PUBLICATION UPDATE

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Federal Evidence Practice Guide

Publication 473 Release 43 April 2025

HIGHLIGHTS

New and Amended Federal Rules of Evidence

- Analysis of new Evidence Rule 107 and amendments to Evidence Rules 613, 801, 804, and 1006, effective Dec. 1, 2024, is incorporated in this release.

Latest Legal Developments

- This publication has been updated with analysis of the latest case law and legal developments.

Release 43 of *Federal Evidence Practice Guide* has been updated with the latest legal developments, including:

NEW RULE 107 AND AMENDMENTS TO RULES 613, 801, 804, and 1006, effective December 1, 2024

Rule 107 (Illustrative Aids). New Rule 107 provides standards for the use of illustrative aids—including drawings, photos, diagrams, video depictions, charts, graphs, and computer simulations—offered not as evidence, but to assist the trier of fact in understanding evidence or argument. The rule authorizes the court to allow the presentation of an illustrative aid at any phase of trial if the aid's utility in assisting comprehension is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time. See §§ 2.11A, 6.31[1][b], [2][b], [3][b], 8.03[4], 17.06[3].

Rule 613 (Witness's Prior Statement). Rule 613(b) has been amended to provide that unless the court orders otherwise, extrinsic evidence of a witness's prior inconsis-

tent statement may not be admitted until after the witness has had an opportunity to explain or deny the statement and an adverse party has had the opportunity to examine the witness about it. See § 12.04[4][b][vi].

Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay). Under amended Rule 801(d)(2), if a party's claim, defense, or potential liability is directly derived from a declarant or the declarant's principal, a statement that would be admissible against the declarant or the principal as a statement of a party-opponent is also admissible against the party. See §§ 6.04[3], 10.08[2][a].

Rule 804 (Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness). Amended Rule 804(b)(3) provides that to be admissible, a statement offered in a criminal case as one that tends to expose the declarant to criminal liability must be supported by corroborating circumstances that clearly indicate its trustworthiness, after considering the totality of circumstances under which it was made and any evidence that supports or undermines it. See §§ 6.07[2][c], 10.08[2][i].

Rule 1006 (Summaries to Prove Content). Rule 1006, which authorizes the admission of a summary of voluminous admissible writings, recordings, or photographs that cannot be conveniently examined in court, has been amended to clarify that a properly supported summary may be admitted in evidence whether or not the underlying materials have been admitted. The amended rule also refers to new Rule 107 for treatment of summaries that are offered not as evidence but solely as illustrative aids. See §§ 5.06, 6.31.

UNITED STATES SUPREME COURT DECISIONS

Confrontation Clause. In *Smith v. Arizona*, 602 U.S. 779, 144 S. Ct. 1785, 219 L. Ed. 2d 420 (2024), the Court held that when a testifying expert conveys an absent analyst's testimonial statements in support of the expert's opinion, and those statements provide that support only if true, then the Confrontation Clause bars their admission. The Court thus rejected the result of *Williams v. Illinois*, 567 U.S. 50, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012), in which a plurality of the Court had held that the Confrontation Clause posed no bar to expert opinion based on facts on which the expert relied, but about which the expert was not competent to testify. See §§ 6.07[1A], 10.08[1][f], 11.12[2A][b][iv].

Expert Opinion—State of Mind. The Court held, in *Diaz v. United States*, 602 U.S. 526, 144 S. Ct. 1727, 219 L. Ed. 2d 240 (2024), that although Rule 704(b) prohibits an expert witness in a criminal case from stating an opinion about whether the defendant had a mental state or condition that is an element of the offense or a defense, an expert may testify that "most people" in the defendant's circumstances have a particular mental state. See

§ 11.12[3][e][ii].

Unduly Prejudicial Evidence. In *Andrew v. White*, 604 U.S. ___, ___ S. Ct. ___, 220 L. Ed. 2d 340, 2025 U.S. LEXIS 406 (Jan. 21, 2025) (per curiam), the Court reaffirmed that in a criminal trial, the Due Process Clause of the Fourteenth Amendment forbids the introduction of evidence that is so unduly prejudicial as to render the trial fundamentally unfair. See §§ 1.02[1], 6.01[2][a], 15.02[2], 15.04[1][c].

OTHER CASE HIGHLIGHTS

Rule 107—Illustrative Aids. *United States v. Ortiz-Orellana*, 90 F.4th 689 (4th Cir. 2024), held that the trial court adequately instructed the jury, before a government agent presented a summary chart and also at the close of the evidence, that the summary should be viewed as an illustrative aid and that the jury should not give greater consideration to the summary than it would give to the underlying evidence. See §§ 2.11A[3], 17.06[3][a].

Rule 803(2)—Excited Utterance. *United States v. Johnson*, 117 F.4th 28 (2d Cir. 2024), held that an email notifying company personnel of the receipt of a death threat, although sent several hours after the threat was received, was properly admitted as an excited utterance, after the district court reasonably concluded that the sender of the email was still under the stress of learning he was the target of a death threat. See § 6.06[2].

Confrontation Clause. *United States v. Thompson*, 119 F.4th 445 (6th Cir. 2024) (per curiam), ruled in a murder case that although the testimony of an expert concerning the cause of the victim's death might have violated the Confrontation Clause by conveying the substance of an underlying autopsy report prepared by someone else, admission of the testimony did not amount to plain error, because it did not affect the defendant's substantial rights. The court pointed out that at trial, the defendant effectively conceded causation and asked the jury to acquit on theories of self-defense and diminished capacity; also, independent photographic and video evidence supported the conclusion that the defendant had caused the victim's death. See § 6.07[1A].

Rule 701—Lay Opinion.

- *United States v. Hay*, 95 F.4th 1304 (10th Cir. 2024), held that Rule 701 authorized the admission of non-expert government agents' testimony of their impressions of what was occurring in a video, informed by their deep familiarity with the footage, that could help the jury determine a fact in issue. See §§ 10.02[5][e], 11.02[1][b]
- *Chi. Joe's Tea Room, LLC v. Vill. of Broadview*, 94 F.4th 588 (7th Cir. 2024), acknowledged that lay opinion testimony on lost profits is allowed in limited circumstances, but rejected the plaintiff's argument that

lost-profits testimony of a limited liability company's owner was admissible under Rule 701, because the owner's testimony constituted an economic analysis that exceeded the scope of his personal knowledge. See §§ 10.02[5][e], 11.02[1][b].

Rule 702—Expert Opinion.

- *Artis v. Santos*, 95 F.4th 518 (7th Cir. 2024), held that although an expert's opinion relied on sources that "may not carry much gravitas," the district court did not err by admitting the expert's testimony while permitting the opposing party to attack those sources on cross-examination. See § 11.18[1][b][i], [ii].
- *United States v. Hunt*, 99 F.4th 161 (4th Cir. 2024), *petition for cert. filed* (U.S. Aug. 13, 2024) (No. 24-5314), pointed out that whether to permit forensic evidence, and whether to limit its use, are within the district court's broad discretion, and even shaky but admissible evidence should be addressed through vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof, not through wholesale exclusion by the trial judge. See § 11.18[1][b][i].

Rule 404(b)(2)—Other Crimes, Wrongs, or Acts.

- *United States v. Cameron*, 99 F.4th 432 (8th Cir. 2024), upheld the admission of the defendant's 10-year-old conviction as probative of his knowledge that he was a felon and therefore possessed ammunition unlawfully. See § 15.04[10][a].
- *United States v. Jimenez-Chaidez*, 96 F.4th 1257 (9th Cir. 2024), ruled that evidence of the defendant's prior acts (smuggling drugs across the U.S.-Mexico border in his car) that were similar and close in time (within five months of his arrest on the current charge) to the currently charged offense was admissible to prove knowledge and intent. See § 15.04[10][a].

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Publication 473 Release 43 April 2025

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