PUBLICATION UPDATE

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Federal Courtroom Evidence, Fifth Edition

Publication 80456 Release 12 May 2010

HIGHLIGHTS

Proposed Amendment to Rule 804(b)(3)

- Proposal would extend requirement of corroborating circumstances to all declarations against penal interest offered in criminal cases.

Confrontation: Testimonial Hearsay

- Chapter 21 has been updated with a Supreme Court case addressing the testimonial nature of the laboratory report that a state forensic analyst prepared for use in a criminal prosecution.

Annual Update. This release of Federal Courtroom Evidence incorporates the latest case law developments throughout the volume.

Proposed Amendment to Evidence Rule 804(b)(3). A proposed amendment to Rule 804(b)(3) extends the corroborating circumstances requirement to all declarations against penal interest offered in criminal cases, including those offered by the prosecution. For current status of the amendment, see http://www.uscourts.gov/rules/newrules1.htm. For further discussion of the rule, see Ch. 22, *Hearsay Exceptions*, § 804.3.3.

Confrontation: Characterization of Lab Report for Trial Use as Testimonial. In the long-awaited Supreme Court case, *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 174 L. Ed. 2d 314, 2009 U.S. LEXIS 4734 (2009), Justice Scalia, writing for a 5-4 majority, held that a state forensic analyst's laboratory report, prepared for use in a criminal prosecution, was testimonial evidence. See Ch. 21, *Hearsay: Definitions and Rules*, § 802.3.3.

Trial Procedures. In *U.S. v. Smith*, 569 F.3d 1209 (10th Cir. 2009), the Tenth Circuit discussed when it is appropriate to ask a witness questions submitted by the jury. See Ch. 17, *Court Control Over Witnesses*, § 611.2. In *U.S. v. Olofson*, 563 F.3d 652 (7th Cir. 2009), the Seventh Circuit addressed the interplay between Rules 615 and 703, holding that Rule 703 is

not an automatic exemption for expert witnesses from Rule 615 sequestration. See Ch. 17, *Court Control Over Witnesses*, § 615.2. In *Monolithic Power Systems, Inc. v. O2 Micro Int'l*, 558 F.3d 1341 (Fed. Cir. 2009), the Federal Circuit addressed whether, under Ninth Circuit law, a trial court abused its discretion in appointing an independent expert in a patent infringement action, even though the court made extemporaneous comments at the case management conference suggesting that the independent expert would greatly influence the jury's determination. See Ch. 20, *Court Appointed Experts*, § 706.2.

Privileges. In *Valero Energy Corp. v. United States*, 569 F.3d 626 (7th Cir. 2009), the Seventh Circuit, addressing the contours of the tax practitioner privilege, found tax documents sought by IRS during its investigation of a financial advisor of an oil refinery were not protected by the privilege. See Ch. 11, *Privileges: General Rule,* § 501.3.3. The chapter has also been updated to clarify that a court must undertake the initial review of a state secrets claim in camera and ex parte, and that the party's counsel has no right to access the classified information during this inquiry (see *Doe v. CIA*, 576 F.3d 95 (2d Cir. 2009)). See Ch. 11, *Privileges: General Rule*, § 501.5.1.

Hearsay. A statement that satisfies all of the elements of the requirements for an excited utterance meets the threshold for admissibility under Rule 803(2), even though its reliability might be subject to challenge on grounds such as inconsistency with subsequent statements or the speaker's motive to fabricate (see *U.S. v. Davis,* 577 F.3d 660 (6th Cir. 2009)). See Ch. 22, *Hearsay Exceptions*, § 803.3.1. In *Chavez v. Carranza,* 559 F.3d 486, 496 (6th Cir. 2009), the Sixth Circuit considered at length the requirements for admission of a public report of investigation. See Ch. 22, *Hearsay Exceptions*, § 803.9. In *U.S. v. McFall*, 558 F.3d 951 (9th Cir. 2009), the Ninth Circuit agreed with the D.C. Circuit that district courts should apply a fact-specific inquiry to determine whether prosecutors had a similar motive to develop testimony at an earlier proceeding as they would have at trial, but rejected the Second Circuit's "gloss" on Rule 804(b)(1), requiring similar "intensity" of motivation. See Ch. 22, *Hearsay Exceptions*, § 804.3.1.

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