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Federal Evidence Practice Guide

Publication 473 Release 42 April 2024

HIGHLIGHTS

Latest Legal Developments

- **Amendments to Federal Rules of Evidence**
- Analysis of amendments to Evidence Rules 106, 615, and 702, effective Dec. 1, 2023, is incorporated in this release.
- This publication has been updated with analysis of the latest case law and legal developments.

Release 42 of *Federal Evidence Practice Guide* has been updated with the latest legal developments, including:

AMENDMENTS TO RULES 106, 615, and 702, effective December 1, 2023

Rule 106 (Remainder of or Related Statements). The 2023 amendment to Rule 106 expands coverage to all statements "in any form," including "oral statements that have not been recorded" and "statements made through conduct or sign language" (*see* Advisory Committee Note (2023)). The amendment also allows any completing statement to be admitted over a hearsay objection. As such, the amendment displaces the common-law rule of completeness as partially codified in former Rule 106. See § 6.33[10].

Rule 615 (Excluding Witnesses from the Courtroom; Preventing Excluded Witness's Access to Trial Testimony). Rule 615(a), as amended, operates only to exclude enumerated witnesses from the courtroom. Rule 615(b), added in 2023, provides the court discretion to issue further orders prohibiting excluded witnesses from accessing or being provided with trial testimony. Rule

615(a), as amended, also clarifies that the exception for exclusion for entity representatives is limited to one representative per entity. If an entity wants more than one witness-representative protected from exclusion, it must show, under Rule 615(a)(3), that the witness is essential to presenting the party's claim or defense. See §§ 11.12[4], 11.18, 13.02.

Rule 702 (Testimony by Expert Witnesses). Rule 702, as amended, clarifies that expert testimony may not be admitted unless the proponent demonstrates to the court that is it more likely than not (the Rule 104(a) standard) that the proffered testimony meets *all* of the rule's admissibility requirements, including its three reliability based requirements (Rule 702(b)–(d))—requirements that many courts have incorrectly determined to be governed by the more permissive Rule 104(b)standard. Rule 702(d), as amended, requires that the "expert's opinion reflects a reliable application of the principles and methods to the facts of the case." This change emphasizes that each expert opinion must stay within the bounds of what can reasonably be concluded from a reliable application of the expert's basis and methodology. See §§ 11.02, 11.03, 11.12[2A][d], 11.18[1], [2].

UNITED STATES SUPREME COURT: Right to Confrontation

Generic Redactions to Non-Testifying Codefendants Confessions Satisfy the Confrontation Clause. In *Samia v. United States*, 216 L. Ed. 2d 597 (2023), a 6-3 decision authored by Justice Thomas, the majority held that the Confrontation Clause was not violated by the admission of a non-testifying codefendant's (Stillwell's) confession which did not directly implicate the defendant and was the subject of a limiting instruction. "Stillwell's confession was redacted to avoid naming Samia, satisfying *Bruton's* rule. And, it was not obviously redacted in a manner resembling the confession in *Gray*; the neutral references to some 'other person' were not akin to an obvious blank or the word 'deleted.' " Justice Kagan's dissenting opinion, joined by Justices Sotomayor and Jackson, emphasized that the redaction of Stillwell's confession to exclude explicit references to Samia, by substituting an "other person" and "the other person he was with" as placeholders, violated Samia's Sixth Amendment right to confrontation. "[I]t didn't make a lick of difference[.] [. . .]. Any reasonable juror would have realized immediately—and without reference to any other evidence—that 'the other person' who 'pulled the trigger' was Samia." See § 13.06[5].

OTHER CASE HIGHLIGHTS

Rule 105—Bruton Inquiry. *United States v. Ridings*, 75 F.4th 902 (8th Cir. 2023), held "*Bruton* is not implicated when a non-testifying defendant's statement inculpates a co-defendant 'inferentially-through linkage to other evidence' . . . [citing *Samia*] Thus, *Bruton* violations may be avoided through redaction if

a cautionary jury instruction is given, if the redactions are neutral, and if they do not obviously directly refer to the defendant." See § 13.06[5]

Rule 404(b)—Exception for Plan or Preparation. *United States v. Caruso*, 63 F.4th 1197 (8th Cir. 2023), held the public Pinterest profile of defendant, who used that social media website to trade child pornography, was admissible for a non-propensity purpose under Rule 404(b), as evidence of the "plan" and "preparation"—part of a single "course of conduct leading to . . . the crime charged." See § 15.04[10][b].

Rule 404(b)—Reverse 404(b) Evidence. *United States v. Cox*, 54 F.4th 502 (7th Cir. 2022), rejected pornography defendant's attempt to shift blame for the charged offenses on someone else, because that individual's proffered prior bad acts shared only generic similarities with the at-issue conduct; "[r]everse 404(b) evidence requires 'something distinctive about all the crimes that makes them form a pattern, rather than their having merely a chance resemblance.' " See § 15.04[10][j].

Rule 404(b)(3)—Notice.

- *United States v. Abarca*, 61 F.4th 578 (8th Cir. 2023), held the government erred under Rule 404(b)(3) by providing defendant a copy of report of his pretrial interview, which provided notice of only "the general nature" of the evidence, 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[,]" as required by the 2020 amendment, although the error was not plain. See § 15.04[10][h].
- *United States v. Ghost*, 79 F.4th 927 (8th Cir. 2023) observed that Rule 404(b) imposes no specific time limits beyond requiring reasonable pretrial notice; here, the initial Rule 404(b) notice, given 22 days before trial, and amended 14 days before trial, was reasonable, given that the evidence was "extremely brief and limited[,]" and defendant was unable to show prejudice. See § 15.04[[10][h].

Rule 408—Evidence Offered for Another Purpose. *Klauber v. Vmware, Inc.*, 80 F.4th 1 (1st Cir. 2023), upheld the admission, under Rule 408, of evidence plaintiff offered to show that he believed the parties' terms and conditions were unenforceable, but finding inadmissible evidence he offered to show defendant had settled a previous suit. See § 15.04[13].

Rule 503—Common Interest Doctrine. In *Lionbridge Techs., LLC v. Valley Forge Ins. Co.*, 53 F.4th 711 (1st Cir. 2022), a trade secrets lawsuit against its insured, defendant general liability insurer could compel the insured to produce some documents

and communications exchanged between the insured and its law firm, because the common-interest exception applied to the relationship of the insured, the insurer, and the law firm. See § 10.07[2][l].

Rule 509: FOIA 5 U.S.C. § 552(b)(5), Deliberative Process Privilege. *Waterman v. IRS*, 61 F.4th 152 (D.C. Cir. 2023), held (with two exceptions) that an attorney misconduct report and related documents withheld by the IRS were predecisional under § 552(b)(5)'s exemption for deliberative process; although some recommendations in the contested documents were not adopted in Office of Professional Responsibility's ultimate determination, "disclosure of the authors' potentially mistaken recommendations might have a chilling effect on their willingness to make such recommendations." See § 10.07[9][b].

Rule 509: FOIA 5 U.S.C. § 552(a)(4)(B), In **Camera Review of Documents Withheld in Response to FOIA Request.** *Jabar v. United States DOJ*, 62 F.4th 44 (D.C. Cir. 2023), upheld the district court's decision not to conduct an in camera review of the contested documents withheld in full; plaintiff provided no reasons to question the declaration by the head of Record/Information Dissemination Section at FBI, which described the FBI's filing system, its search methodology, and its justifications for refusing to release the withheld documents. See § 10.07[9][b].

Rule 511: Waiver: Attorney-Client Privilege. *Ironburg Inventions Ltd. v. Valve Corp.*, 64 F.4th 1274 (Fed. Cir. 2023), held that defendant, who had asserted the attorney-client privilege to prevent a witness from testifying during his deposition, could not obtain a new trial on the basis of this excluded evidence; the privilege may not be used as a shield and later as a sword. See § 10.07[2][o].

Rule 602: Personal Knowledge Requirement. *United States v. Burgos-Montanez*, 2023 U.S. App. LEXIS 7944 (3d Cir. Apr. 4, 2023) (unpublished opinion), held a DEA officer, who translated during co-defendant's post-arrest interview, could testify from his personal knowledge about the interview, after refreshing his recollection by reviewing another agent's report; the officer "testified that the report was accurate: after he read it, it matched his recollection of the interview. Thus, a reasonable juror could conclude that [Officer] was testifying from his personal knowledge rather than merely reciting the contents of the report." See § 10.02[5][b].

Rule 608: Prohibitions. *United States v. Jones*, 74 F.4th 1065 (10th Cir. 2023), held a mother's testimony, vouching for the truthfulness of her daughters' accusations against their stepfather, was impermissible under Rule 608(a) because she spoke directly to whether her daughters were truthful on specific prior occasions, rather than to their character for truthfulness. See § 12.04[4][b][ii].

Rule 704: Admissible Testimony

on Predicate Facts. In *United States v. Primm*, 63 F.4th 1186 (8th Cir. 2023), a prosecution for tax evasion and failure to file, the district court did not err in admitting a tax agent's expert testimony, because the agent "did not directly testify to defendant's mental state but rather to the modus operandi of tax evasion criminals." See § 11.12[3][e][ii].

Confrontation Clause: **Out-of-Court Statements.** *United States v. Meyer*, 63 F.4th 1024 (5th Cir. 2023), held that if a witness testifies about the *lack* of any statement, there is no Confrontation Clause violation because the witness has not testified about any out-of-court statement. Here, a border patrol agent's testimony about the *lack* of statements from a backpacker about cocaine or its transportation in specific types of cars or on specific highways did not violate the drug-trafficking defendant's confrontation rights. See § 10.08[1][f].

Rule 803(3)—State of Mind. *United States v. Shah*, 2023 U.S. App. LEXIS 26057 (5th Cir. Oct. 2, 2023), excluded, in a prosecution for receiving kickbacks for patient referrals, defendant surgeons' statements that fell outside Rule 803(3) because they were "statements of memory or belief offered to prove the fact remembered or believed" (i.e., that hospital was not federally funded and was not "affected by [ ] anti-kickback issues)." See § 10.08[2][c][iv].

Rule 804: Unavailability Due to Illness. *Bastani v. AFGE*, 70 F.4th 563 (D.C. Cir. 2023), upheld the district court's finding under Rule 804(a)(4) that the defense witness was unavailable to appear at trial in person due to physical illness and allowing his prior sworn testimony to be read in by defendant's substitute representative; a note signed by the witness's treating physician stated he was to undergo surgery in North Carolina and was not cleared to travel to District of Columbia to testify during this trial. See § 6.07[1][d].

Rule 807—Trustworthiness. *Carmichael v. Balke (In re Imperial Petro. Recovery Corp.)*, 2023 U.S. App. LEXIS 26705 (5th Cir. Oct. 6, 2023), found transcribed testimony of defendant's sole employee admissible under Rule 807; the employee's examination was treated as a deposition, and plaintiffs offered no evidence to undermine the examination transcript's reliability. See §§ 6.05[3][b], 10.08[2][j].

Rule 901: Lay Opinion on Handwriting. *England v. United States*, 61 F.4th 505 (6th Cir. 2023), held that a bank teller, who was familiar with the handwriting on defendant robber's demand note, "was free to testify as to whether that handwriting resembled the handwriting that was on the trial exhibit." See § 6.08[6][g].

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Publication 473 Release 42 April 2024

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