

PUBLICATION UPDATE

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Weinstein's Federal Evidence

Publication 803

Release 137

June 2023

HIGHLIGHTS

- Release 137 adds coverage of numerous recent cases on federal evidence topics.
- **Rule 606(b)—Circuit Split on Admissibility, in Federal Habeas Cases, of Juror Testimony Considered in State Proceeding.** Ch. 606, *Juror's Competency as a Witness*, includes expanded discussion on the circuits courts' differing views on whether Rule 606(b)(1) bars evidence, in federal habeas proceedings, of juror testimony considered in a state proceeding—including, most recently, *Gavin v. Comm'r, Alabama Dep't of Corr.*, 40 F.4th 1247 (11th Cir. 2022), concluding that a juror's statement about an irregularity in the jury's deliberative process was "the exact type of evidence that Alabama's Rule 606(b) excludes". See § 606.04[2][d].

- **Rule 606(b)—Remmer Hearings.** Ch. 606, *Juror's Competency as a Witness*, highlights suggestions, by some courts, that post-*Remmer* decisions and Rule 606(b) narrowed or overturned *Remmer's* presumption of prejudice—including, most recently, *United States v. Elbaz*, 52 F.4th 593 (4th Cir. 2022), highlighting this issue, but continuing "to adhere to a *Remmer* presumption when the contact goes beyond the innocuous." See § 606.05[1][a], [b].

Recent Cases of Interest

Rule 101—Scope of Federal Rules of Evidence. *Mizell v. Citizens Bank*, 2023 U.S. App. LEXIS 515 (11th Cir. Jan. 10, 2023) (unpublished opinion), rejected plaintiff's jurisdictional theory that defendant bank violated Rule 1002 by not producing an original promissory note

during 2008 bankruptcy: The Rules of Evidence do not “create any cause of action or ever provide standing.” See § 101.02[1].

Rule 105—*Bruton* Inquiry. *United States v. Collins*, 2023 U.S. App. LEXIS 1257 (2d Cir. Jan. 19, 2023) (unpublished opinion), outlined the Second Circuit’s approach to determining whether modifications to a confession satisfy *Bruton*. See § 105.06[3][b].

Rule 201—Facts Reported in Another Court’s Records Not Subject to Judicial Notice. *Gattineri v. Town of Lynnfield*, 58 F.4th 512 (1st Cir. 2023), declined to take judicial notice of findings of facts, assumed to be true, from another judicial opinion, offered to “kick out” a contrasting allegation in a complaint (collecting cases). See § 201.12[3].

Rule 404(b)—Impermissible Propensity Evidence. *Republic of Turkey v. Christie’s Inc.*, 62 F.4th 64 (2d Cir. 2023), held Turkey’s speculation that the buyer of a six-thousand-year-old marble idol (“Stargazer”) would have purchased it even if he had known it was stolen—relying on evidence of “other acts” showing the buyer’s past purchases of unprovenanced antiques—was inadmissible propensity evidence under Rule 404(b)(1). See § 404.12[3].

Rule 404(b)—Scope. *United States v. Colbert*, 2022 U.S. App. LEXIS 35752 (6th Cir. Dec. 27, 2022) (unpublished opinion), reiterated that Rule 404(b) does not apply to conduct encompassed by the charge, properly rejecting defen-

dant’s requested limiting instruction. See § 404.12[3].

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 § 404.22[5][a].

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 § 404.23[1].

Rule 405(b)—Proving Character. In *United States v. Sutton*, 2022 U.S. Dist. LEXIS 192681 (D.D.C. Oct. 23, 2022), defendants’ character traits of truthfulness and reliability as police officers were relevant to the obstruction of justice charge in connection with high-speed police chase causing victim’s death; therefore, “‘specific instances’ of defendants’ ‘professional diligence’ may be of-

ferred at trial to defend against the obstruction of justice charge.” See § 405.05[4].

Rule 410—Waiver. In *United States v. Hahn*, 58 F.4th 1009 (8th Cir. 2023), the trial court’s choice to credit the testimony of defendant’s former attorney that defendant had “knowingly and voluntarily signed the plea agreement” was “virtually unassailable on appeal”; rejecting defendant’s argument that the court should not have relied on that testimony alone, because it contradicted defendant’s testimony. See § 410.12.

Rule 414—403 Balancing. *United States v. Schave*, 55 F.4th 671 (D.C. Cir. 2022), explaining that the D.C. Circuit considers whether the proffered evidence is “especially graphic” in the context of the crimes for which the defendant was charged, found “a particular risk of undue prejudice” in the admission of prior, uncharged sexual offenses that were arguably more serious and therefore more prejudicial than the charged acts. See § 414.04[2].

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 § 503.21[2].

Rule 509 and FOIA Exemption

5(b)—Attorney Client and Work Product Protections. In *Rocky Mt. Wild, Inc. v. United States Forest Serv.*, 56 F.4th 913 (10th Cir. 2022), the Tenth Circuit held that the public dissemination by a third party of documents inadvertently disclosed in response to a FOIA request does not erase their exempt status under Exemption 5, providing attorney-client and work product protections. See § 509.23[1].

Rule 608(b)—No Confrontation Clause Violation. In *United States v. Abreu*, 2023 U.S. App. LEXIS 1135 (5th Cir. Jan. 18, 2023) (unpublished opinion), Rule 608(b) barred defendant from using extrinsic evidence (informant’s wife’s testimony) to inquire about a collateral issue (whether informant reported \$50,000 payment unrelated to this case on his tax returns), and defendant was able to cross-examine informant, as necessary for his entrapment defense. See § 608.22[2][e].

Rule 701—Distinguishing Lay From Expert Testimony. *United States v. Davis*, 53 F.4th 833 (5th Cir. 2022), held a forensic auditor’s testimony was properly admitted as lay testimony; although the volume of math required was large, “nothing about that process suggested it could be mastered only by specialists in field with particularized expertise.” See § 701.03[1].

Rule 703—Admissibility on Expert Opinion Testimony. *Weidman v. Ford Motor Co.*, 2022 U.S. Dist. LEXIS 227119 (E.D. Mich. Dec. 16, 2022), observing that “[t]here is no

requirement that an expert must physically inspect or test items on which they offer an opinion” and admitted expert opinion testimony based on numerous technical documents provided by defendant. See § 703.04[3].

Rule 802 and Confrontation Clause—Defendant’s Translated Statements. *United States v. Harbans Singh*, 2022 U.S. App. LEXIS 34948 (9th Cir. Dec. 19, 2022) (unpublished opinion), found no violation of defendant’s Confrontation Clause rights by introducing, at trial, translations of his oral statements made during his asylum interview, without calling as witnesses the interpreters who contemporaneously translated those statements; because the interpreters qualified as “language conduits,” under the factors established by *United States v. Nazemian*, 948 F.2d 522 (9th Cir. 1991), use of their translations did not implicate the Confrontation Clause. See § 802.05[3][a].

Rule 901—Authenticating Audio and Video Recordings. In *United States v. Kimble*, 54 F.4th 538 (8th Cir. 2022), the Eighth Circuit reiterated that it has “repeatedly cautioned” that the factors it uses to authenticate audio tapes (the *McMillan* factors) “are not to be applied rigidly.” The court found no abuse of discretion in admitting the contested recordings; given “the totality of the circumstances surrounding the re-

cordings,” the government laid an adequate foundation to assure reliability, even though it “did not satisfy every *McMillan* factor before every piece of evidence [] was admitted.” See § 901.05[1].

Rule 901—Authenticating Social Media. *Huzinec v. Six Flags Great Adventure, LLC*, 2023 U.S. App. LEXIS 2530 (9th Cir. Feb. 1, 2023) (unpublished opinion), held admission of plaintiff’s YouTube videos, “not for their content but for their very existence” [to show notice that roller coaster passengers were disregarding loose articles policy] did not require authentication of content by a witness with personal knowledge, but a foundation by a witness that the YouTube videos purported to show a point-of-view action shot of the roller coaster. See §§ 900.07[4A], 901.08[2].

Rule 1002—Best Evidence Rule. *Roundtree v. Bowers*, 2022 U.S. App. LEXIS 35839 (11th Cir. Dec. 29, 2022) (unpublished opinion), excluded an internal investigatory report in which the investigator stated that the videos showed that officers hit defendant 16 times; “to prove the contents of the videos separate and apart from the videos alone by a witness who was not privy to the events described by the videos” violated the best evidence rule. See § 1002.04[1].

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