

PUBLICATION UPDATE

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Weinstein's Federal Evidence

Publication 803

Release 111

November 2014

HIGHLIGHTS

- **Amendments to the Federal Rules of Evidence, Effective December 1, 2014.**
- **Rule 801(d)(1)(B).** Ch. 801, *Definitions That Apply to This Article; Exclusions from Hearsay*, has been updated throughout with the revisions to Rule 801(d)(1)(B), which extend the rule to include a prior consistent statement used to “rehabilitate[] the declarant’s credibility as a witness when attacked on another ground.” See Ch. 801, *Definitions That Apply to This Article; Exclusions from Hearsay*, § 801.22[1][a].
- **Rule 803: Rules 803(6) (Records of a Regularly Conducted Activity), Rule 803(7) (Absence of a Record of a Regularly Conducted Activity), and Rule 803(8) (Public Records).** Ch. 803, *Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness*, has been updated with the 2014 amendments to Rule 803(6), (7), and (8). The amendments eliminate an ambiguity uncovered during the restyling project and clarify that the opponent of the record has the burden of showing

that the proffered record is untrustworthy. See Ch. 803, *Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness*, §§ 803.08[1], 803.09, 803.10[1].

Ch. 103, *Rulings on Evidence*, has been updated with discussion about **what constitutes a “definitive” ruling** for purposes of Rule 103(b). The recent Eighth Circuit case, *United States v. Young*, 753 F.3d 757 (8th Cir. 2014) clarifies that a district court’s invitation to re-raise evidentiary challenges renders its ruling non-definitive. See § 103.11[2][b][ii].

Ch. 104, *Preliminary Questions*, includes expanded discussion about the **district court’s admission of conditionally relevant evidence**, highlighting that, in most cases, the proffered evidence will obviously be relevant because it will involve past convictions or uncharged conduct that undeniably occurred. A few cases, however, present a real Rule 104(b) dispute, see, e.g., *United States v. Gutierrez-Mendez*, 752 F.3d 418 (5th Cir. 2014). See § 104.30[1].

Ch. 403, *Excluding Relevant Evidence*

for *Prejudice, Confusion, Waste of Time, or Other Reasons*, includes expanded discussion of **Rule 403 balancing in cases that mention a person's religion**, including the recent Seventh Circuit case, *United States v. Haldar*, 751 F.3d 450 (7th Cir. 2014). See § 403.04[2]. The chapter has also been updated with *United States v. Smith*, 749 F.3d 465 (6th Cir. 2014), admitting at trial portions of a commercial movie, based on “direct connections between The Boiler Room [a movie in which salesmen working for a fictional investment firm employ high-pressure sales tactics to defraud clients] and the fraud committed by [defendants].” See § 403.04[2].

Ch. 404, *Character Evidence, Crimes or Other Acts* has been updated with discussion of the **Seventh Circuit's Rule 404(b)** balancing test, noting that the circuit is considering whether should it retain the existing test for Rule 404(b) evidence, or if some other test would be preferable, such as one that asks directly whether the proposed evidence is relevant to a specifically identifiable and disputed non-propensity issue and then leaves the work of balancing prejudice against probative value to Rule 403. See *United States v. McMillan*, 744 F.3d 1033 (7th Cir. 2014), discussed at § 404.21[1][i].

Ch. 509, *Secrets of State and Other Official Information (Supreme Court Standard 509)*, has been updated with the recent District of Columbia Circuit case, *Nat'l Sec. Archive v. CIA*, 752 F.3d 460 (D.C. Cir. 2014), holding that a draft of CIA's official history of 1961 Bay of Pigs operation was pre-decisional and deliberative, and therefore protected by the deliberative process privilege, 5 U.S.C. § 552(b)(5). See § 509.23[2].

Ch. 606, *Juror's Competency as a Witness*, has been updated with cases distin-

guishing internal from external influences on a jury's deliberations, including:

- *United States v. Morris*, 2014 U.S. App. LEXIS 11632 (3d Cir. June 20, 2014) (mistake in jury's understanding of court's instructions and how special interrogatory should be answered).
- *United States v. Torres-Chavez*, 744 F.3d 988 (7th Cir. 2014) (juror's post-trial statements, referring to defendant's failure to testify at trial and suggesting that they “could not help but draw an adverse inference”).

See § 606.04[2][b], [3][a].

Ch. 702, *Testimony by Expert Witnesses*, includes expanded discussion of the **“lessons” learned in considering the sufficiency of a trial court's reliability findings**. See *StorageCraft Tech. Corp. v. Kirby*, 744 F.3d 1183 (10th Cir. 2014), discussed at § 702.02[6][a]. The chapter has also been updated with the recent Ninth Circuit case, *Messick v. Novartis Pharms. Corp.*, 747 F.3d 1193 (9th Cir. 2014), collecting cases addressing the reliability of differential diagnosis to prove causation and noting that the protocol has been accepted by all but the Fifth Circuit. See § 702.06[2][c].

Ch. 802, *The Rule Against Hearsay*, has been updated with discussion highlighting the **confusion among the lower courts**, both federal and state, following the plurality decision in *Williams v. Illinois*, 567 U.S. ___, 132 S. Ct. 2221, 183 L. Ed.2d 89 (2012) **about the application of the Confrontation Clause to expert testimony that involves the statements of nontestifying witnesses**. The Supreme Court has yet to grant certiorari review in any of the more than a dozen cases presenting the issue. See § 802.05[3][b]. The chapter has

also has been updated with recent cases distinguishing testimonial from non-testimonial statements, including:

- *United States v. Wallace*, 753 F.3d 671 (7th Cir. 2014) (videotape (without any sound) showing defendant handing crack to his nephew).
- *United States v. Vitrano*, 747 F.3d 922 (7th Cir. 2014) (preparing exhibit for trial).
- *United States v. Volpendesto*, 746 F.3d 273 (7th Cir. 2014) (statement to confidential informant).
- *Ruhl v. Hardy*, 743 F.3d 1083 (7th Cir. 2014) (accomplice's direct order that defendant knock on victim's car window and shoot him).
- *United States v. Albino-Loe*, 747 F.3d 1206 (9th Cir. 2014) (certifications of authenticity).

- *United States v. Lopez*, 747 F.3d 1141 (9th Cir. 2014) (verification of removal).
- *United States v. Campbell*, 743 F.3d 802 (11th Cir. 2014) (pretrial admission of certification of Secretary of State to establish extra-territorial jurisdiction).

See § 802.05[3][b], [c], [7].

Ch. 900, *Discovering and Admitting Computer-Based Evidence*, has been updated with the recent Seventh Circuit case, *Specht v. Google Inc.*, 747 F.3d 929 (7th Cir. 2014), holding that screenshots of plaintiff's client websites as they supposedly appeared in 2005, bearing the Android Data mark, were not admissible as business records, even though website creators asserted from memory that the screenshots reflected how those sites appeared in 2005. See § 900.07[1][b].

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