearing");

Page 432: Add to footnote 4:

[4] United States v. Robertson, 895 F.3d 1206 (9th Cir. 2018) (rule governing exclusion of testifying witnesses from the courtroom applies to both trial and pretrial evidentiary hearings);

§ 615.2 Persons Not Subject to Exclusion

Page 434: Add to footnote 11:

[11] United States v. Barret, 848 F.3d 524 (2d Cir. 2017) (when one defendant changed his plea to guilty in the middle of trial and agreed to testify against the others as a government witness, court has the discretion to allow him to testify even though he was present in the courtroom during the testimony of the first government witness while he was still a party to the case);

Page 434: Add to footnote 12:

[12] United States v. Lee, 834 F.3d 145 (2d Cir. 2016) (in a criminal case, the district court has broad discretion to allow the prosecution to designate its chief investigative agent as the government's "representative," and to therefore exempt that agent from an order excluding all other witnesses from the courtroom, even if that agent is allowed to testify as the final government witness, despite the defense objection that this allowed him to "bat clean-up" and tailor his testimony to fix any holes in the prosecution's case);

Page 434: Add to footnote 13:

[13] United States v. Arayatanon, 980 F.3d 444 (5th Cir. 2020) (where two government agents had worked on the case at different times and the Government told the court that each was necessary in the presentation of its case, the trial court could properly grant a prosecution request to exempt both witnesses from sequestration, even though they were both scheduled to possibly testify);

§ 615.3 Violation of a Separation Order

Page 436: Add to footnote 17:

[17] Cruz v. Maverick County, 957 F.3d 563 (5th Cir. 2020) (even if witnesses violated Rule 615 by discussing testimony with other witnesses who had testified and counsel should have warned them of that obligation, the district judge has the discretion to refuse to strike their testimony if it appears that they did

not violate the rule knowingly and that their level of culpability was very low);

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. Oral George Thompson, 921 F.3d 263 (D.C. Cir. 2019) (two members of the defendant's conspiracy were properly allowed to offer lay opinion testimony as to the meaning of code words used in recorded evidence; so long as members of the conspiracy testify based on their own participation in the conspiracy, not necessarily participation in a particular conversation, such witnesses do not have to be qualified as experts); 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);

Page 444: Add to footnote 10:

[10] It should be remembered, although it is often forgotten, that this rule also protects witnesses from being forced on cross-examination to express an opinion on something they do not know. United States v. Pereira, 848 F.3d 17 (1st Cir. 2017) (although it is permissible to ask a witness whether another witness at the trial was wrong or mistaken, it is improper for a cross examiner to ask a testifying defendant whether another witness at the trial was *lying*; witness has no personal knowledge of whether any discrepancy in the testimony was intentional, and it is unfairly prejudicial to force the defendant into the position of branding another witness as dishonest).

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

Page 444: Add to footnote 12:

[12] Sanchez v. City of Chicago, 880 F.3d 349 (7th Cir. 2018) (on the question whether an individual was intoxicated at the time of his arrest, evidence that he did not appear visibly intoxicated to one witness five hours later was of very limited probative value or helpfulness because of the human body's natural metabolic processes that cause the dissipation of alcohol in the blood over time); 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. Oldrock, 867 F.3d 934 (8th Cir. 2017) (even where a forensic examiner is not testifying as an expert, she may testify to her lay opinion based upon her perceptions of a minor victim whom she interviewed, where that opinion was based exclusively on her personal observations and did not refer to any scientific, technical, or other specialized knowledge); United States v. Lomas, 826 F.3d 1097 (8th Cir. 2016) (lay opinion testimony about defendant using "tool" as synonym for "gun" was admissible in prosecution for bank robbery, because the witness lived with defendant); 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. Diaz, 951 F.3d 148 (3d Cir. 2020) (it was error to allow a DEA agent, when giving lay testimony, to offer his opinion that the defendant was working at the direction of another individual to bag and distribute drugs; the conclusory statement was obviously unhelpful, and the witness was no better suited than the jury to make that judgment, based upon the evidence before the jury); United States v. Diaz, 951 F.3d 148 (3d Cir. 2020) (a lay witness may testify about opinions concerning the meaning of recorded conversations only if the speaker speaks as if he were using code and the witness's opinion will be helpful to the jury, but a lay witness may not interpret clear statements understandable to a jury; a statement is not a coded conversation merely because it is vague or lacks clarity, as long as the jury can independently assess the meaning of the conversation just as helpfully without the opinion of the witness); United States v. Jett, 908 F.3d 252 (7th Cir. 2018) (a lay witness may properly offer an opinion as to whether the defendant is an individual in a photograph only if his opinion would likely assist the jury—for example, if he had significant experience with the defendant, or if the defendant had undergone significant physical changes before the trial; it was therefore error for a police officer to offer an opinion that the defendant was shown in a photograph that the jurors could see for themselves when the appearance of the accused had changed very little since the time of a fleeting encounter between him and the officer); United States v. Knowles, 889 F.3d 1251 (11th Cir. 2018) (when a jury is called upon to determine whether the defendant

is the individual depicted in a surveillance video, a lay witness may properly testify to his opinion on that question only if the witness is more likely to correctly identify the defendant than is the jury; a police officer could properly offer such testimony based upon his 20-minute interaction with the defendant during a traffic stop); United States v. Preston, 873 F.3d 829 (9th Cir. 2017) (because the jury has the responsibility to decide the weight and credibility of testimony, it was reversible error for a sex therapist, when testifying as a lay witness, to offer the opinion that her patient was telling the truth about alleged sexual abuse); United States v. Fulton, 837 F.3d 281 (3d Cir. 2016) (where a witness is no better position than the jurors to form an opinion or make an inference, the witness's opinion is inadmissible under Rule 701(b); it was error to allow government agents to offer an opinion comparing the defendant's appearance with that of a man in a video, for they were no better equipped than the jurors to make such a comparison); 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. McLellan, 958 F.3d 1110 (11th Cir. 2020) (just as any lay witness may testify to an opinion based on his professional experience, a police officer who is testifying as a lay witness may testify that there is a relationship between guns and drug activity, where the opinion was based merely on information he acquired during his work as a police officer, and was not based on any technical or specialized knowledge); United States v. Smith, 962 F.3d 755 (4th Cir. 2020) (even when a police officer was not designated as an expert, he may testify as a lay witness to an opinion that is rationally based on his first-hand observations during years of law enforcement—such as a description of methods typically employed by drug dealers—where those first-hand observations are common enough and do not require the expertise of specialists); Lane v. D.C., 887 F.3d 480 (D.C. Cir. 2018) (in a wrongful death suit, the district court properly prevented the plaintiff from testifying that her deceased son suffered from ADHD and bipolar disorder, because such matters were not a proper basis for opinion testimony from a lay witness); United States v. Kearn, 863 F.3d 1299 (10th Cir. 2017) (even a lay witness may offer an opinion that a photo contained "child pornography"—that is, that it involves sexually explicit images of children—because such testimony does not go beyond the realm of common experience, and therefore did not constitute expert testimony); United States v. Preston, 873 F.3d 829 (9th Cir. 2017) (it was reversible error for a sex therapist, when testifying as a lay witness, to offer the opinion that her patient exhibited the typical emotions of a sex abuse victim, and that those who claim to have been sexually abused are usually telling the truth); United States v. Williams, 827 F.3d 1134 (D.C. Cir. 2016) (lay opinion is proper if based upon personal knowledge of events that occurred in the case being tried; an individual testifying about the operations of a drug conspiracy because of knowledge of that drug conspiracy should be admitted as a lay witness. On the other hand, an individual testifying about the operation of a conspiracy based on experience with other conspiracies has 'specialized' knowledge and—provided his testimony meets the rule's enumerated requirements—should be admitted as an expert); 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] Hirchak v. W.W. Grainger, Inc., 980 F.3d 605 (8th Cir. 2020) (although an expert is not required to rule out every possible alternative, his opinion is inadmissible if it fails to account for obvious alternative explanations for the matter on which he is testifying); Madej v. Maiden, 951 F.3d 364 (6th Cir. 2020) (a district judge did not abuse his discretion in excluding the opinion of a medical doctor about "multiple-chemical-sensitivity diagnosis," a theory that had been rejected by numerous reported decisions 10 years earlier and was still unrecognized by the American Medical Association, especially since the plaintiff could not show that more recent advances have led to more widespread scientific acceptance of that theory); Hall v. Conoco Inc., 886 F.3d 1308 (10th Cir. 2018) (when reaching a differential diagnosis to identify the most likely cause of a disease, an expert need not consider and rule out every conceivable cause, but must consider all plausible causes and rule out the less plausible ones until only the most likely cause remains); 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. Johnson, 916 F.3d 579 (7th Cir. 2019) (ATF Agent was properly allowed to offer expert testimony as to how drug dealers often carry multiple cell phones, how they prepackage drugs, how the defendant's Facebook messages showed him setting up a drug deal using industry slang, and how much money drug dealers carry on them at a given time, and was also allowed to explain how items discovered in defendant's possession during his arrest and their relationship to drug dealing, to help the jury understand how he used the pistol in furtherance of the drug crime); United States v. Chapman, 839 F.3d 1232 (10th Cir. 2016) (in domestic abuse prosecution, a certified sexual assault nurse examiner was properly allowed to testify—even though she had never met or examined the victim—that scratches she had inflicted upon herself were consistent with the injuries such victims often inflict upon themselves as a coping mechanism, to rebut the defendant's suggestion that she scratched herself to fabricate evidence against him); 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 453: Add to footnote 10:

[10] Viamedia, Inc. v. Comcast Corp., 951 F.3d 429 (7th Cir. 2020) (an expert may offer an opinion, even if it overlaps with the experience of the jurors or covers patterns that are within their comprehension, so long as the expert uses specialized knowledge to assist the jury in understanding those events);

Page 454: Add to footnote 11:

[11] Delsa Brooke Sanderson v. Wyoming Hwy. Patrol, 976 F.3d 1164 (10th Cir. 2020) (trial court did not abuse its discretion in excluding the opinion of a proposed expert who would testify based on her own experience with gender stereotypes in law enforcement; she did not explain how her experience led to those conclusions, and the subject was well within the common knowledge and experience of jurors); United States v. Nickelous, 916 F.3d 721 (8th Cir. 2019) (the district court did not err in excluding the opinion of a defense expert on eyewitness identification, who believed that a government witness could have unintentionally misconstrued some other object like a phone as a gun; the evaluation of eyewitness testimony and the credibility of a witness is for the jury alone, and an expert is not permitted to offer an

opinion as to the believability or truthfulness of a victim's story); United States v. Brown, 871 F.3d 532 (7th Cir. 2017) (in prosecution of police officer for use of excessive force, defendant was properly precluded from offering expert testimony from a former officer who would have explained the Chicago Police Department's "Use of Force Model." The case did not involve any unusual law enforcement tools or techniques, and expert testimony would have added nothing the jurors could not ascertain on their own by viewing the videotape and applying their everyday experience and common sense to blows struck with officer's bare hands); 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. Lopez, 870 F.3d 573 (7th Cir. 2017) (where defense lawyer was allowed to offer opinion testimony by a certified public accountant, the trial court did not abuse its discretion in precluding the lawyers for both sides from referring to their witnesses as "experts" in the presence of the jury; there is a danger in every case that upon hearing the title "expert," a jury may assign inappropriate weight and credibility to that witness's testimony); 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] United States v. Grote, 961 F.3d 105 (2d Cir. 2020) (expert testimony that usurps the role of the trial judge in instructing the jury as to the applicable law does not aid the jury in making a decision, and is therefore inadmissible); 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 18:

But see United States v. Diaz, 876 F.3d 1194 (9th Cir. 2017) (although it is normally unhelpful and forbidden for an expert to give an opinion as to a legal conclusion, or to tell the jury what result to reach on an ultimate issue of law, an expert is not forbidden to offer an opinion phrased in medical terminology that also appears in the applicable legal standard, as long as those terms do not have a specialized legal meaning; in criminal prosecution, government expert may testify that the defendant's prescriptions were "outside the usual course of medical practice" and served no "legitimate medical purpose"); United States v. Kearn, 863 F.3d 1299 (10th Cir. 2017) (testimony by government agents that photos found on defendant's computer were "child pornography" were helpful to the jury and admissible; the witnesses did not mention the legal definition of child pornography, nor tell the jury what result to reach, and the government made clear its questions did not concern the legal definition of child pornography).

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);

Page 457: Add to footnote 25:

[25] ; *but see* United States v. Rodriguez-Flores, 907 F.3d 1309 (10th Cir. 2018) (the credibility of another person is not an appropriate subject for expert opinion testimony, even when the opinion concerns a class of persons that includes persons whose credibility is at issue in the trial; DEA agent improperly offered the opinion that most people found transporting drugs were lying when they denied knowledge of the drugs).

§ 702.4 Reliability of Expert Testimony

Page 460: Add to footnote 36:

[36] Wendell v. GlaxoSmithKline LLC, 858 F.3d 1227 (9th Cir. 2017) (fact that experts' opinions were not developed independently of litigation and had not been published in peer-reviewed journal did not preclude admission of expert testimony in strict liability action against prescription drug manufacturer; expert testimony concerned rare disease that did not impel published studies, and experts' unwillingness to publish their opinions weighed against admissibility, but was not determinative);

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 49:

[49] Bill Barrett Corp. v. YMC Royalty Co., LP, 918 F.3d 760 (10th Cir. 2019) (a judge is not always required to conduct a formal pretrial *Daubert* hearing, and does not abuse his discretion by conducting the hearing in the presence of the jury through direct examination and voir dire); The trial court has an obligation, however, to provide a reasoned analysis of the relevant factors underlying the court's ruling. City of Pomona v. SQM N.A. Corp., 866 F.3d 1060 (9th Cir. 2017) (district judge committed reversible error and abdicated his gatekeeping authority by denying a *Daubert* motion in a one-word ruling—"DENY"—and failing to provide any analysis or explanation to confirm that the court assessed the scientific validity or methodology of the proposed expert testimony).

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] Sandifer v. Hoyt Archery, Inc., 907 F.3d 802 (5th Cir. 2018) (the expert opinion of an "accident reconstruction expert and biomechanics consultant" as to the cause of an accident was improperly based on the victim's reputation as a "meticulous" and "very safety conscious" bow hunter; an expert may offer an opinion on inadmissible evidence, including character or propensity evidence, only if such data is regularly relied upon by experts in his field, and there was no evidence that biomechanics experts routinely form judgments on the basis of the character or propensity or habits of individuals); United States v. Szczerba, 897 F.3d 929 (8th Cir. 2018) (member of FBI task force on human trafficking could properly opine as to his understanding of terminology and as to what pimps and prostitutes typically do because he possessed adequate credentials and sufficient factual data, including interviews of more than 300 women involved in prostitution and 30 suspected pimps, as well as his investigation of more than 120 sex-trafficking cases); 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 473: Add to footnote 2:

[2] United States v. Caniff, 955 F.3d 1183 (11th Cir. 2020) (detective's opinion did not violate the rule limiting expert opinion on the defendant's mental state, because he was never offered or qualified as an expert witness); United States v. Stahlman, 934 F.3d 1199 (11th Cir. 2019) (in prosecution for attempting to entice a minor into sexual activity, the District Court properly refused to allow the defendant to offer the expert opinion of a psychologist that he intended to act out a fantasy involving adults rather than have sexual contact with a minor; the witness would be doing more than providing testimony that supports an inference as to intent—he would, in effect, be telling the jury that the accused did not intend to commit the charged crime);

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. Portillo, 969 F.3d 144 (5th Cir. 2020) (the prohibition in Rule 704(b) must be interpreted narrowly, and only forbids expert opinions that directly opine on the defendant's mental state; it does not forbid expert testimony "about the typical mental state shared by individuals in a specific criminal role"); United States v. Dunnican, 961 F.3d 859 (6th Cir. 2020) (a DEA agent could testify that the marijuana he observed in the defendant's vehicle appeared to be "packaged for resale"; the agent did not explicitly offer an opinion about the defendant's mental state, but simply "described in general terms the common practices of those who clearly do possess the requisite intent, leaving unstated the inference that the defendant, having been caught engaging in more or less the same practices, also possessed the requisite intent"); United States v. Tingle, 880 F.3d 850 (7th Cir. 2018) (DEA agent did not impermissibly offer expert opinion on the defendant's mental state when he testified that the amount of drugs in defendant's residence was "definitely for distribution" and that a gun found on top of the desk near the drugs and money was "utilized as protection by Mr. Tingle to protect himself and/or the methamphetamine and the currency," because his expert opinion was clearly based upon his general training and experience, and no jury could believe that he was speaking from special personal knowledge of the defendant); United States v. Jeri, 869 F.3d 1247 (11th Cir. 2017) (in drug smuggling prosecution, agent who interviewed defendant at airport did not improperly offer an opinion on the ultimate issue of whether the defendant had the mental state required to commit the offense; he never offered an opinion as to whether the accused knew there was cocaine concealed in his suitcase, but only offered an explanation as to why he believed the

defendant was giving untruthful answers in their interview); United States v. Kohli, 847 F.3d 483 (7th Cir. 2017) (government expert, who testified that prescriptions written by defendant lacked a legitimate medical purpose, did not offer an impermissible opinion about the defendant's subjective mental state or whether he had the requisite intent to commit the crimes charged; the witness did not rely on some special knowledge of the accused's mental processes, but based his opinion on a review of the office records in light of his own experience and training); 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. Oti, 872 F.3d 678 (5th Cir. 2017) (an expert witness is permitted to give his opinion on an "ultimate issue" of fact, assuming he is qualified to do so, but may never offer an opinion on the conclusion of law that would merely tell the jury what result to reach; ATF agent should not have been allowed to offer the opinion that the defendant's use of a firearm was "in furtherance of the drug trafficking activity," a legal conclusion that should have been left to the jury); 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] *E.g.,* 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);

Chapter 706

Rule 706. Court-Appointed Expert Witnesses

§ 706.2 Procedure for Applying Rule 706

Page 489: Add to footnote 14:

[14] Karsjens v. Piper, 845 F.3d 394 (8th Cir. 2017) (district court did not commit error in appointing four experts to assist in understanding the complexities of a case, even though that testimony substantially assisted the plaintiff, because the defendant was able to fully present its case at a six-week bench trial and the court gave due consideration to all arguments from both sides);

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: Rule 801 was amended April 25, 2014, effective December 1, 2014. 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

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* 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, 576 U.S. 237, 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, 576 U.S. 237, 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, 576 U.S. 237, 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, 576 U.S. 237, 135 S. Ct. 2173, 192 L. Ed. 2d 306 (2015).

Page 516: Add to footnote 82:

[82] *See also* United States v. LeBeau, 867 F.3d 960 (8th Cir. 2017) (statements by a member of a conspiracy in coded language during outgoing telephone calls from a jail were not testimonial, even though he was aware that law enforcement could listen to his calls and use them as evidence, because the primary purpose of the calls was to further the drug conspiracy and not to create a record for a criminal prosecution; the admission of those recorded calls against his codefendant was therefore not a violation of the Confrontation Clause, even though the declarant was not available to be cross-examined about those statements).

Page 517: Add to footnote 86:

[86] United States v. Fryberg, 854 F.3d 1126 (9th Cir. 2017) (a business or public record is not testimonial due to the mere possibility that it could be used in a later criminal prosecution, but only if the primary purpose of the record was for use at a later criminal trial); 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 518: Add to footnote 88:

[88] United States v. Garcia, 887 F.3d 205 (5th Cir. 2018) (in a prosecution for illegal reentry, the Confrontation Clause was not violated by the admission of a written warrant of removal, reflecting the date on which the defendant had been removed from the country; such documents are nontestimonial because they are routinely issued to memorialize an alien's departure—not specifically or primarily to prove facts in a hypothetical future criminal prosecution);

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 522: Add to footnote 104:

[104] United States v. Purcell, 967 F.3d 159 (2d Cir. 2020) (the Confrontation Clause does not forbid a police officer from testifying to statements made to him by a victim, even if the statements were testimonial, as long as the victim also testified at the trial and was made available for cross-examination by the defendant); United States v. Al-Awadi, 873 F.3d 592 (7th Cir. 2017) (in sexual exploitation prosecution, the Confrontation Clause did not bar the admission of a videotaped statement given by the child victim to law enforcement officers two years after the crime, because the child appeared at trial and was made available for cross-examination);

Page 522: Add to footnote 106:

[106] United States v. King, 865 F.3d 848 (6th Cir. 2017) (in money-laundering prosecution, Confron-

tation Clause was not violated when the government played recordings of statements made to the defendant by a government informant who was posing as a drug dealer, and who falsely claimed that he had money from drug sales that he wanted the defendant to help him launder; those statements were not offered for their truth, but only to prove the terms of the criminal agreement between the two);

Page 522: Add to footnote 107:

[107] *But see* United States v. Johnson, 875 F.3d 1265 (9th Cir. 2017) (although hearsay statements directly inculpating the defendant are not normally admissible to explain the course of a police investigation unless that is somehow relevant to the government's case, a police officer may testify to statements incriminating the defendant in order to rebut the defendant's suggestion at trial that the officer's failure to investigate another criminal suspect was "sloppy police work," as long as the jury is instructed that such evidence is not admissible for its truth, but merely to explain the police department's conduct).

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).

Page 527: Add to footnote 132:

[132] At least one Circuit has held, however, that the right to Confrontation does apply to pretrial suppression hearings. United States v. Daniels, 930 F.3d 393 (5th Cir. 2019) (although the Sixth Amendment right to confront is a trial right, it also applies to suppression hearings).

§ 801.3 Definition of a Statement

Page 527: Add to footnote 133:

[133] United States v. Pulliam, 973 F.3d 775 (7th Cir. 2020) (defendant was properly precluded from offering evidence that, when asked by police about a gun he had thrown the bushes, he responded "what gun?"; the remark, in context, was not truly a question intended to elicit a response, but was the equivalent of a substantive assertion meant to express the idea that "I don't know what you're talking about"); 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);

Page 530: Add to footnote 146:

[146] United States v. Hernandez, 864 F.3d 1292 (11th Cir. 2017) (testimony by customs officer—describing how he saw another officer search a vessel without reacting in a way that displayed any concern—was admissible to prove that the vessel did not contain anything suspicious; the evidence was not hearsay, because the searching officer did not intend through his silent nonverbal conduct to communicate any message to the other officer).

§ 801.5 Definition of Hearsay

Page 530: Add to footnote 149:

[149] United States v. Cummings, 858 F.3d 763 (2d Cir. 2017) (when Government witness testified that defendant had made certain statements but denied that they were made to the witness "directly," the testimony was inadmissible hearsay, because it was relating something the witness had obviously been told by someone else about what the defendant had said);

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). *But see* United States v. Jones, 930 F.3d 366 (5th Cir. 2019) ("A witness's statement to police that the defendant is guilty of the crime charged is highly likely to influence the direction of a criminal investigation. But a police officer cannot repeat such out-of-court accusations at trial, even if helpful to explain why the defendant became a suspect or how the officer was able to obtain a search warrant").

§ 801.6 Implied Assertions and the Assertion-Oriented Approach of the Federal Rules of Evidence

Page 532: Add to footnote 153:

[153] Baines v. Walgreen Co., 863 F.3d 656 (7th Cir. 2017) (statement by a person who instructed a subordinate "you cannot hire [plaintiff]" was not hearsay because it was a command and therefore not a statement; statements, unlike commands, assert propositions that may be true or false).

§ 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] Booker v. Graham, 974 F.3d 101 (2d Cir. 2020) (in an action by prisoner who alleged he was punished in retaliation for exercise of First Amendment rights, reports of his gang affiliation and his criminal and disciplinary history were not hearsay or impermissible character evidence, because they were not admitted for their truth but only to explain the motivation behind the defendant's actions); Kitchen v. BASF, 952 F.3d 247 (5th Cir. 2020) (when plaintiff alleged that he was illegally dismissed based upon his disability and age, testimony by his employer about conversations with an in-house company physician was not hearsay; the testimony was not offered to prove the truth of the physician's opinion—that the plaintiff had in fact been intoxicated on the day of his dismissal—but merely to show its effect on the employer, and the reason for his honest opinion that the plaintiff had been intoxicated while at work); Miles v. S. C. Human Resource Agency, Inc., 946 F.3d 883 (6th Cir. 2020) (in age discrimination lawsuit, testimony by the defendant's chief executive about complaints he had received from the plaintiff's subordinates about her poor treatment of them was not hearsay; it was not offered to show that she in fact treated them poorly, but only to demonstrate that they had lodged these complaints and that she was not fired because of her age); United States v. Greenspan, 923 F.3d 138 (3d Cir. 2019) (in prosecution for bribery and fraud, the hearsay rule did not preclude the accused from testifying that he had relied on the advice of his lawyer, who had died before trial; he was not using the lawyer's statements to show that the agreements were in fact lawful, but only to prove their effect on his state of mind—to explain why he believed that they were lawful, and to support his "advice of counsel" defense); United States v. Scully, 877 F.3d 464 (2d Cir. 2017) (at a criminal fraud trial, the district court abused its discretion in refusing to allow the defendant to testify how he received and relied upon the advice of an attorney that his business plans were completely legal; such evidence was not hearsay, because it was offered not to prove the truth of what he was told by the lawyer, but only to explain the impact of those statements on his state of mind); Poullard v. McDonald, 829 F.3d 844 (7th Cir. 2016) (in employment discrimination case, defendant's employee

could properly testify that she had concerns regarding plaintiff's classification evaluated by a specialist who said that the classification was appropriate; that testimony was not admissible to prove the truth of what the specialist said, but was admissible to show its effect on the supervisor, whose state of mind was relevant); 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 183:

183 United States v. Rowland, 826 F.3d 100 (2d Cir. 2016) (hearsay rules did not preclude a defendant from offering emails and text messages that he wrote to the chief operating officer of a company, because those messages were not offered to prove the truth of those statements, but merely as evidence of the disputed fact that he was actually performing work for that company and in communication with that officer);

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);

Page 538: Add to footnote 188:

[188] United States v. King, 865 F.3d 848 (6th Cir. 2017) (in money-laundering prosecution, neither the hearsay rule nor the Confrontation Clause was violated when the government played audio recordings of statements made out of court to the defendant by a government informant who was posing as a drug dealer, and who falsely claimed that he had money from drug sales that he wanted the defendant to help him launder; those statements were not offered for their truth, but only to prove the terms of the criminal agreement between the two);

§ 801.9 Non-Hearsay, Out-of-Court Statements; Verbal Parts of Acts

Page 539: Add to footnote 191:

[191] United States v. Lewisbey, 843 F.3d 653 (7th Cir. 2016) (in prosecution for illegal firearms trafficking, messages sent to defendant's cell phone were not hearsay because they were not admitted for their truth, but merely to supply the context for his responding texts);

§ 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 545: Add to footnote 215:

[215] United States v. Oloyede, 933 F.3d 302 (4th Cir. 2019) (a criminal defendant is not permitted to ask FBI agent on cross-examination about exculpatory statements he made to that agent during his post-arrest interview; such statements are inadmissible hearsay and only admissible as prior consistent statements if the defendant testifies and become available for cross examination);

Page 546: Add to footnote 217:

[217] United States v. Lynch, 903 F.3d 1061 (9th Cir. 2018) (defendant charged with illegal marijuana production and distribution was properly precluded from calling a lawyer to testify about how the

defendant told him about an alleged conversation with a DEA agent; such a statement was not admissible as a "prior consistent statement" to support the defendant's entrapment defense, because any statement he made to the lawyer while planning to open up his marijuana business did not predate the defendant's possible motivation to fabricate the contents of that telephone call—the same motive he had at the time of trial);

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);

Page 546: Add to footnote 218:

Under the important amendment to the Rule that took effect in 2014, however, prior consistent statements may now be introduced to rehabilitate a witness whose credibility has attacked on other grounds, such as an attack on the witness's memory. United States v. Cox, 871 F.3d 479 (6th Cir. 2017) (after defense counsel suggested that a child witness had a faulty memory, it was proper for the prosecution to call an agent to testify to the child's prior consistent statements concerning the same matter, for the purpose of rehabilitating the testimony of the child). *See also* United States v. Purcell, 967 F.3d 159 (2d Cir. 2020) (after a defense attorney impeaches witness on cross-examination with questions designed to suggest that her trial testimony is inconsistent with statements she made to the police, it is permissible to rehabilitate the witness by asking the officer on redirect about other statements made by the witness during that interview to rebut the charge of inconsistency and to place the alleged discrepancies in context); United States v. Iu, 917 F.3d 1026 (8th Cir. 2019) (after defense cross-examined and impeached a sexual abuse victim with evidence of inconsistent statements she made to a defense investigator, the Government was properly allowed to rehabilitate the victim by calling an officer to testify to her much earlier prior consistent statement identifying the accused, offered specifically to rebut the theory that she had fabricated her claim, and to demonstrate that her account of the assault changed only much later in the process, after speaking with the defense investigator, and following repeated attempts by the defendant to convince her to change her story).

§ 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. Williston, 862 F.3d 1023 (10th Cir. 2017) (after a jury was shown a third of a murder defendant's recorded interview with the police, the rule of completeness did not give him the right to play for the jury, or ask the officer about, other portions of the recording in which the defendant denied killing the child, asserted that he had been abused as a child, and claimed that he would not hit a child because he thought that child abuse was wrong); 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);

Page 554: Add to footnote 248:

[248] Parker v. Winwood, 938 F.3d 833 (6th Cir. 2019) (a party does not necessarily adopt another person's statement as his own merely by putting it on the party's website; posting a statement on a webpage might imply one's general agreement with it, but is not necessarily an actual manifestation of one's adoption of a statement or belief in it); United States v. Lomas, 826 F.3d 1097 (8th Cir. 2016) (testimony in prosecution for bank robbery by getaway driver's teenage daughter about statements driver made in conversation with defendant about robbery was admissible as nonhearsay adoptive admissions; defendant was present, he overheard statements, and he had opportunity to deny truth of statements);

§ 801.20 Statements That Are Not Hearsay—Vicarious Admissions

Page 556: Add to footnote 258:

[258] In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig., 888 F.3d 753 (5th Cir. 2018) (resignation letter written by a defendant's employee, complaining about racism in the workplace, was not admissible as a statement by an employee on a matter within the scope of employment; that rule does not apply to resignation letters, where the employee is no longer inhibited by his relationship with the employer);

Page 557: Add to footnote 262:

[262] Weil v. Citizens Telecom Services Co., LLC, 922 F.3d 993 (9th Cir. 2019) (under hearsay exception for a statement made by an opposing party's agent or employee on a matter within scope of that relationship, a statement may concern a matter within the scope of employment—even though the declarant was no longer involved with that particular matter when the statement is made—so long as the declarant was involved with that matter at some point in his or her employment, and was still employed by that party in some capacity when the statement was made); Walsh v. New York City Housing Authority, 828 F.3d 70 (2d Cir. 2016) (sex discrimination plaintiff could testify to a statement made to her by the one of the defendant's human resource representatives who was present when hiring decisions were made, regardless of whether that employee had any "decision-making" authority; no such authority is required for an employee to be considered an agent of the defendant as long as his statement involved a matter within the scope of his agency);

§ 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. Amede, 977 F.3d 1086 (11th Cir. 2020) (statements made in furtherance of the conspiracy are admissible even against members of the conspiracy who did not join until after the statement was made); 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. Lebedev, 932 F.3d 40 (2d Cir. 2019) (once a party withdraws from a conspiracy, later statements by his former conspirators are not admissible against him, but withdrawal requires affirmative action to disavow or defeat the purpose of the conspiracy, and a mere disagreement or a falling out between the members, or resignation from the conspiracy, is not sufficient to establish withdrawal from the conspiracy. Absent withdrawal, a conspirator's participation in a conspiracy is presumed to continue until the last overt act by any of the conspirators); United States v. Nagelvoort, 856 F.3d 1117 (7th Cir. 2017) (statements made by a member of a conspiracy are not admissible against former members who had withdrawn from the conspiracy by that time, but ceasing one's active participation in the conspiracy, by itself, is not sufficient to prove withdrawal; withdrawal requires an affirmative action to disavow or defeat the purpose of the conspiracy); 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).

Page 561: Add to footnote 276:

[276] *See also* United States v. Alcorta, 853 F.3d 1123 (10th Cir. 2017) (statements made after the objectives of the conspiracy have either failed or been achieved are not made during the conspiracy and are not admissible under this exception, and when an arrest terminates the conspiracy, post-arrest statements of any kind, including those made to prevent detection or punishment for the terminated conspiracy, are inadmissible because they were not made during the conspiracy, but a conspiracy does not end simply because one conspirator has been arrested, and statements between conspirators after their arrest may be may be in furtherance of their ongoing conspiracy if made in an effort to avoid detection of evidence by law enforcement personnel).

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

Page 561: Add to footnote 278:

[278] United States v. Bailey, 973 F.3d 548 (6th Cir. 2020) (a statement may be in furtherance of a conspiracy even if it was not made exclusively, or even primarily, to further the conspiracy, as long as that was one of the speaker's motives; a statement identifying other members and their roles in the conspiracy may further the conspiracy); United States v. Elder, 840 F.3d 455 (7th Cir. 2016) (a statement may be in furtherance of a conspiracy even if the statement was not made exclusively, or even primarily, to further the conspiracy); United States v. Ford, 839 F.3d 94 (1st Cir. 2016) (to be admissible as a statement in

furtherance of a conspiracy, a hearsay statement need not be necessary or even important to the conspiracy, or even made to another member of the conspiracy, as long as it can be said to advance the goals of the conspiracy in some way); 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 281:

[281] United States v. Merritt, 945 F.3d 578 (1st Cir. 2019) (for out-of-court statements made by a conspirator, it is immaterial that the person to whom the statement is made is a government informant, as long as the statement itself was made in furtherance of the common scheme);

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. Elder, 840 F.3d 455 (7th Cir. 2016) (statements can further a conspiracy in a number of ways, including comments designed to assist in recruiting potential members, to inform other members about the progress of the conspiracy, to control damage to or detection of the conspiracy, to hide the criminal objectives of the conspiracy, or to instill confidence and prevent the desertion of other members); 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 286:

[286] United States v. Mathis, 932 F.3d 242 (4th Cir. 2019) (a statement by a conspirator to his girlfriend, that he and others had "killed a cop" and asking if she knew a place where he could get rid of a vehicle, was admissible against other members of the conspiracy, even though the girlfriend was not a member of the conspiracy; the exception applies even to statements made to those who have only a casual relationship to the conspiracy, as long as the declarant was seeking assistance in furtherance of the conspiracy);

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: Rule 803 was amended April 25, 2014, effective December 1, 2014. 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.

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

Page 571: Replace subdivision (16) with the following:

(16) ***Statements in Ancient Documents.*** A statement in a document that was prepared before January 1, 1998, and whose authenticity is established.

§ 803.3 Requirement of Temporal Proximity

Page 576: Add to footnote 12:

[12] United States v. Lovato, 950 F.3d 1337 (10th Cir. 2020) (a recording of a 911 phone call was admissible as a present sense impression; the caller reported that he witnessed two men in a Honda shoot at another car only two or three minutes after observing the gunfire, and continued to report his observations of the Honda and its occupants as he followed it for approximately 13 minutes); Miller v. Greenleaf Orthopedic Associates, S.C., 827 F.3d 569 (7th Cir. 2016) (plaintiff could not offer evidence of entries made by her in her own diary as "present sense impressions," in the absence of any evidence that the entries were made without calculated narration, or while she was perceiving the events described by her);

§ 803.7 Theory Supporting Rule 803(2)

Page 580: Add to footnote 26:

[26] United States v. Magnan, 863 F.3d 1284 (10th Cir. 2017) (although a spontaneous statement surely is more likely to qualify as an excited utterance than a statement in response to questioning, even statements made in response to questioning may qualify if the excitement level was severe; the issue is whether the statement was the product of reflective thought or the stress of excitement caused by the startling event);

§ 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 32:

[32] United States v. Hemsher, 893 F.3d 525 (8th Cir. 2018) (statements allegedly made by police officers during the routine execution of a search warrant were not admissible as excited utterances, because such an event in the normal course of employment by trained officers does not constitute a startling event);

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. Magnan, 863 F.3d 1284 (10th Cir. 2017) (after a victim was shot twice and left to die, paralyzed from the chest down, her later statements to the police and medical personnel identifying the defendant as her shooter were admissible as excited utterances, even though they were made between two to five hours after the shooting, and even though she did not die for nearly three weeks); 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. Magnan, 863 F.3d 1284 (10th Cir. 2017) (Whether a statement out-of-court was made under the stress of startling event, as required for an excited utterance, depends on (1) amount of time between the event and the statement; (2) nature of event; (3) subject matter of statement; (4) age and condition of declarant; (5) presence or absence of self-interest; and (6) whether statement was volunteered or in response to questioning); 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);

§ 803.12 Rule 803(3) Then-Existing Mental, Emotional, or Physical Condition

Page 587: Add to footnote 51:

[51] United States v. West, 877 F.3d 434 (1st Cir. 2017) (a criminal defendant has no right to offer evidence that he told the police, following his arrest, that the crime video and witnesses would not identify him; such exculpatory statements, offered by the defendant, are inadmissible hearsay, and not admissible to show that he had "an innocent state of mind," because this hearsay exception does not pertain to a statement of memory, offered to prove the truth of his statement about that memory).

§ 803.14 State of Mind in Issue

Page 589: Add to footnote 57:

[57] United States v. Gonzalez, 905 F.3d 165 (3d Cir. 2018) (in a cyberstalking prosecution, emails written by the victim describing her distress over the defendant's actions were admissible under Rule 803(3) not to show the truth of her descriptions of the defendants' acts, which were proved by other evidence in the case, but merely to demonstrate that she was aware of those acts);

§ 803.16 State of Mind to Demonstrate Beliefs

Page 594: Add to footnote 75:

[75] United States v. West, 877 F.3d 434 (1st Cir. 2017) (a criminal defendant has no right to offer evidence that he told the police, following his arrest, that the crime video and witnesses would not identify him; such exculpatory statements, offered by the defendant, are inadmissible hearsay, and not admissible under the state of mind exception to show that he had "an innocent state of mind," because this exception

does not pertain to a statement of memory, offered to prove the truth or accuracy of that memory).

§ 803.19 "Reasonably Pertinent" Requirement

Page 601: Add to footnote 96:

[96] Kitchen v. BASF, 952 F.3d 247 (5th Cir. 2020) (in employment discrimination case, medical records were admissible to show that the plaintiff reported to a physician that he had been having a recent alcohol binge and drinking heavily for the previous ten days).

Page 602: Add to footnote 100:

[100] United States v. Kootswatewa, 893 F.3d 1127 (9th Cir. 2018) (although statements identifying the perpetrator of a crime are generally not pertinent to medical diagnosis or treatment, such statements are often admissible in cases involving child sexual abuse, because medical providers need to know who abused a child in order to protect her from future abuse at the hands of the same perpetrator, and to assist in diagnosing and treating the psychological and emotional injuries caused by the abuse); 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);

§ 803.21 Psychiatrists

Page 604: Add to footnote 105:

[105] United States v. Gonzalez, 905 F.3d 165 (3d Cir. 2018) (the hearsay exception for statements made for "medical diagnosis or treatment" covers statements made to a mental health professional, as well as statements to a physician);

§ 803.28 Rule 803(6) Records of a Regularly Conducted Activity

Page 613: Add to footnote 131:

[131] *E.g.*, Christian Faith Fellowship Church v. adidas AG, 841 F.3d 986 (Fed. Cir. 2016) (the preprinted address on a check is hearsay if offered as proof of the signer's address, but admissible as a business record).

§ 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 149:

[149] *But see* United States v. Petrunak, 856 F.3d 484 (7th Cir. 2017) (in tax fraud prosecution, trial court properly refused to allow defendant to offer alleged minutes of corporate meetings of his company; defendant was sole "employee" of company and sole attendee at meetings, minutes were not originals, but reproductions created by him after IRS began its investigation, and his destruction of original minutes cast doubt on whether minutes were actually made at time of meeting, or were produced or altered in light of impending litigation).

Page 619: Add to footnote 152:

[152] United States v. Daneshvar, 925 F.3d 766 (6th Cir. 2019) (an email is not admissible as a "business record" simply because it was sent between two employees in a company or because employees regularly conduct business through emails; such evidence alone is insufficient to show that the email is a record made as "a regular practice" of the company and that "the record was kept in the course of a regularly conducted activity of a business." The business records exception is designed for a limited category of records—those that are regularly produced as a part of a company's business activities—and does not apply to a one-time discussion between two employees); United States v. Browne, 834 F.3d 403 (3d Cir. 2016) (Facebook chat logs are not admissible under the "business records exception," because Facebook employees can only attest to the fact that an exchange took place between certain accounts, and the company does not attempt to verify the accuracy or the substantive contents of those communications); 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] United States v. Petrunak, 856 F.3d 484 (7th Cir. 2017) (in tax fraud prosecution, trial court properly refused to allow defendant to offer alleged minutes of corporate meetings of his company; defendant was sole "employee" of company and sole attendee at meetings, minutes were not originals, but reproductions created by him after IRS began its investigation, and his destruction of original minutes cast doubt on whether minutes were actually made at time of meeting, or were produced or altered in light of impending litigation); 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] Ernst v. City of Chicago, 837 F.3d 788 (7th Cir. 2016) (handwritten committee notes taken during a committee meeting are admissible under the business records exception, and may be authenticated by a member of the committee other than the one who took the notes); United States v. House, 825 F.3d 381 (8th Cir. 2016) (motel receipt with the defendant's name and driver license identification number was admissible to prove that he stayed at a hotel near a jewelry store the night before its robbery; the document was admissible as a business record even though the motel record custodian who authenticated the document was not present when it was created); Christian Faith Fellowship Church v. adidas AG, 841 F.3d 986 (Fed. Cir. 2016) (a document may be admitted as a business record even if it was not prepared by the party offering the document, as long as the party offering the document relied upon the accuracy of that document and there were other circumstances indicating its trustworthiness; a church was entitled to offer evidence of a check it had received as proof of the address of the person who wrote the check, in light of evidence that the check was maintained in the church records in the normal course of its bookstore sales); 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);

Page 623: Add to footnote 161:

[161] United States v. Buendia, 907 F.3d 399 (6th Cir. 2018) (a school secretary was not qualified to lay the foundation for the admission of receipts that purported to document school expenses; she did not regularly maintain a record of the receipts, and did not testify that she knew who submitted each receipt, whether that person was reimbursed, and—if so—where the money came from); Flourney v. City of Chicago, 829 F.3d 869 (7th Cir. 2016) (in civil suit against city Police Department, the District Court properly excluded a handwritten notation found on one copy of a typed police report; the handwriting was not admissible as a business record, because there was no evidence as to who had written those words or when, and so there was no way to know whether they were written by someone at the time of the relevant events or in the normal course of business);

§ 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 167:

[167] United States v. Melton, 870 F.3d 830 (8th Cir. 2017) (in fraud prosecution of a company's chief financial officer, it was an abuse of discretion to admit a report prepared by an outside auditor hired by the company; the report was hearsay, and was not admissible under Rule 803(6) because it was not a record of a regularly conducted activity but was prepared to determine the extent of the company's liability in anticipation of litigation); United States v. Petrunak, 856 F.3d 484 (7th Cir. 2017) (in tax fraud prosecution, trial court properly refused to allow defendant to offer alleged minutes of corporate meetings of his company; his destruction of original minutes cast doubt on whether minutes were actually made at time of meeting, or were produced or altered in light of impending litigation);

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] Mamani v. Sanchez Bustamante, 968 F.3d 1216 (11th Cir. 2020) (State Department cables signed by the ambassador to Bolivia were not admissible to prove the details about social unrest in Bolivia; it was impossible to determine whether the information was gleaned from observations by State Department officials or other agents under a duty to truthfully report, was a conclusion drawn by them based on an investigation, or just a collection of statements made by unidentified sources and other third parties); 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. Slatten, 865 F.3d 767 (D.C. Cir. 2017) (a record prepared by a government investigator is admissible only if it contains information reported by the one who made the document or others acting for that agency in the regular course of business, but not if it contains a description of an incident supplied to the investigator by a witness); 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 638: Add to footnote 220:

[220] United States v. Gluk, 831 F.3d 608 (5th Cir. 2016) (in criminal wire fraud prosecution, the defendant was entitled to offer reports of investigations conducted by the Securities and Exchange Commission; those reports were admissible against the government under the public records exception to the hearsay rule, even though those reports contained opinions by individual agents at the SEC, because those conclusions and opinions were never disavowed by the agency).

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 641: Add to footnote 238:

[238] United States v. Lundstrom, 880 F.3d 423 (8th Cir. 2018) (at a criminal trial, Federal Rule 803(8)(A)(iii) forbids the admission of reports prepared by law enforcement officials at the scene of a crime or in investigating a crime, but not reports authored by other government agents regarding routine matters in nonadversarial settings; the prosecutor could properly use reports prepared by a state agency which was charged with the responsibility to conduct regular bank supervision to ensure their soundness and compliance with financial laws and regulation, and which did not conduct criminal investigations, collect evidence, or bring criminal charges); United States v. Fryberg, 854 F.3d 1126 (9th Cir. 2017) (return of service prepared by tribal police officer did not fall within scope of law enforcement exception to public records exception to hearsay rule, because it recorded completion of largely ministerial task of serving defendant with notice of hearing; purpose of "law enforcement exception" to public records exception to hearsay rule is to exclude observations made by officials at scene of crime or apprehension, because observations made in adversarial setting are less reliable than observations made by public officials in other situations);

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));

§ 803.46 Trustworthiness

Page 644: Add to footnote 254:

[254] United States v. The Boeing Company, 825 F.3d 1138 (10th Cir. 2016) (In considering trustworthiness of public reports, for purposes of public records hearsay exception, court should consider timeliness of investigation, special skill or experience of investigator, whether hearing was held and level at which it was conducted, and any possible motivation problems in preparation of report);

§ 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);

Page 660: Replace § 803.64 with the following:

§ 803.64 Rule 803(16) Statements in Ancient Documents

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

***

(16) ***Statements in Ancient Documents.*** A statement in a document that was prepared before January 1, 1998, and whose authenticity is established.

Rule 803(16) permits written statements in a document to be offered for their truth upon a preliminary showing that the document is authentic and that it was prepared before January 1, 1998.[316.1] Before the amendment, the subdivision referred to documents "at least 20 years old."[316.2] The Advisory Committee stated that The Committee understands that the new cutoff date, though somewhat arbitrary, is a rational way to deal with concerns about old and unreliable ESI.

Originally, the common-law doctrine of "ancient documents" pertained only to

authenticity,[316.3] but many American courts admitted the authenticated writing to prove the truth of statements made in the document.[316.4] The common-law tradition required the document in question to be in existence for at least *thirty years*, so in respect to age, Rule 803(16) before the latest amendment represented a modification of pre-Rule law.[316.5]

[316.1] Fed. R. Evid. 803(16) (as amended effective Dec. 1, 2017).

[316.2] *See generally,* 2 MCCORMICK, § 323; 5 WEINSTEIN'S FEDERAL EVIDENCE § 803.21; 4 MUELLER & KIRKPATRICK, § 466; 5 WIGMORE, §§ 1573–1574; 7 WIGMORE, § 2145. *See also* Wickes, *Ancient Documents and Hearsay*, 8 TEX. L. REV. 451 (1930); Note, *Recitals in Ancient Documents*, 46 IOWA L. REV. 448 (1961); Note, *The Effect of the Ancient Document Rule on the Hearsay Rule*, 83 U. PA. L. REV. 247 (1934); Comment, *Ancient Documents as an Exception to the Hearsay Rule*, 33 YALE L.J. 412 (1924).

[316.3] *See* 2 MCCORMICK, § 323; *see* Ninety Six v. Southern Railway Co., 267 F.2d 579 (4th Cir. 1959) (stating that the exception for ancient documents "deals only with the authentication of the document sought to be proved, and not with its competency or admissibility"); King v. Watkins, 98 F. 913, 917 (C.C.D. Va. 1899), *rev'd on other grounds,* 118 F. 524 (4th Cir. 1902) ("[T]he doctrine of admitting ancient documents in evidence, without proof of their genuineness, is based on the ground that they prove themselves, the witness being presumed to be dead. The doctrine goes no further than this. The questions of its relevance and admissibility as evidence cannot be affected by the fact that it is an ancient document. It is no more admissible on that ground than if it were a newly-executed instrument"). *See generally,* 5 WIGMORE, §§ 1573–1574; 5 WEINSTEIN'S FEDERAL EVIDENCE § 803.21; 4 MUELLER & KIRKPATRICK, § 466.

[316.4] *See, e.g.,* Stewart Oil Co. v. Sohio Petroleum Co., 202 F. Supp. 952 (E.D. Ill. 1962), *aff'd,* 315 F.2d 759 (7th Cir. 1963) (recognizing hearsay exception for ancient documents but finding particular document inadmissible on basis of untrustworthiness); Burns v. United States, 160 F. 631 (2d Cir. 1908) (maps); *cf.* Lee Pong Tai v. Acheson, 104 F. Supp. 503 (D. Pa. 1952).

[316.5] For a recital of common-law decisions, see Comment, *Ancient Documents as an Exception to the Hearsay Rule*, 33 YALE L.J. 412 (1924).

§ 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);

§ 803.66 Rationale

Page 662: Add to footnote 327:

[327] *But see* Chemehuevi Indian Tribe v. McMahon, 934 F.3d 1076 (9th Cir. 2019) (In a dispute involving the boundaries of an Indian reservation, a special agent's report prepared in 1907 for the Commissioner of Indian Affairs, identifying land to be included in the reservation, was clearly admissible as an ancient document, which may contain multiple levels of hearsay).

§ 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).

§ 803.81 Rationale of the Rule

Page 677: Add to footnote 393:

[393] The absence of these factors in a civil case explains why this exception does not authorize the admission of a judgment entered in an earlier civil case. United States v. Benjamin Brandon Grey, 891 F.3d 1054 (D.C. Cir. 2018) (at criminal prosecution for bank fraud, victim's testimony about default judgment against defendant in state court was inadmissible hearsay, because it was offered to prove the facts established in the default judgment, and civil judgments are inadmissible hearsay when offered to prove the underlying facts established in those judgments).

§ 803.82 Scope of the Rule

Page 678: Add to footnote 395:

[395] United States v. Green, 873 F.3d 846 (11th Cir. 2017) (when a prosecutor seeks to prove the defendant committed some other criminal act under Rule 404(b), his commission of that act may not be proved with evidence that he pled no contest when charged with that crime; Rule 803(22) precludes the use of a conviction based upon a no contest plea as proof that the person who entered that plea was in fact guilty of the offense); United States v. Green, 842 F.3d 1299 (11th Cir. 2016) (a conviction based upon a plea of nolo contendere is inadmissible hearsay if offered to prove that the convicted individual was in fact guilty of that offense, and therefore may not be later used under Rule 404(b) as substantive evidence against the defendant who entered the plea, regardless of whether exclusion of such evidence would be required by Rule 410);

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).

§ 804.7 Rule 804(a)(5) Criteria for Being Unavailable—Absence

Page 692: Add to footnote 50:

[50] United States v. Burden, 934 F.3d 675 (D.C. Cir. 2019) (even though defense counsel had a chance to cross-examine a government witness at a pretrial deposition before his deportation, the video of that deposition was not admissible at trial on the grounds that the witness had become unavailable, because the government failed to take reasonable steps to make him available before he was deported: the government never issued him a subpoena, offered to permit and pay for him either to remain in the United States or to return from Thailand, obtain his commitment to appear, or confirm his contact information);

§ 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. Klemis, 859 F.3d 436 (7th Cir. 2017) (at trial of man charged with heroin distribution resulting in death, two witnesses were properly allowed to testify to hearsay statement by a deceased victim who had told them that he needed to borrow or steal money from them to pay off a debt for heroin from the defendant, as his admission to heroin purchases was clearly contrary to his penal interest); 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. Hammers, 942 F.3d 1001 (10th Cir. 2019) (hearsay statements made in a suicide note are not admissible as statements against penal interest, because at the time the author wrote the note, it cannot seriously be argued that she subjectively believed the statement would expose her to criminal liability); 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 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);

Page 723: Add to footnote 171:

[171] *But see* United States v. Hammers, 942 F.3d 1001 (10th Cir. 2019) (embezzlement defendant could not offer evidence of the portions of a note by his alleged accomplice in which she exculpated the defendant and stated that he had nothing to do with the crime, because those portions of the statements were not self-inculpatory and were not against her interest); United States v. Lynch, 903 F.3d 1061 (9th Cir. 2018) (criminal defendant could not offer evidence that his conspirator told an investigator that "Charlie didn't know anything about this deal"; stating that another person does not know about a crime hardly inculpates the declarant, and is therefore not admissible under the hearsay exception for statements against interest).

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

Page 724: Add to footnote 173:

[173] United States v. Slatten, 865 F.3d 767 (D.C. Cir. 2017) (in prosecution of a defendant charged with a firearms offense, hearsay evidence that another person had stated that he had fired the shot was not admissible as a statement against penal interest; the declarant made the statement under a promise of immunity and claimed that he was acting in self-defense, so his admissions were not clearly against his penal interest); 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). But the mere unavailability of the declarant is not a reason for excluding the statement. United States v. Rosario-Perez, 957 F.3d 277 (1st Cir. 2020) (when hearsay is otherwise admissible under the exception for statements against interest because it was sufficiently corroborated and contrary to the declarant's interest, it may not be excluded merely because the witness who heard the statement could not be cross-examined about the statement; that is usually true when hearsay is admitted under some exception).

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. Pratt, 915 F.3d 266 (4th Cir. 2019) (testimony from FBI agent regarding statements made by non-testifying 17-year-old victim implicating defendant in prostitution ring was admissible under hearsay exception for forfeiture by wrongdoing, because defendant made veiled threats to the victim on phone, warned her not to cooperate and to deny any knowledge of defendant's criminal activities, some time before the victim refused to speak with government agents and then disappeared); United States v. Ponzo, 853 F.3d 558 (1st Cir. 2017) (by his wrongful act of becoming a fugitive for many years, the defendant effectively made unavailable for confrontation a witness who testified against his conspirators at their trial 15 years earlier, and thereby waived his right to object to the admission of that testimony); 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).

§ 806.3 Inconsistent Statements Attacking the Hearsay Declarant's Credibility

Page 743: Add to footnote 16:

[16] United States v. Stewart, 907 F.3d 677 (2d Cir. 2018) (after the government offered evidence of hearsay as a statement against penal interest, the defendant should have been allowed to impeach the declarant by proving that he made a statement that was arguably inconsistent);

Chapter 807

Rule 807. Residual Exception

Page 745: Add at beginning of Chapter 807:

Editor's Note: Rule 807 was amended April 25, 2019, effective December 1, 2019. Set forth below is a redline version of the amended rule. The explanatory Advisory Committee Note is also set forth below.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 807. Residual Exception

(a) In General. Under the following ~~circumstances~~ conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not ~~specifically covered by~~admissible under a hearsay exception in Rule 803 or 804:

(1) the statement ~~has equivalent circumstantial~~is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and

~~**(2)** it is offered as evidence of a material fact;~~

[1] New material is underlined; matter to be omitted is lined through.

2 FEDERAL RULES OF EVIDENCE

(~~3~~2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts~~; and~~

~~**(4)** admitting it will best serve the purposes of these rules and the interests of justice~~.

(b) Notice. The statement is admissible only if~~, before the trial or hearing,~~ the proponent gives an adverse party reasonable notice of the intent to offer the statement ~~and its particulars, including the declarant's name and address,~~ —including its substance and the declarant's name— so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing—or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

Committee Note

Rule 807 has been amended to fix a number of problems that the courts have encountered in applying it.

Courts have had difficulty with the requirement that the proffered hearsay carry "equivalent" circumstantial guarantees of trustworthiness. The "equivalence" standard is difficult to apply, given the different types of guarantees of reliability, of varying strength, found among the categorical exceptions (as well as the fact that some hearsay exceptions, e.g., Rule 804(b)(6), are not based on reliability at all). The "equivalence" standard has not served to guide a court's discretion to admit hearsay, because the court is free to choose among a spectrum of exceptions for comparison. Moreover, experience has shown that some statements offered as residual hearsay cannot be compared usefully to any of the categorical exceptions and yet might well be trustworthy. Thus the requirement of an equivalence analysis has been eliminated. Under the amendment, the court should proceed directly to a determination of whether the hearsay is supported by guarantees of trustworthiness. *See* Rule 104(a). As with any hearsay statement offered under an exception, the court's threshold finding that admissibility requirements are met merely means that the jury may consider the statement and not that it must assume the statement to be true.

The amendment specifically requires the court to consider corroborating evidence in the trustworthiness enquiry. Most courts have required the consideration of corroborating evidence, though some courts have disagreed. The rule now provides for a uniform approach, and recognizes that the existence or absence of corroboration is

relevant to, but not dispositive of, whether a statement should be admissible under this exception. Of course, the court must consider not only the existence of corroborating evidence but also the strength and quality of that evidence.

The amendment does not alter the case law prohibiting parties from proceeding directly to the residual exception, without considering the admissibility of the hearsay under Rules 803 and 804. A court is not required to make a finding that no other hearsay exception is applicable. But the opponent cannot seek admission under Rule 807 if it is apparent that the hearsay could be admitted under another exception.

The rule in its current form applies to hearsay "not specifically covered" by a Rule 803 or 804 exception. The amendment makes the rule applicable to hearsay "not admissible under" those exceptions. This clarifies that a court assessing guarantees of trustworthiness may consider whether the statement is a "near-miss" of one of the Rule 803 or 804 exceptions. If the court employs a "near-miss" analysis it should—in addition to evaluating all relevant guarantees of trustworthiness—take into account the reasons that the hearsay misses the admissibility requirements of the standard exception.

In deciding whether the statement is supported by sufficient guarantees of trustworthiness, the court should not consider the credibility of any witness who relates the declarant's hearsay statement in court. The credibility of an in-court witness does not present a hearsay question. To base admission or exclusion of a hearsay statement on the witness's credibility would usurp the jury's role of determining the credibility of testifying witnesses. The rule

provides that the focus for trustworthiness is on circumstantial guarantees surrounding the making of the statement itself, as well as any independent evidence corroborating the statement. The credibility of the witness relating the statement is not a part of either enquiry.

Of course, even if the court finds sufficient guarantees of trustworthiness, the independent requirements of the Confrontation Clause must be satisfied if the hearsay statement is offered against a defendant in a criminal case.

The Committee decided to retain the requirement that the proponent must show that the hearsay statement is more probative than any other evidence that the proponent can reasonably obtain. This necessity requirement will continue to serve to prevent the residual exception from being used as a device to erode the categorical exceptions.

The requirements that residual hearsay must be evidence of a material fact and that its admission will best serve the purposes of these rules and the interests of justice have been deleted. These requirements have proved to be superfluous in that they are already found in other rules. *See* Rules 102, 401.

The notice provision has been amended to make four changes in the operation of the rule:

- First, the amendment requires the proponent to disclose the "substance" of the statement. This term is intended to require a description that is sufficiently specific under the circumstances to allow the opponent a fair opportunity to meet the evidence. *See* Rule 103(a)(2)

(requiring the party making an offer of proof to inform the court of the "substance" of the evidence).

- Second, the prior requirement that the declarant's address must be disclosed has been deleted. That requirement was nonsensical when the declarant was unavailable, and unnecessary in the many cases in which the declarant's address was known or easily obtainable. If prior disclosure of the declarant's address is critical and cannot be obtained by the opponent through other means, then the opponent can seek relief from the court.

- Third, the amendment requires that the pretrial notice be in writing—which is satisfied by notice in electronic form. *See* Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually provided.

- Finally, the pretrial notice provision has been amended to provide for a good cause exception. Most courts have applied a good cause exception under Rule 807 even though the rule in its current form does not provide for it, while some courts have read the rule as it was written. Experience under the residual exception has shown that a good cause exception is necessary in certain limited situations. For example, the proponent may not become aware of the existence of the hearsay statement until after the trial begins, or the proponent may plan to call a witness who without warning becomes unavailable during trial, and the proponent might then need to resort to residual hearsay.

The rule retains the requirement that the opponent receive notice in a way that provides a fair opportunity to meet the evidence. When notice is provided during trial after

a finding of good cause, the court may need to consider protective measures, such as a continuance, to assure that the opponent is not prejudiced.

§ 807.1 History and Rationale

Page 746: Add to footnote 6:

[6] United States v. Mason, 951 F.3d 567 (D.C. Cir. 2020) (the residual exception to the hearsay rule is extremely narrow, and is applied sparingly and only in the most exceptional circumstances, and only to justify the admission of hearsay that is both very important and very reliable) United States v. Slatten, 865 F.3d 767 (D.C. Cir. 2017) (because the legislative history of Rule 807 indicates that it should be applied sparingly, a court should only engage in a Rule 807 analysis if it is apparent that no other exception might render a hearsay statement admissible); *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. Bruguier, 961 F.3d 1031 (8th Cir. 2020) (statements by defendant's girlfriend to FBI before her death, offered by defendant, lacked circumstantial guarantees of trustworthiness to justify admission under residual hearsay exception, in prosecution of defendant for sexual abuse of two foster children who lived with defendant and girlfriend; statements were made nine months after episodes of abuse, she was not under oath, there was good reason to doubt the truthfulness of a person who knew her romantic partner was accused of committing a serious crime, and audio recording of statement merely assured faithful reproduction, not trustworthiness) United States v. Slatten, 865 F.3d 767 (D.C. Cir. 2017) (in prosecution of a defendant charged with a firearms offense, hearsay evidence that another person had stated that he had fired the shot was admissible under residual hearsay exception; it was obviously vital to the defense, was given under penalty of perjury and immunity, did not seek to divert blame to others, was consistent over multiple interviews, and was corroborated by other evidence); United States v. Moore, 824 F.3d 620 (7th Cir. 2016) (a statement by a probationer to his probation officer, relating his cell phone number, was admissible under Rule 807; although he had a criminal record and dubious credibility, he would have no reason to lie about his phone number, because he knew he could be prosecuted for giving false information, and that his officer would be using that number to contact him. "The purpose of Rule 807 is to make sure that reliable, material hearsay evidence is admitted, regardless of whether it fits neatly into one of the exceptions enumerated in the Rules of Evidence"); 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 13:

[13] *But see* United States v. Stoney End of Horn, 829 F.3d 681 (8th Cir. 2016) (the circumstantial guarantees of trustworthiness must be gleaned from the circumstances that surround the making of the statement and that render the declarant worthy of belief, not by bootstrapping on the trustworthiness of other evidence at trial; otherwise inadmissible hearsay statements do not become admissible under Rule 807 merely because there is other evidence to corroborate their truth).

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);

Page 749: Add to footnote 20:

[20] At least one Circuit extends a special measure of deference to trial court rulings involving Rule 807. United States v. Slatten, 865 F.3d 767 (D.C. Cir. 2017) (although evidentiary rulings are usually reviewed on appeal for abuse of discretion, a trial court's admissibility ruling under the residual hearsay exception should not be reversed absent a definite and firm conviction that the ruling was a clear error of judgment).

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. Craig, 953 F.3d 898 (6th Cir. 2020) (it was reversible error for a prosecutor, on cross-examination of the defendant, to show the jury a video of a masked individual rapping while holding a firearm and using violent language; even if the masked individual may have looked somewhat like the defendant, it was never authenticated and no witness testified that he was the individual depicted or how or where the video was found); 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. Vazquez-Soto, 939 F.3d 365 (1st Cir. 2019) (if a proponent of social media evidence seeks to introduce the evidence to show that the social media page or a post is that of a particular person, authenticity standards are not automatically satisfied by the fact that the post or the page is in that person's name because someone can create a social media page in someone else's name); United States v. Browne, 834 F.3d 403 (3d Cir. 2016) (the authentication of electronically stored information requires consideration of the ways in which such data can be manipulated or corrupted, and the authentication of social media evidence presents special challenges because of the ease with which a social media account may be falsified or accessed by an imposter. But the government provided adequate extrinsic evidence to support

a finding by the jury that disputed Facebook chat logs reflected online conversations between the defendant and several of his minor victims); United States v. Lewisbey, 843 F.3d 653 (7th Cir. 2016) (incriminating posts on social networking website were properly authenticated as belonging to defendant in his trial for unlawfully dealing firearms; account that posts were made on listed his nickname, date of birth, and place of residence, e-mail address associated with account corresponded to e-mail linked to defendant's smart phone, account included more than 100 photos of defendant which matched photos found on his smart phone, and application for website on defendant's smart phone was linked to account in question); 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).

§ 901.3 Function of the Court and the Jury in Authentication

Page 761: Add to footnote 12:

[12] United States v. Mar. Life Caribbean Ltd., 913 F.3d 1027 (11th Cir. 2019) (a two-step process governs the determination of whether a document is authentic: the district court first makes a preliminary assessment of authenticity under Rule 901, which requires sufficient evidence that the proffered evidence is what it purports to be; if the proponent satisfies this "prima facie burden," the evidence may be admitted, and the ultimate question of authenticity is then decided by the factfinder);

§ 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);

§ 901.9 Bases of Familiarity

Page 769: Add to footnote 46:

[46] United States v. Iriele, 977 F.3d 1155 (11th Cir. 2020) (although a lay witness may not testify to handwriting based upon familiarity that was acquired solely for the purposes of identifying it at trial, that rule does not apply to a government agent who becomes familiar with the defendant's handwriting during the course of trying to solve a crime);

§ 901.17 Rule 901(b)(4) Example—Distinctive Characteristics and the Like

Page 777: Add to footnote 85:

[85] United States v. Lewisbey, 843 F.3d 653 (7th Cir. 2016) (sufficient evidence established that two smart phones from which incriminating text messages were sent and received were defendant's phones;

first phone was confiscated from defendant at time of arrest and defendant told his mother in phone call from jail that police took his phone, contacts directory for first phone included information for defendant's mother under heading "Mom," both phones listed contact information for defendant's former employer, and confidential informant arranged gun sales with defendant on the second phone).

§ 901.22 Authentication by Proof of External Circumstances

Page 781: Add to footnote 104:

[104] Am. Fedn. of Musicians of U.S. and Canada v. Paramount Pictures Corp., 903 F.3d 968 (9th Cir. 2018) (to authenticate an email as having been created by the employee of a corporation, it is sufficient to show that the email was produced in pretrial discovery by the corporation, in addition to the fact that is contained in the email signature and address of one of the corporation's employees); Nester v. Textron, Inc., 888 F.3d 151 (5th Cir. 2018) (despite the absence of actual eyewitness testimony, video of a similar accident involving a device manufactured by the defendant was adequately authenticated based on the facts, among others, that the defendant never offered any rebuttal evidence to dispute the authenticity of the video, and that the video was produced and given to the plaintiff in pretrial discovery by the defendant); United States v. Haight, 892 F.3d 1271 (D.C. Cir. 2018) (district court did not abuse its discretion in admitting letters found in backpack carried by defendant's girlfriend, referencing a desire to deal drugs in area of city where defendant was arrested; defendant's name appeared on the writings, the backpack also contained defendant's employment papers, and the girlfriend had just left apartment she and defendant shared, and such facts provided sufficient authentication for the writings); 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. Trent, 863 F.3d 699 (7th Cir. 2017) (a witness may testify to his opinion about the identity of a person heard speaking on a phone call as long as he has at least minimal familiarity with that person's voice, which is satisfied even if the witness only spoke with the person once in a face-to-face meeting); 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

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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

Rule 902. Evidence That Is Self-Authenticating

Page 810: Add to end of Rule 902:

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

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

§ 902.5 Documents Cognizable under the Rule

Page 813: Add to footnote 12:

[12] *But see* United States v. Alvirez, 831 F.3d 1115 (9th Cir. 2016) (a certificate issued by an Indian Tribe is not admissible as a self-authenticating document under 902(1), because Indian tribes are not listed among the political entities that may create self-authenticating documents, and the rule must be applied as written).

§ 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).

§ 902.16 Rule 902(9) Commercial Paper and Related Documents

Page 827: Add to footnote 69:

[69] Christian Faith Fellowship Church v. adidas AG, 841 F.3d 986 (Fed. Cir. 2016) (a check is a species of commercial paper, and is therefore self-authenticating).

§ 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).

Page 832: Add new subsection after § 902.20:

§ 902.21 Rule 902(13) and (14): Certified Records Generated by an Electronic Process or System, and Certified Data Copied from an Electronic Device, Storage Medium, or File

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

***

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

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

The Advisory Committee added Rule 902(13) and (14) in December 2017 for the

same reasons as it did for business records in Rules 902(11) and (12), finding that the expense and inconvenience of producing an authenticating witness for this evidence is often unnecessary.

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

§ 1002.1 The Best Evidence Rule Defined

Page 853: Add to footnote 2:

[2] United States v. Chavez, 976 F.3d 1178 (10th Cir. 2020) (before a trial court may admit into evidence a transcript with an English translation of a recording of a conversation conducted partially or entirely in

another language, the best evidence rule requires the court to admit into evidence the audio recordings themselves or to play them for the jury, even if the recording is in a language the jury cannot understand).

§ 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);

Page 858: Add to footnote 28:

[28] United States v. Delorme, 964 F.3d 678 (8th Cir. 2020) (Rule 1002 did not require the Government to play the entire three-hour video of the defendant's interview with a government agent, or forbid the agent from answering questions about that interview, because the testimony was not being offered to prove the contents of the video but merely the details of an event—the interview—which were personally observed by the witness);

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 885: Add to footnote 2:

[2] United States v. Oloyede, 933 F.3d 302 (4th Cir. 2019) (a summary chart admitted under Rule 1006 must be an objectively accurate summarization of the underlying documents, not a skewed selection of some of the documents to further the proponent's theory of the case. When the government was not using charts as surrogate evidence offered in lieu of voluminous underlying records, but rather was seeking to help the jury understand how various related records demonstrated a pattern of suspicious activity engaged

in by the defendants, the charts may be shown to the jury under Rule 611(a), but may not be admitted into evidence under Rule 1006);

Page 886: Add to footnote 5:

[5] United States v. Dunnican, 961 F.3d 859 (6th Cir. 2020) (it was permissible to use a summary to assist the jury in understanding the significance of more than 11,000 pages of evidence obtained by a forensic examiner after downloading the contents of the defendant's cellular telephone, a volume so great that it might take a court years to examine those contents; "it appears that Rule 1006 was designed to govern this exact scenario");

Page 886: Add to footnote 9:

[9] United States v. Shorter, 874 F.3d 969 (7th Cir. 2017) (the proponent of a summary exhibit must make a showing that the underlying records are accurate and would be admissible as evidence, but law does not require the party to make such a showing by producing a witness who can testify about the accuracy of those records);

Page 887: Add to footnote 11:

[11] United States v. Nicholson, 961 F.3d 328 (5th Cir. 2020) (an IRS agent could properly testify as the prosecution's final witness and to act as a "summary witness," to assist the jury by summarizing voluminous records in a complex case, although such testimony may not substitute for closing argument or introduce evidence the jury has not heard); United States v. Spalding, 894 F.3d 173 (5th Cir. 2018) (courts must be cautious with the admission of Rule 1006 charts and to omit argumentative matter in their preparation lest the jury believe that such matter is itself evidence of the assertion it makes, and to assure that the summary accurately portrays the contents of the underlying material and do not contain outright argument or attempt to prove an element that the Government had not established); 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 2017 AMENDMENT. The ancient documents exception to the rule against hearsay has been limited to statements in documents prepared before January 1, 1998. The Committee has determined that the ancient documents exception should be limited due to the risk that it will be used as a vehicle to admit vast amounts of unreliable electronically stored information (ESI). Given the exponential development and growth of electronic information since 1998, the hearsay exception for ancient documents has now become a possible open door for large amounts of unreliable ESI, as no showing of reliability needs to be made to qualify under the exception.

The Committee is aware that in certain cases—such as cases involving latent diseases and environmental damage—parties must rely on hardcopy documents from the past. The ancient documents exception remains available for such cases for documents prepared before 1998. Going forward, it is anticipated that any need to admit old hardcopy documents produced after January 1, 1998 will decrease, because reliable ESI is likely to be available and can be offered under a reliability-based hearsay exception. Rule 803(6) may be used for many of these ESI documents, especially given its flexilimible standards on which witnesses might be qualified to provide an adequate foundation. And Rule 807 can be used to admit old documents upon a showing of reliability—which will often (though not always) be found by circumstances such as that the document was prepared with no litigation motive in mind, close in time to the relevant events. The limitation of the ancient documents exception is not intended to raise an inference that 20-year-old documents are, as a class, unreliable, or that they should somehow not qualify for admissibility under Rule 807. Finally, many old documents can be admitted for the non-hearsay purpose of proving notice, or as party-opponent statements.

The limitation of the ancient documents hearsay exception is not intended to have any effect on authentication of ancient documents. The possibility of authenticating an old document under Rule 901(b)(8)—or under any ground available for any other document—remains unchanged.

The Committee carefully considered, but ultimately rejected, an amendment that would preserve the ancient documents exception for hardcopy evidence only. A party will often offer hardcopy that is derived from ESI. Moreover, a good deal of old

information in hardcopy has been digitized or will be so in the future. Thus, the line between ESI and hardcopy was determined to be one that could not be drawn usefully.

The Committee understands that the choice of a cutoff date has a degree of arbitrariness. But January 1, 1998 is a rational date for treating concerns about old and unreliable ESI. And the date is no more arbitrary than the 20-year cutoff date in the original rule. *See* Committee Note to Rule 901(b)(8) ("Any time period selected is bound to be arbitrary.").

Under the amendment, a document is "prepared" when the statement proffered was recorded in that document. For example, if a hardcopy document is prepared in 1995, and a party seeks to admit a scanned copy of that document, the date of preparation is 1995 even though the scan was made long after that—the subsequent scan does not alter the document. The relevant point is the date on which the information is recorded, not when the information is prepared for trial. However, if the content of the document is *itself* altered after the cut-off date, then the hearsay exception will not apply to statements that were added in the alteration.

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.

ARTICLE IX.
AUTHENTICATION AND IDENTIFICATION

Rule 902. Evidence That Is Self-Authenticating

Page 1159: Add to Rule 902:

ADVISORY COMMITTEE NOTE TO THE 2017 AMENDMENT. *Paragraph (13).* The amendment sets forth a procedure by which parties can authenticate certain electronic evidence other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing a witness to authenticate an item of electronic evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness, and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule. The Rule specifically allows the authenticity foundation that satisfies Rule 901(b)(9) to be established by a certification rather than the testimony of a live witness.

The reference to the "certification requirements of Rule 902(11) or (12)" is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this Rule to prove the requirements of Rule 803(6). Rule 902(13) is solely limited to authentication, and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can establish only that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility of the proffered item on other grounds—including hearsay, relevance, or in criminal cases the right to confrontation. For example, assume that a plaintiff in a defamation case offers what purports to be a printout of a webpage on which a defamatory statement was made. Plaintiff offers a certification under this Rule in which a qualified person describes the process by which the webpage was retrieved. Even if that certification sufficiently establishes that the webpage is authentic, defendant remains free to object that the statement on the webpage was not placed there by defendant. Similarly, a certification authenticating a computer output, such as a spreadsheet, does not preclude an objection that the information produced is unreliable—the authentication establishes only that the output came from the computer.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert; such factors will affect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

Paragraph (14). The amendment sets forth a procedure by which parties can authenticate data copied from an electronic device, storage medium, or an electronic file, other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing an authenticating witness for this evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness, and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure in which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Today, data copied from electronic devices, storage media, and electronic files are ordinarily authenticated by "hash value." A hash value is a number that is often represented as a sequence of characters and is produced by an algorithm based upon the digital contents of a drive, medium, or file. If the hash values for the original and copy are different, then the copy is not identical to the original. If the hash values for the original and copy are the same, it is highly improbable that the original and copy are not identical. Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates. This amendment allows self-authentication by a certification of a qualified person that she checked the hash value of the proffered item and that it was identical to the original. The rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule.

The reference to the "certification requirements of Rule 902(11) or (12)" is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this Rule to prove the requirements of Rule 803(6). Rule 902(14) is solely limited to authentication, and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the proffered item on other grounds—including hearsay, relevance, or in criminal cases the right to confrontation. For example, in a criminal case in which data copied from a hard drive is proffered, the defendant can still challenge hearsay found in the hard drive, and can still challenge whether the information on the hard drive was placed there by the defendant.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert; such factors will affect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.