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Federal Courtroom Evidence, Fifth Edition

Publication 80456 Release 13 May 2011

HIGHLIGHTS

Proposed Amendment to Rule 804(b)(3)

- Amendment to Rule 804(b)(3), effective December 1, 2010.
- Other-Acts Evidence: "Inextricably Intertwined."
- Rule 408: Evidence of Settlement Between Party and Third Person.
- Attorney-Client Privilege: Corporate Officers/Employees Seeking to Assert Personal Claim of Attorney-Client Privilege.
- Attorney-Client Privilege: Communications Between Corporate Counsel and Outside Consultants.
- Rule 701: Lay Witness Testify About Drug Operations.
- Rule 702: Applying *Daubert* Standard at Class Certification Stage.
- Hearsay: Prior Consistent Statements.
- Rule 803(2): Excited Utterances.
- Restyled Evidence Rules 101-1103.

Amendment to Rule 804(b)(3), effective December 1, 2010. The amendment extends the corroborating circumstances requirement to all declarations against penal interest offered in criminal cases, including those offered by the prosecution. See Ch. 22, *Hearsay Exceptions*, §§ 804.1, 804.3.3.

Other-Acts Evidence: "Inextricably Intertwined." Ch. 9, *Character and Habit Evidence*, has been updated with *U.S. v. Green*, 617 F.3d 233 (3d Cir. 2010), in which the Third Circuit analyzed, in detail, the "inextricably intertwined" standard. *See* Ch. 9, *Character and Habit Evidence*, §§ 404.4.7, 404.4.8, 404.5.3, 4.4.5.5.

Rule 408: Evidence of Settlement Between Party and Third Person. Ch. 10, *Limited Admissibility*, has been updated with expanded discussion of the admissibility, under Rule 408, of evidence of settlement of a claim between a third person and a party to the suit being litigated, including *Lyondell Chem. Co. v. Occidental Chem. Corp.*, 608 F.3d 284 (5th Cir. 2010), in which the Fifth Circuit rejected the notion that different disputes must arise

out of the "same transaction" in order to trigger Rule 408. *See* Ch. 10, *Limited Admissibility*, § 408.4.

Attorney-Client Privilege: Corporate Officers/Employees Seeking to Assert Personal Claim of Attorney-Client Privilege. Ch. 11, *Privileges: General Rule*, includes expanded discussion of the tests used to determine whether a corporate employee holds a joint privilege over communications with corporate counsel, including the Ninth Circuit case, *U.S. v. Graf*, 610 F.3d 1148 (9th Cir. 2010). *See* Ch. 11, *Privileges: General Rule*, § 501.3.5.

Attorney-Client Privilege: Communications Between Corporate Counsel and Outside Consultants. Ch. 11, *Privileges: General Rule*, also includes expanded coverage of the circumstances in which communications between an outside consultant and an entity's attorneys are covered by the entity's attorney-client privilege. *See* Ch. 11, *Privileges: General Rule*, § 501.3.5.

Rule 701: Lay Witness Testify About Drug Operations. Ch. 18, *Opinions by Lay Witnesses*, includes expanded discussion and up-to-date cases from circuits that do not permit a lay witness to testify about drug operations based on past personal experience with other, similar drug operations. At least four circuits have found that these witnesses may testify only when qualified as experts. *See* Ch. 18, *Opinions by Lay Witnesses*, § 701.5.

Rule 702: Applying *Daubert* Standard at Class Certification Stage. Ch. 19, *Expert Opinions*, has been updated with cases from the Seventh and Ninth Circuits, reaching contrary conclusions about whether the trial court must perform a full *Daubert* analysis at the class certification stage: *Am. Honda Motor Co. v. Allen*, 600 F.3d 813 (7th Cir. 2010) and *Dukes v. Wal-Mart, Inc.*, 603 F.3d 571 (9th Cir. 2010). *See* Ch. 19, *Expert Opinions*, § 702.5.1.

Hearsay: Prior Consistent Statements. Ch. 21, *Hearsay: Definitions and Rules*, includes the Third Circuit case, *U.S. v. Riley*, 621 F.3d 312 (3d Cir. 2010), holding that a statement of illegal activity can still be within the scope of employment and can be admissible under Rule 801(d)(2)(D), and the Ninth Circuit case, *U.S. v. Bonds*, 608 F.3d 495 (9th Cir. 2010), ruling that statements of a party's independent contractors typically do not come within Rule 801(d)(2)(D). *See* Ch. 21, *Hearsay: Definitions and Rules*, § 801.5.4.

Rule 803(2): Excited Utterances. Ch. 22, *Hearsay Exceptions*, has been updated with *Brunsting v. Lutsen Mts. Corp.*, 601 F.3d 813 (8th Cir. 2010), in which the Eighth Circuit emphasized the importance of identifying "the entirety of the 'event' for Rule 803(2) purposes," in determining if the witness was under the stress of excitement. *See* Ch. 22, *Hearsay Exceptions*, § 803.3.2.

Restyled Evidence Rules 101-1103. On September 14, 2010, the Judicial Conference met and approved the pending Evidence Rule amendments to make the rules simpler and easier to read and understand without changing substantive meaning. These rules, if approved by the Supreme Court and by Congress, will be effective December 1, 2011.

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