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EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES

Sixth Edition

2010 Supplement

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Chapter 1
THE PHILOSOPHY AND HISTORY OF AMERICAN EVIDENCE LAW

B. THE ADVERSARY SYSTEM

Page 7: ***Add at the end of Note 2:***

Norman W. Spaulding, *The Rule of Law In Action: A Defense of Adversary System Values*, 93 CORNELL L. REV. 1377 (2008) (discussing David Luban's book, LEGAL ETHICS AND HUMAN DIGNITY (2007), which in part critiques the adversary system); Michael Asmiow, *Popular Culture and the Adversary System*, 40 LOY. L.A. L. REV. 653 (2007). For an interesting historical study, see Randolph N. Jonakait, *The Rise of the American Adversary System: America Before England*, 14 WIDENER L. REV. 323 (2009).

The American adversarial model raises significant ethical issues. For a recent discussion of several of these ethical problems that involve evidentiary issues, see the Fordham Law Review December 2007 Symposium: *Ethics and Evidence*, 76 FORDHAM L. REV. beginning at p. 1225.

C. THE USE OF LAY JURORS

Page 10: ***Add at the end of Note 3:***

The work of the ABA Commission on the American Jury Project continues. See www.abanet.org/jury/home.html. For a recent comprehensive treatment, see NEIL VIDMAR & VALERIE HANS, AMERICAN JURIES: THE VERDICT (2007).

G. THE HISTORY OF AMERICAN EVIDENCE LAW

3. The Federal Rules of Evidence

c. Today

Page 22: ***Add at the end of the third paragraph:***

As of December 2009, it is expected that the proposed Georgia Rules of Evidence will be submitted to the legislature in January 2010. It is not certain whether they will be acted on in this forthcoming session.

Page 22: ***Add following Note 2:***

3. Beginning in the fall of 2007, the Advisory Committee on Evidence Rules has been working on a comprehensive stylistic revision of the Federal Rules of Evidence. That project is now essentially complete, and in its May 2009 report the committee recommended that the "proposed restyled Evidence Rules 101–1103" be released for public comment. The goal was to improve the clarity and readability of the rules and to make the style and terminology of the rules

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consistent throughout and consistent with other federal rules (i.e. the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure). The committee was specifically charged not to propose revisions that would change the substance of any rule.

The proposed new rules have been published and are available at http://www.uscourts.gov/rules/newrules1.htm. The deadline for bench, bar and public comments is February 16, 2010. Public hearings on the rules are scheduled in January and February 2010. The Standing Committee, in its August 2009 publication memo, stated: "After the public comment period, the Advisory Committees will decide whether to submit the proposed amendments to the Standing Committee on Rules of Practice and Procedure."

Based on discussion to date, it is likely that there will be some changes to the proposed amendments before they are finalized. In particular, some who have analyzed the rules have suggested that there may, indeed, be substantive changes lurking in the text. However, it seems highly likely that the proposed new rules will eventually be adopted with minor changes. ***Therefore, the federal rules of evidence you will be using in your professional work will be different in form from the ones you are studying in this course.*** We can only hope and expect that they will remain substantively consistent.

4. You will recall from your course in Civil Procedure that, for *Erie* purposes, rules of evidence are almost always deemed rules of procedure. This means that in federal court, the Federal Rules of Evidence and other federal evidentiary rules apply, even in a diversity case. *Schrott v. Bristol-Myers Squibb Co.*, 403 F.3d 940, 943 (7th Cir. 2005). Conversely, this also means that state courts applying federal substantive law are not bound by federal court precedent interpreting a rule of evidence, even if the state rule is patterned after, or copied verbatim from, a federal rule. However, as noted in later chapters, in federal diversity cases state law may affect relevancy determinations under Federal Rules 401 and 402, and sometimes a state privilege or burden of proof or presumption rule may apply.

Chapter 2

EVIDENCE: TYPES, SOURCES AND SUBSTITUTES

C. SUBSTITUTES FOR EVIDENCE: OTHER METHODS OF ESTABLISHING FACTS

1. Judicial Notice

a. Judicial Notice of Facts

Page 46: ***Add at the end of the first paragraph:***

; *MVM Inc. v. Rodriguez*, 568 F. Supp. 2d 158, 164 (D.P.R. 2008); *Unruh-Haxton v. Regents of Univ. of Calif.*, 162 Cal. App. 4th 343, 76 Cal. Rptr. 3d 146, 163–66 (Cal. App. 2008).

Page 46: ***Add following Note 2:***

3. Can a court take judicial notice of the contents of a business's web site? *Compare Victaulic Co. v. Tieman*, 499 F.3d 227, 236 (3d Cir. 2007); *O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1224–25 (10th Cir. 2007); *Enterprise Rent-A-Car Co. v. U — Haul Int'l*, 327 F. Supp. 2d 1032, 1042 (E.D. Mo. 2004). What about minutes of a city council meeting posted on the city's web site? *Freedom From Religion Foundation v. City of Green Bay*, 581 F. Supp. 2d 1019, 1024 (E.D. Wis. 2008). *See Seifert v. Winter*, 555 F. Supp. 2d 3, 11 n.5 (D.D.C. 2008) (discussing judicial notice of information posted on government web sites). How about a study from an internet web site on identity theft and a list of data breach incidents reported in California during a two-year period? *Ruiz v. Gap, Inc.*, 540 F. Supp. 2d 1121, 1124 (N.D. Cal. 2008). A Wikipedia article? *See Palisades Collection, L.L.C. v. Graubard*, 2009 WL 1025176 (N.J. Super. A.D. 2009).

4. Judicial notice is applied more broadly in administrative proceedings. *See Singh v. Ashcroft*, 393 F.3d 903, 9055–06 (9th Cir. 2004).

b. Judicial Notice of Law

Page 48: ***Add at the end of Note 2:***

The Advisory Committee Note to Rule 201 states: "These . . . rules [Rule 44.1 of the Federal Rules of Civil Procedure and Rule 26.1 of the Federal Rules of Criminal Procedure] are founded upon the assumption that the manner in which law is fed into the judicial process is never a proper concern of the rules of evidence but rather of the rules of procedure. The Advisory Committee on Evidence, believing that this assumption is entirely correct, proposes no evidence rule with respect to judicial notice of law, and suggests that those matters of law which, in addition to foreign-country law, have traditionally been treated as

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requiring pleading and proof and more recently as the subject of judicial notice be left to the Rules of Civil and Criminal Procedure." Nevertheless, courts sometimes do take judicial notice of law under Rule 201. *United States v. Feldman*, 324 F. Supp. 2d 1112, 1118 (C.D. Cal. 2004) (treaty with Spain).

On this issue, see *Getty Petroleum Marketing, Inc. v. Capital Terminal Co.*, 391 F.3d 312, 320–330 (1st Cir. 2004) (comprehensive discussion in dissent). Rule 44.1 provides, in part: "In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law."

Chapter 3
THE CHRONOLOGY OF A TRIAL

B. THE ORGANIZATION OF THE TRIAL AS A WHOLE

7. The Plaintiff's or Prosecutor's Rebuttal

Page 58: ***Add after the*** **Bowman** ***citation:***

Peals v. Terre Haute Police Dept., 535 F.3d 621, 629–30 (7th Cir. 2008).

12. The Judge's Instructions or Charge to the Jury

Page 67: ***Add at the end of Note 2:***

The rule of limited admissibility presents important ethical questions. *See* Daniel D. Blinka, *Ethical Firewalls, Limited Admissibility, and Rule 703*, 76 FORDHAM L. REV. 1229 (2007).

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Chapter 4
THE EXAMINATION OF A WITNESS

A. THE ORDER OF THE EXAMINATION OF A WITNESS

3. Questions by the Trial Judge

Page 72: ***Add after the*** **Ralph v. Nagy** ***citation:***

McMillan v. Castro, 405 F.3d 405, 409–12 (6th Cir. 2005); *Miller v. Holzmann*, 563 F. Supp. 2d 54, 104–07 (D.D.C. 2008).

B. THE SCOPE OF THE EXAMINATION OF A WITNESS

2. Cross-Examination

b. The Consequences of Undue Restriction of the Scope of Cross-Examination

Page 82: ***Add after the*** **Sanchez** ***citation:***

Other cases illustrate the point. As noted in the text, scope of cross-examination rules permit cross on the substance of the direct and also allow the cross-examiner to attack the credibility of an opposing witness. One way to attack witness credibility is to ask the witness if he harbors strong personal feelings about one of the parties to the case, and for that reason his trial testimony is biased.

The trial judge may, however, impose some limits on bias impeachment of a witness. As one court explained, a defendant is entitled to a reasonable cross-examination on the question of whether the witness believed that he would personally benefit from testifying favorably for the prosecution, but that does not mean that there are no limits on the cross-examiner's inquiry into the potential bias of an adverse witness. On the contrary, a trial court retains wide latitude to impose reasonable limits on such cross-examination, especially in the situation in which the interrogation may be only marginally relevant. *See Lawton v. State*, 281 Ga. 459, 640 S.E.2d 14 (2007); *United States v. Davis*, 490 F.3d 541 (6th Cir. 2007) (defense counsel precluded from inquiring into witness's alleged extra-marital affair with one of the defendants; court held that "[w]hile bias is always relevant with regard to a witness's credibility, it remains the case that a trial court can opt to exclude evidence that is marginally relevant and highly prejudicial").

In criminal trials, a judge's discretion to limit defense cross-examination is restricted by the defendant's Sixth Amendment right to confrontation. A 2009 decision provides helpful guidelines: "An accused's constitutional right of confrontation is violated when either (1) he or she is absolutely prohibited from engaging in the otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of a witness, or (2) a reasonable jury would

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have received a significantly different impression of the witness' credibility had counsel been permitted to pursue his or her proposed line of cross-examination." *State v. Banks*, 771 N.W.2d 75 (Neb. 2009). Under Confrontation Clause case law, it is one thing to place proper restrictions on examination for bias.

3. Redirect Examination

Page 86: ***Add following carry-over paragraph from p. 85:***

2. As was emphasized regarding scope of cross-examination, trial courts must be careful to not unduly cut off a party's proof upon redirect. In one case, a defendant charged with tax violations was cross-examined about a letter she had received from an expert who questioned the legality of her business practices. On redirect she sought to testify about legal opinions she had received from other experts supporting her practices. However, she was stopped when the trial judge sustained the prosecutor's scope objection. On appeal, this ruling was held to be in error. *United States v. Moran*, 493 F.3d 1002, 1013 (9th Cir. 2007).

C. THE FORM OF THE EXAMINATION OF A WITNESS

1. In General

Page 88: ***Add to Problem 4-9:***

For a definition of multiple or compound questions, see *United States v. Littlejohn*, 489 F.3d 1335, 1340–46 (D.C. Cir. 2007) (during jury voir dire the judge asked the jury six compound questions; this was reversible error).

Page 89: ***Add to Problem 4-12:***

During cross-examination, the volunteer answers of an overly eager witness require control. The cross-examiner should use the motion to strike to try to rein in the runaway witness. The right to strike on the ground of unresponsiveness belongs to the examining counsel only. The following transcript illustrates how it works:

Cross-examiner: The car which ran the red light, was that the blue car?

Witness: The driver of the yellow car was drunk!

Cross-examiner: (represents driver of yellow car): Objection, your honor, the answer was unresponsive, and prejudicial as well. Move to strike, and ask the jury be instructed to disregard the answer.

Court: Sustained. Jury is directed to disregard the last answer from the witness.

If the volunteered material is damaging enough, the objecting lawyer may wish to couple her request to strike with a motion for mistrial.

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2. Leading Questions

Page 91: ***Add at the end of Note 2:***

In states without federal rules, there are civil trial counterparts to Federal Rule 611(c). See, e.g., OCGA 24–9–81 (Ga. 2009) (party may call opposing party and subject him to cross-examination and impeachment).

4. Argumentative Questions

Page 95: ***Add to Problem 4-15:***

While "asked and answered" may not be applicable in the above-described scenario, there are other situations where an interrogator is blatantly repetitive. Suppose in an accident injury case a defense attorney has the plaintiff describe the facts of the accident. Then, before passing the witness, he says: "Mr. Plaintiff, let's go over the facts of the accident again." A timely objection will prevent repetition. *See State v. Carter*, 771 N.W. 2d 329 (S.D. 2009).

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Chapter 5
THE ROLES OF JUDGE, JURY AND ATTORNEYS

A. THE ROLE OF THE PROPONENT OF AN ITEM OF EVIDENCE

2. Trial

Page 110: ***At the end of Note 1, add:***

See Commonwealth v. Little, 453 Mass. 766, 906 N.E.2d 286, 292 (2009), where the court reversed defendant's conviction based on the trial judge's ruling that a prior conviction would be allowed for impeachment and defendant thereafter chose not to testify.

Page 111: ***At the end of Note 4, after the Gary M.B citation, add:***

State v. Swanson, 707 N.W.2d 645, 654 (Minn. 2006); *Zola v. Kelley*, 149 N.H. 648, 826 A.2d 589, 591–92 (2003).

Chapter 7
WITNESS COMPETENCY

B. THE EARLY COMMON LAW COMPETENCY DOCTRINE

Page 152: ***Add at the end of the last paragraph of Section B:***

See Kenneth S. Abraham, *The Common Law Prohibition on Party Testimony and the Development of Tort Liability*, 95 VA. L. REV. 489 (2009).

C. THE PREVAILING MODERN DOCTRINE

2. Applications of the General Requirements

b. Mentally Disordered Persons

Page 167: ***Add above "NOTES AND PROBLEMS":***

Thus, persons who have significant mental impairment may, in the discretion of the court, testify if the judge concludes that the witness is able to give accurate and reliable testimony as to the events in issue. *Greyhound Lines, Inc. v. Wade*, 485 F.3d 1032, 1036 (8th Cir. 2007) (witness permitted to testify who had a serious brain impairment "that makes normal thinking and processing almost impossible").

E. SPECIALIZED ASPECTS OF COMPETENCY

1. Disqualification For Interest: Dead Man's Acts

Page 171: ***Correction in footnote 2:***

The correct citation for the Arizona statute is § 12-2251.

2. Judges, Jurors and Attorneys

b. Jurors

Page 184: ***Add immediately above "c. Attorneys":***

Although the language of Rule 606(b) appears to prohibit inquiry and juror testimony concerning racial or ethnic bias that may have infected the jury's deliberations, some courts have held that a trial judge has discretion to undertake such an inquiry to protect a criminal defendant's constitutional rights to a fair trial and an impartial jury. For example, in *United States v. Villar*, 586 F.3d 76 (1st Cir. 2009), the First Circuit Court of Appeals stated that it agreed with the majority of decisions that Rule 606(b) clearly precludes the inquiry. *Id.*

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at 85. But it went on to hold that such an inquiry is permissible under the Fifth and Sixth amendments:

> While the issue is difficult and close, we believe that the rule against juror impeachment cannot be applied so inflexibly as to bar juror testimony in those rare and grave cases where claims of racial or ethnic bias during jury deliberations implicate a defendant's right to due process and an impartial jury. In our view, the four protections relied on by the *Tanner* Court do not provide adequate safeguards in the context of racially and ethnically biased comments made during deliberations. While individual pre-trial voir dire of the jurors can help to disclose prejudice, it has shortcomings because some jurors may be reluctant to admit racial bias. In addition, visual observations of the jury by counsel and the court during trial are unlikely to identify jurors harboring racial or ethnic bias. Likewise, non-jurors are more likely to report inappropriate conduct — such as alcohol or drug use — among jurors than racial statements uttered during deliberations to which they are not privy.

Accordingly, we conclude that the district court here did have the discretion to inquire into the validity of the verdict by hearing juror testimony to determine whether ethnically biased statements were made during jury deliberations and, if so, whether there is a substantial probability that any such comments made a difference in the outcome of the trial.

Id. at 87.

c. Attorneys

Page 185: ***Add new Note 6:***

6. If a party's attorney is prohibited from participating in the trial because she will be a witness in the case and the court has excluded her from the courtroom during the trial, can she nevertheless interact with the party's other attorneys and witnesses outside the courtroom before, during, and after her testimony? In other words, can she still represent the party in the case, just not in the courtroom? *Minebea Co. v. Papsti*, 374 F. Supp. 2d 231 (D.D.C. 2005). Are there circumstances in which the court can permit the attorney who is also a witness on substantive matters to be in the courtroom? *Milicevic v. Fletcher Jones Imports, Ltd.*, 402 F.3d 912, 915–16 (9th Cir. 2005).

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Chapter 8

LOGICAL RELEVANCE: PROBATIVE VALUE

B. THE DISTINCTION BETWEEN PURE LOGICAL RELEVANCE AND MATERIALITY

2. Materiality

b. Curative Admissibility

Page 194: ***Add after the first sentence in the last full paragraph on the page:***

Even in these jurisdictions, the trial judge has discretion as to whether to invoke the doctrine and permit the opponent to introduce responsive, otherwise inadmissible evidence. Gilligan & Imwinkelried, *Bringing the "Opening the Door" Theory to a Close: The Tendency to Overlook the Specific Contradiction Doctrine in Evidence Law*, 41 Santa Clara L. Rev. 807 (2001). Although the proponent has violated the evidentiary rules, the opponent does not have a full-fledged right to introduce the inadmissible evidence.

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Chapter 9

SPECIALIZED ASPECTS OF LOGICAL RELEVANCE: AUTHENTICATION OF WRITINGS

B. PRIVATE WRITINGS

Page 223: ***Add a new subsection immediately above "C. BUSINESS WRITINGS":***

5. Authentication of Electronically Stored Evidence

Increasingly, writings are taking electronic form — text messages, email messages, web sites and pages, blogs, chat room transcripts and other online conversations or postings, database contents, downloaded or stored images and videos, PDF files, and, of course, text files in various formats stored on a computer or online. As you probably learned in your first-year civil procedure course, discovery of electronically stored information has generated a new set of rules, and e-discovery often requires the assistance of experts in the field. Once such evidence is obtained during discovery, the trial lawyer must then develop a plan for authenticating those items he or she intends to introduce into evidence.

In theory, as well as in practice, the methods of authenticating electronically stored evidence are the same as for authenticating other writings. Rules 901 and 902 apply, and case law deciding authentication issues for other writings is considered valid precedent for electronic evidence.

In addition, there is a growing body of case law specifically involving authentication of these various forms of electronic evidence. For an assortment of these cases, see Annot., 34 A.L.R.6th 253. Some scholars have urged that authentication of electronic evidence presents unique difficulties and should be governed by a separate — and more rigorous — rule.

C. BUSINESS WRITINGS

1. Custody

Page 224: ***Add after Note 3:***

4. When a party has produced a document in response to a subpoena or discovery request, the party has implicitly authenticated the document. *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1020 (9th Cir. 2004); *South Cent. Bank & Tr. Co. v. Citicorp Credit Services*, 863 F. Supp. 635 (N.D. Ill. 1994).

Chapter 11

SPECIALIZED ASPECTS OF LOGICAL RELEVANCE: IDENTIFICATION OF SPEAKERS AND VERIFICATION OF PHOTOGRAPHS AND CHARTS

A. THE IDENTIFICATION OF A SPEAKER

5. Tape Recordings

Page 269: ***Add to Note 2:***

For Example, in *McCormick v. Brevig*, 322 Mont. 112 (2004), failure to show an absence of changes in the recording was fatal to authentication. "In this case, the District Court found that the tape recording had been intentionally altered so as to capture only certain phrases or sentences from the original recording and the original version of the recording was no longer available." The tape recording was therefore properly rejected by the trial court. Other courts continue to require a heightened showing. *See Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor, Ltd.*, 262 F. Supp. 2d 251, 263 (S.D.N.Y. 2003) ("Because tape recordings are likely to have a strong effect on the jury and are susceptible to alteration, the Second Circuit requires their authenticity to be established by clear and convincing evidence") (citing *United States v. Morrison*, 153 F.3d 34, 56 (2d Cir. 1998).

Page 269: ***Add to Note 5:***

It seems clear that the transcript must be a verbatim rendition of the words and sounds on the tape, and not a summary. The point is made in C. Fishman, *Recordings, Transcripts and Translations as Evidence*, 81 Wash. L. Rev. 473, 494 (2006):

> If the transcript is received as evidence of what the recording contains, the transcript is governed by the "mirror the tape" rule. Common sense dictates that, other than the identity of the conversants, the transcript should contain only what can actually be heard on the recording. Although a *witness* may "narrate" the recording while testifying, explaining what physical actions accompanied each passage or sound on the tape, the transcript that is distributed to the jury "should . . . mirror the tape and should not be an amalgam of the recording and the hearsay testimony of persons present at the conversation."

B. THE VERIFICATION OF PHOTOGRAPHS

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1. Verification of Still Photographs

Page 273: ***Add at bottom of page:***

Notwithstanding the low threshold required for authentication of photographic proof, sometimes the proponent of a picture fails to satisfy even this low bar. In *Schmidt v. City of Bella Villa*, the plaintiff in a civil rights action complained about police photographing her hip tattoo at headquarters and offered her own posed photo, which was made by her some time after her arrest. The court rejected the evidence as lacking in foundation because it failed to duplicate the plaintiff's clothing on the night of the arrest. "In order to be admissible, a photograph must be shown to be an accurate representation of the thing depicted *as it appeared at the relevant time*." *Schmidt v. City of Bella Villa*, 557 F. 2d 564 (8th Cir. 2009) (emphasis added).

4. Verification of Motion Pictures, Videotapes and Electronic Imagery

Page 284: ***Add Note 3:***

Creating videos is relatively easy with today's computer and video technology. Videos offered in evidence can range from low budget homemade portrayals to extensive productions. In death penalty sentencing hearings, some victim impact videos have extended to 20 minutes in length and have featured photos and film clips of the murder victim's life often accompanied by background music and sometimes narrated by the victim's family members. The Supreme Court recently denied review of two California Supreme Court decisions allowing such a victim impact videos to be played for the jury, which then sentenced the defendants to death. *Kelly v. California*, 42 Cal. 4th 763 (2007), *cert. denied*, 129 S.Ct. 564 (2008). Justice Stevens, dissenting from the denial of review, wrote:

> Victim impact evidence is powerful in any form. . . . But in each of these cases, the evidence was especially prejudicial. Although the video shown to each jury was emotionally evocative, it was not probative of the culpability or character of the offender or the circumstances of the offense. Nor was the evidence particularly probative of the impact of the crimes on the victims' family members: The pictures and video footage shown to the juries portrayed events that occurred long before the respective crimes were committed and that bore no direct relation to the effect of crime on the victims' family members.
>
> Equally troubling is the form in which the evidence was presented. As these cases demonstrate, when victim impact evidence is enhanced with music, photographs, or video footage, the risk of unfair prejudice quickly becomes overwhelming. While the video tributes at issue in these cases contained moving portrayals of the lives of the victims, their primary, if not sole, effect was to rouse jurors' sympathy for the victims and increase jurors' antipathy for the capital defendants. The videos added nothing relevant to the jury's deliberations and invited a verdict based on sentiment, rather than reasoned judgment.

Chapter 12

SPECIALIZED ASPECTS OF LOGICAL RELEVANCE: VALIDATION OF SCIENTIFIC EVIDENCE

A. INTRODUCTION

Page 292: ***Add at the end of the carryover paragraph on the top of the page:***

In February 2009, the National Research Council of the National Academy of Science released an important and long-awaited report entitled STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD. The report raises significant questions about the reliability of several forensic science techniques, including fingerprint analysis, questioned document examination, and firearms identification. It remains to be seen whether — and how — the findings in the report will affect admissibility of these types of forensic evidence going forward.

B. THE EDUCATING OR TEACHING WITNESS

2. The Validity of the Underlying Theory and the Reliability of the Instrument Implementing the Theory

Page 295: ***Add after the first sentence in the first full paragraph on the page:***

If courts treated the admissibility of scientific evidence as an issue governed by Rule 901(b)(9) and Rule 104(b), as Chapter 5 pointed out the jury would make the real decision. Instead, all jurisdictions agree that the question is one for the trial judge under Rule 104(a). Furthermore, all jurisdictions require more than the minimal showing mandated by Rule 901(b)(9).

Page 298: ***Add at the end of the second paragraph in Problem 12-4:***

In 2004, the National Research Council of the National Academy of Science published a report on CBLA evidence. *See* FORENSIC ANALYSIS: WEIGHING BULLET LEAD EVIDENCE. The report concluded that although CBLA analysts had used very imprecise instrumentation to determine the elemental composition of bullets, in many cases the testifying expert had overstated the inference from the available empirical data.

Page 308: ***Add after "179 F. Supp. 2d 492 (E.D. Pa. 2002)":***

In his original opinion, the judge ruled that although experts could testify as to points of similarity or dissimilarity between the latent and known prints, they could not testify on the ultimate issue of whether the latent print could be attributed to the defendant.

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Page 308: ***Add at the end of the carryover paragraph on the top of the page:***

The National Research Council's February 2009 report on forensic science will undoubtedly add fuel to the controversy.

C. THE REPORTING WITNESS

4. Proof That the Proper Test Procedures Were Used

Page 311: ***Add after the first full paragraph on the page:***

There is a strong policy case for the majority view. Article, *The Debate in the DNA Cases Over the Foundation For the Admission of Scientific Evidence: The Importance of Human Error as a Cause of Forensic Misanalysis*, 69 WASH. U.L.Q. 19 (1991). The teaching witness often relies on "controlled" experimentation to validate the underlying theory and technique. The experiments are "controlled" in the sense that the researcher controls certain variables: If the test is conducted under these controlled conditions, this is the expected outcome. That research does not furnish support for the validity of the second witness's testimony unless, in conducting the test, he or she duplicated the conditions that obtained during the validating research.

D. THE INTERPRETING OR EVALUATING WITNESS

3. The Interpretive Standard Used to Evaluate the Test Result

Page 316: ***Add Note 3:***

3. This element of the foundation raises the question of the specificity of the interpretive standard as well as its subjectivity. In a Tort suit, a toxicologist might be called to testify only about general causation: Exposure to this chemical can cause a particular illness. However, the foundation for that testimony would not necessarily suffice to permit the expert to take the next step and testify as to specific causation. Before permitting the expert to do so, the trial judge might demand additional testimony that: (a) an exposed individual will probably develop the illness once he or she has received a certain dose of the chemical; and (b) this plaintiff was exposed to that dose of the chemical. By the same token, a judge who admitted psychological testimony about the general phenomenon of mistaken eyewitness identification might balk at permitting the psychologist to opine that a particular eyewitness's identification was erroneous.

Page 326: ***Add at the end of the section:***

It would be an overstatement, though, to assert that there is now complete consensus over the use of random match probabilities in DNA cases. In the past, the testimony was admitted in cases involving "confirmation" matches: Non-DNA evidence pointed to a suspect, the police obtained a DNA sample from that suspect, and that sample matched the crime scene sample. However, as DNA databases grow, experts are increasingly testifying to "database" matches: The crime scene evidence did not point to a particular suspect, the police collected

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DNA evidence at the scene, the local authorities compared that sample to the samples in a DNA database, and that comparison led to the charges against the defendant. Kaye, *Rounding Up the Usual Suspects: A Legal and Logical Analysis of DNA Trawling Cases*, 87 N.C.L. Rev. 425 (2009). This development has triggered a controversy over the appropriate method of computing the match probability in such cases. Some commentators and courts believe that a rarity statistic, computed in the normal fashion, is admissible in database cases as well as confirmation cases. *People v. Nelson*, 43 Cal. 4th 1242, 185 P.3d 49, 78 Cal. Rptr. 3d 69, *cert. denied*, 129 S.Ct. 357, 172 L.Ed.2d 219 (2008). Others argue that the use of the database renders the normal statistic inappropriate because such use increases the probability of a coincidental match. They suggest, for example, that the random match probability should be multiplied by the number of persons in the database. Still other commentators support the Balding-Donnelly position that the probative value of the match is even greater in database cases because the database search has eliminated other potential suspects. Most jurisdictions have yet to reach this question.

Chapter 13

LEGAL IRRELEVANCE: THE DISCRETION OF THE COURT TO EXCLUDE

C. APPLYING THE LEGAL IRRELEVANCE DOCTRINE

1. Step One: Determining the Probative Value of the Item of Evidence

Page 330: ***Add in the second full paragraph after the citation to "FEDERAL EVIDENCE TACTICS":***

; *United States v. Dorsey*, 523 F.3d 878, 880–81 (8th Cir. 2008)(referring to "*Old Chief*'s narrow holding," the court stated that "[t]he point to be proved in *Old Chief* was abstract and completely divorced from the story of the case . . .").

2. Step Two (The Minus Side): Identifying the Countervailing Probative Dangers

Page 337: ***Add after Note 1:***

1.1. It may be unrealistic for the court to attempt to exclude evidence that will create an undue risk that the jury will decide the case on an emotional basis. *See* Madeira, *Lashing Reason to the Mast: Understanding Judicial Constraints on Emotion in Personal Injury Litigation*, 40 U.C. Davis L. Rev. 138, 147 (2006). Especially in personal injury litigation, the plaintiff's evidence will naturally tend to create sympathy for the injured plaintiff. Can the court differentiate between legitimate and "undesirable" emotions? *Id.* at 150, 173. Is it simply a question of degree? *Id.* at 149.

Page 338: ***Add at the end of Note 3:***

One recent appellate decision has suggested that a trial judge may exclude otherwise admissible expert testimony when the opponent lacks the financial means to afford rebuttal expert testimony. *Commonwealth v. Serge*, 586 Pa. 671, 896 A.2d 1170, *cert. denied*, 549 U.S. 920, 127 S.Ct. 275 (2006). However, neither the text of Rule 403 nor its legislative history indicates that the trial judge may exercise Rule 403 power to level the playing field at trial. It has also been argued that in many, if not most, cases, there are feasible alternatives to exclusion, including liberal application of the learned treatise hearsay exception, judicial notice, and cautionary instructions. Article, *Impoverishing the Trier of Fact; Excluding the Proponent's Expert Testimony Due to the Opponent's Inability to Afford Rebuttal Evidence*, 40 Conn. L. Rev. 317 (2007).

Page 339: ***Add after Note 5:***

6. Do not assume that the application of Rule 403 is an "all or nothing" proposition. Rather than invoking Rule 403 as a meat axe and requesting that the judge exclude all of the proffered evidence, it is often advisable for the opponent

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to use the statute as a scalpel and ask the judge to excise a marginally relevant, highly prejudicial detail. *Gerber v. Computer Associates Intern., Inc.*, 303 F.3d 126 (2d Cir. 2002). Such requests have the additional benefit of allowing the trial judge to feel Solomonic.

7. On its face, Rule 403 appears to apply across the board to all types of evidence. However, consider the wording of Rule 609(a)(2), discussed on pages 465–67 of the main text. As a matter of statutory interpretation, should that Rule be construed to exempt qualifying convictions from exclusion under Rule 403? Keep this question in mind as well in the context of Federal Rules of Evidence 413–15, which we will consider in Chapter 14.

D. RECURRING PROBLEMS OF LEGAL IRRELEVANCE

2. Experiments and Tests

Page 345: ***Add at the end of the carryover Note that begins on p. 344:***

Hoffman, *If the Glove Don't Fit, Update the Glove: The Unplanned Obsolescence of the Substantial Similarity Standard for Experimental Evidence*, 86 NEB. L. REV. 633, 668–70 (2008) (advancing the statutory construction argument that the enactment of Rule 403 overturned the rigid substantial similarity standard enforced at common law in many jurisdictions).

3. Exhibitions

b. Displays of a Person or Parts of the Body

Page 347: ***Add at the end of Problem 13-5:***

See also Madeira, *Lashing Reason to the Mast: Understanding Judicial Constraints on Emotion in Personal Injury Litigation*, 40 U.C. DAVIS L. REV. 137, 148 (2006) (noting some courts' fear that this kind of evidence "brings the trier of fact too close to the experience of an injury" and the consequent attempt to maintain a "distance" between the plaintiff's injured body and the trier of fact).

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Chapter 14

SPECIALIZED ASPECTS OF LEGAL IRRELEVANCE: CHARACTER, HABIT, OTHER ACTS AND TRANSACTIONS

A. CHARACTER EVIDENCE

2. Character as Circumstantial Evidence of the Conduct of a Party

Page 355: ***Add at the end of the carryover paragraph on the top of the page:***

Since the publication of Ms. Davies' article, support for interactionism has grown in the field of psychology. Imwinkelried, *Reshaping the "Grotesque" Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research*, 36 Sw. U.L. Rev. 741 (2008). Many psychologists now regard interactionism as a more accurate description of how people behave. However, interactionists stress that a reliable prediction of behavior requires a large sample of very similar conduct.

a. Circumstantial Character Evidence in Criminal Cases

1) When Does the Defendant's Character Come Into Issue?

The Traditional Approach — At the Defendant's Election

Page 356: ***Add at the end of Note 2:***

See United States v. Yarbrough, 527 F.3d 1092, 1100–01 (10th Cir. 2008) (where defendant was charged with obstructing an official proceeding, it was relevant to introduce character evidence of his integrity and status as a law-abiding police officer).

2) What Methods of Proof Are Permissible?

The Traditional View — Only Reputation and Opinion

Page 361: ***Add at the end of Note 4:***

Note that although expert opinion testimony on this subject may be admissible, any such testimony will have to pass muster under Article VII of the Federal Rules and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), discussed in Chapter 12. Expert testimony based on "soft science" is no longer exempt from scrutiny under FRE 702, as it was in many jurisdictions under *Frye*.

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The F.R.E. Approach: Rules 413-14 — Specific Acts

Page 364: ***Add Note 3:***

3. As previously stated, interactionism is now the dominant school of thought in psychological circles. *See* Imwinkelried, *Reshaping the "Grotesque" Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research*, 36 SW. U.L. REV. 741 (2008). However, before venturing a prediction, an interactionist would insist on a large sample of the person's similar conduct. Do Rules 413 and 414 require a substantial sampling of the defendant's behavior, or do they on their face authorize the trier of fact to infer the defendant's character from a single instance of the defendant's conduct?

3. Character as Circumstantial Evidence of the Conduct of a Non-Party

b. The Victims of Sexual Crimes

Page 370: ***In Note 6, insert after "the victim's history of viewing pornography. Id.":***

See also Note, *The Next Generation of Sexual Conduct: Expanding the Protective Reach of Rape Shield Laws to Include Evidence Found on MySpace*, 13 SUFF. J. TRIAL & APP. ADV. 211, 229 (2008) (insert parenthetical).

Page 370: ***In Note 7, insert after the citation to Mathis:***

; Colquitt, *Evidence and Ethics: Litigating in the Shadows of the Rules*, 76 FORDHAM L. REV. 1641, 1550 (2007) (noting the majority rule).

Page 370: ***Add at the end of Note 7:***

In sexual harassment cases, some courts admit the complainant's prior sexual conduct on the question of whether the complainant invited or welcomed the allegedly offensive conduct. *Wilson v. City of Des Moines*, 442 F.3d 637, 643 (8th Cir. 2006).

B. HABIT OR ROUTINE PRACTICE

1. The Difference Between Character and Habit Evidence

Page 372: ***Add at the end of Note 1:***

Should the courts resolve the issue by applying the psychological theory to evidence of a person's habit but the probability theory to evidence of an entity's routine practice?

Page 373: ***Insert in the first complete paragraph on the page after the IOWA L. REV. citation:***

; *Gann v. Oltesvig*, 491 F. Supp. 2d 771, 779 (N.D. Ill. 2007) (Illinois Pattern Instruction text directs trial judges to admit habit evidence and instruct the jury

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on such evidence only "when there are no witnesses to the occurrence other than the defendant").

C. OTHER ACTS AND TRANSACTIONS

2. Other Acts Evidence in Criminal Cases

a. The Independent Logical Relevance Requirement

Page 377: ***Add at the end of the paragraph beginning "Modus operandi":***

Some prosecutors are now offering expert testimony on this issue. For example, a police officer might be called to testify that she searched the police department's computer database and found only one other crime evidencing the same modus operandi — another offense linked to the defendant. Such testimony, of course, must pass muster under Article VII of the Federal Rules.

Page 378: ***Add at the end of the paragraph beginning "Plan":***

This hypothetical illustrates a "chain" plan. Courts also agree that there is legitimate noncharacter relevance in the case of "sequential" plans: The defendant first burglarizes the bank president's residence to steal the key to the entrance to the bank and then uses the key to burglarize the bank. Article, *Using a Contextual Construction to Resolve the Dispute Over the Meaning of the Term "Plan" in Federal Rule of Evidence 404(b)*, 43 U. Kan. L. Rev. 1005 (1995). In addition, there is arguably genuine independent relevance in "template" cases — fact situations in which there is evidence that the defendant thought about the method of committing the crime before perpetrating the initial offense in a series of crimes, all displaying the same modus. However, what if the prosecution only has evidence that the defendant committed recent, similar crimes?

Page 382: ***Add before Note 1:***

0.5. Distinguish the *admissibility* of doctrine of chances evidence from its *sufficiency* to sustain a conviction. In *Woods*, the prosecution presented a forensic pathologist's testimony that, given Paul's case history, there was a 75% probability that his death was a homicide. Without more, the doctrine of chances establishes only that one or some of the incidents were not accidents. There is nothing in the inherent logic of the doctrine that singles out the charged incident as a crime.

3. Other Acts Evidence in Civil Actions

b. Tort Actions

2) Other Torts by the Defendant

Page 393: ***Add new Note 8:***

8. The Supreme Court recently clarified the contours of the Rule 403 analysis in a case involving evidence of other torts by the defendant in an age discrimination lawsuit. In *Sprint/United Mgmt. Co. v. Mendelson*, 128 S.Ct. 1140

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(2007) the plaintiff offered "me too" evidence — testimony about allegedly similarly situated employees who had also been subjected to age discrimination — in order to prove discriminatory intent on the part of the defendant. The court of appeals construed the trial judge's ruling as announcing a per se rule of exclusion, rejected such a rule, and then itself engaged in a Rule 403 analysis to determine the admissibility of the evidence. The Supreme Court reversed. It held that the appellate court erred first in characterizing the trial judge's ruling as the adoption of a per se rule. In the Supreme Court's view, the record was "equally susceptible" to the interpretation that the trial judge simply found the evidence insufficiently probative. The Court added that even if the trial judge had done so, the court of appeals should have remanded the case to the trial judge and directed the judge to conduct the 403 analysis. Justice Thomas emphasized that a Rule 403 analysis "requires an on-the-spot balancing of probative value and prejudice. . . . Relevance and prejudice under Rules 401 and 403 are determined in the context of the facts and arguments in a particular case, and thus are generally not amenable to broad per se rules. [T]he inquiry required by those Rules is within the province of the District Court in the first instance. . . ." The appellate court's limited role is to review the trial judge's decision under an abuse of discretion standard. *See* Starr & Wilson, *Employment Law: "Me Too" Evidence*, Nat'l L.J., Jan. 21, 2008, at 12.

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Chapter 15

CREDIBILITY EVIDENCE: BOLSTERING AND IMPEACHING

C. BOLSTERING BEFORE IMPEACHMENT

Page 399: ***Add after the second full paragraph on the page:***

Although it is not an "exception" to the general ban, it is important to distinguish corroboration from bolstering. If witness #1 testifies to fact *A*, it is improper bolstering to call witness #2 to testify that witness #1 is a truthful person. In contrast, it is proper corroboration to call witness #2 to give additional testimony about fact *A*.

D. IMPEACHMENT

Page 406: ***In Problem 15-6, insert after the citation to Mobile Materials:***

Delozier v. Sirmons, 531 F.3d 1306, 1323 (10th Cir. 2008) (allowing proponent to "reduce the sting"), *cert. denied*, 129 S.Ct. 2058 (2009); *United States v. Stapleton*, 297 Fed. Appx. 413, 421 (6th Cir. 2008) (same).

Chapter 16
CREDIBILITY: IMPEACHMENT TECHNIQUES

A. ATTACKS ON COMPETENCY

2. The Testimonial Quality of Sincerity

Page 413: ***Add at the end of the last full paragraph on the page:***

More recently, the debate over polygraph has again heated up in the wake of a 2003 report by the National Research Council of the National Academy of Science. The report, entitled POLYGRAPH AND LIE DETECTION, was highly critical of the empirical data supposedly validating the use of the polygraph to detect conscious deception.

Page 416: ***Add before Note:***

0.5. Do not read too much into *Scheffer*. *Scheffer* does not hold that polygraph evidence does not satisfy *Daubert* and Rule 702. Rather, the case holds only that the defendant had not made such a powerful showing of the reliability and importance of the polygraph evidence in that case that the exclusion of the evidence violated the defendant's constitutional right to present a defense. As we shall see in Chapter 32, the threshold for triggering that constitutional right is higher than the standard for laying an adequate *Daubert* foundation.

B. PRIOR INCONSISTENT STATEMENTS AND SPECIFIC CONTRADICTION

1. Prior Inconsistent Statements and Acts

Page 426: ***Add at the end of Note 5:***

Many states have taken the further step of enacting a full-fledged privilege for statements made during mediation. *See* Kentra, *Hear No Evil, See No Evil: The Intolerable Conflict for Attorney Mediators Between the Duty to Maintain Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 B.Y.U.L. Rev. 715, 733, 757–76 (containing appendix detailing State statutes).

2. Specific Contradiction

Page 434: ***Add at the end of the carry-over Note from the previous page:***

United States v. Gilmore, 553 F.3d 266 (3d Cir. 2009) (impeachment by contradiction is a permissible means of impeachment under the Federal Rules; moreover, it is not subject to the limitations prescribed by Rule 609).

But Article VI does not so much as mention the term "specific contradiction." Given that silence, is it justifiable for the courts to recognize this impeachment

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technique? Revisit this question after you have reviewed bias impeachment and the *Abel* decision on pages 440–41 of the main text.

C. BIAS

2. Bias Impeachment in General

Page 441: ***Add Note 3:***

3. Think back to specific contradiction impeachment, *supra.* Just as Article VI is silent on bias impeachment, it makes no mention of specific contradiction. Given that common denominator, does *Abel* help explain why the courts continue to permit specific contradiction impeachment?

D. PROOF OF A CHARACTER TRAIT OF UNTRUTHFULNESS AND SPECIFIC UNTRUTHFUL ACTS

3. Specific Methods of Proving the Character Trait of a Witness for Untruthfulness

b. Specific Untruthful Acts (Which Have Not Resulted in a Conviction)

Page 455: ***Insert after "Ordover, supra" in the first full paragraph on the page:***

Recall the discussion of interactionism in Chapter 14. If the interactionist view of behavior is correct, do the witness's "bad, illegal, or immoral" acts have much predictive value on the question of whether the witness is currently testifying truthfully?

Page 456: ***Add after the first full paragraph on the page:***

The Advisory Committee's Note to the 2003 amendment to Rule 608(b) indicates that when the cross-examiner uses this technique, he or she must ask bluntly and directly about whether the witness committed the untruthful act. On the one hand, the cross-examiner may pressure the witness by reminding the witness of the penalties for perjury. On the other hand, the cross-examiner may not inquire whether the witness was fined, demoted, fired, or punished for the act:

> [The] extrinsic evidence prohibition of Rule 608(b) bars any reference to the consequences that a witness may have suffered as a result of the alleged bad act. See . . . Stephen A. Saltzburg, 7 CRIM. JUST. 28, 31 (Wint. 1983) ("counsel should not be permitted to circumvent the no-extrinsic-evidence provision by tucking a third person's opinion about prior acts into the question asked of the witness who has denied the act").

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But see United States v. Dawson, 434 F.3d 956 (7th Cir.) (reference to "tucking a third person's opinion about the prior acts into a question" appears only in citation to an article in the Advisory Committee Note; courts should not construe the amendment as precluding a question inquiring whether a judge had disbelieved the witness in a previous case; "findings by judges or juries are entitled to more weight than what any old third party might happen to think about a witness's credibility"), *cert. denied sub nom. Ingram v. United States*, 549 U.S. 1101 (2006). Do you agree with the Seventh Circuit?

E. CONVICTION OF A CRIME

2. Cross-Examination of a Witness About a Prior Conviction

a. The Types of Crimes

Page 462: ***Add at the bottom of the page:***

Once again think back to the discussion of interactionism in Chapter 14. If the interactionists are right, is Rule 609(a)(1) defensible? What about 609(a)(2)?

3. Extrinsic Evidence of a Prior Conviction

Page 471: ***Add at the end of Note 1:***

Some jurisdictions permit "tacking." If the witness had only a 15-year old conviction, the conviction would presumptively be inadmissible. However, assume that the witness also has four-year-old and seven-year-old convictions. Those courts that permit "tacking" reason that cumulatively, these convictions show an ongoing pattern of untruthfulness, justifying admitting all three convictions. Reread Rule 609(b). Should that statutory language be interpreted to allow "tacking?"

Chapter 17

CREDIBILITY: REHABILITATION

B. THE USE OF REDIRECT EXAMINATION FOR REHABILITATION

Page 473: ***In the last line on the page, change "1993" to "2007."***

Page 474: ***In the sixth line on the page, change "1993" to "2007."***

Page 474: ***In Problem 17-3, insert after the Vincent citation:***

In the view of these courts, the witness's attempted explanation opens the door to inquiry about those facts.

C. PRIOR CONSISTENT STATEMENTS

2. Timing Requirements for Prior Consistent Statements

Page 480: ***Add new Note 0.5:***

0.5. Rule 801 is part of the hearsay article. There is no mention of prior consistent statements in Article VI, dealing with credibility. Can a prior consistent statement be logically relevant to a witness's credibility even if it does not satisfy the temporal priority doctrine? For example, suppose that the cross-examination strongly implied that the witness has a terrible memory. Some courts enforce the timing requirement even when the prior consistent statement is offered only on a credibility rehabilitative theory. *State v. Fulton*, 333 S.C. 359, 509 S.E.2d 819, 826–27 (Ct. App. 1998). However, that view is not universal. Which position is sounder as a matter of statutory interpretation? Think back to discussions of Rules 401–02 and *Abel* in Chapter 16.

D. CORROBORATION

Page 481: ***Add at the end of the first full paragraph in the section:***

The prior consistent statement rules apply when, after witness #1 testifies to fact *A*, witness #2 attempts to testify about another, similar statement by witness #1 about fact *A*. It is corroboration if witness #2 gives his or her own testimony about fact *A*.

Chapter 18

THE RULE AGAINST HEARSAY: THE ADMISSIBILITY OF OUT-OF-COURT STATEMENTS

A. THE REASONS FOR THE RULE

Page 487: ***Add at the beginning of the section:***

The common law has developed a number of "preferential" rules designed to ensure the reliability of trial testimony and, therefore, the rectitude of the verdict. Nance, *The Best Evidence Principle*, 73 Iowa L. Rev. 227 (1988). The common law prefers, for example, that:

- witnesses limit their testimony to recitations of observed fact and allow the trier of fact to decide which inferences to draw from the facts;
- witnesses produce the document when they propose referring to a document's contents;
- the persons who are the real source of testimony subject themselves to cross-examination in the trier's presence.

The first preference accounts for the opinion rule (Chapter 23), the second underpins the best evidence rule (Chapter 24), and the third led to the emergence of the hearsay rule.

B. THE DEFINITION OF HEARSAY

1. "An Assertion" — The Types of Statements Testable by Cross-Examination

Page 490: ***In the carryover paragraph on the top of the page, insert after the McAllister citation:***

a sentence in a law review article (*Bartholomew v. Unum Life Ins. Co. of America*, 588 F. Supp. 2d 1262, 1267–68 (W.D. Wash. 2008)), a statement about distance and driving time on a Mapquest printout (*Jianniney v. State*, 962 A.2d 229, 231–32 (Del. 2008)),

2. "Offered to Prove the Truth of the Assertion" — The Need to Test the Statement by Cross-Examination

Page 498: ***Add at the end of the last full paragraph in the section:***

In a recent article, Professor Graham presented a lucid explanation of the "trace" theory. Graham, *Employing Hearsay Statements Improperly to Establish Authenticity of Identification and Commercial Documents Connected or*

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Affiliated with Accused Under Fed. R. Evid. 901(b)(4), 44 CRIM. L. BULL. 789, 800-02 (Sep.-Oct. 2008). Professor Graham states:

> Hearsay questions arise only when the relevancy of the circumstantial evidence, such as a tag or sign, derives solely from the truth of the mechanical trace. Take for example the situation of a tag on a briefcase containing a weapon bearing the name "Bill Snow" found . . . in a public locker. Since the relevancy of the evidence to identify the defendant whose name is Bill Snow with the briefcase to which the tag is attached derives from the truth of the assertion made on the tag, i.e. the briefcase belongs to Bill Snow, the tag is hearsay.

In contrast, Professor Graham adds:

> To be distinguished is the situation where the relevancy of the mechanical trace . . . does not derive from the truth of the statement itself. Consider a book of matches bearing the name Red Fox Inn found on the defendant accused of a murder committed at the Red Fox Inn. If authenticated solely as having been taken off the person of the defendant, the matchbook is hearsay since its relevancy depends on the acceptance of the assertive statement on the matchbook that its origin is the Red Fox Inn. Now assume that the owner of the Red Fox Inn testifies that the matchbook found on the defendant is identical to the matchbooks he places on the tables for use by customers. [T]he relevancy of the matchbook is no longer dependent on the truth of the matter asserted but it based upon personal knowledge and the process of comparison.

3. "By a Human Declarant" — Hearsay Issues Versus Scientific Validity Problems

Page 503: ***Insert at the end of the section:***

; *United States v. Lamons*, 532 F.3d 1251 (11th Cir.) (machine-generated CD of data collected from telephone calls), *cert. denied*, 129 S.Ct. 524, 172 L.Ed.2d 384 (2008); *United States v. Crockett*, 586 F. Supp. 2d 877 (E.D. Mich. 2008) (printouts of readings from laboratory instruments such as a mass spectrometer and a gas chromatograph).

C. CONCLUSION

Page 513: ***Insert "Rule 801(b)" at the end of the third bulleted item.***

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Chapter 19

HEARSAY: THE EXEMPTION FOR ADMISSIONS

C. ADOPTIVE ADMISSIONS

1. Affirmative Adoption

Page 523: ***Add at the end of the carryover paragraph on the top of the page:***

There is also an adequate inference of adoption when, in response to a request for information, the declarant supplies a document which was prepared by a third party but contains the requested information. *Tracinda Corp. v. Daimler-chrysler AG*, 362 F. Supp. 2d 487, 500–01 (D. De. 2003), *aff'd*, 502 F.3d 212 (3d Cir. 2007). For that matter, given the right surrounding circumstances, even laughter can be an adequate manifestation of adoption. *Peltz v. People*, 728 P.2d 1271 (Colo. 1986); *People v. Pappadiaskis*, 705 P.2d 983 (Colo. App. 1985), *aff'd*, 728 P.3d 1271 (Colo. 1986).

D. VICARIOUS ADMISSIONS

1. Civil Cases

Page 530: ***Add at the bottom of the page:***

But see Quintanilla v. AK Tube LLC, 477 F. Supp. 2d 828 (N.D. Ohio 2007) (former vice president); *Bouygues Telecom, S.A. v. Tekelec*, 473 F. Supp. 2d 692 (E.D.N.C. 2007) (former division manager).

Page 532: ***Add new Note 5.5:***

5.5. One of the real battlegrounds for the vicarious admission doctrine is the admissibility of statements by corporate agents in employment discrimination cases. During the discussion of the *Mendelson* case in the analysis Rule 404(b) in Chapter 14, we noted that courts have rejected a per se rule that the only uncharged "me too" acts admissible to prove discriminatory intent are acts performed by the plaintiff's immediate supervisor. Similarly, under Rule 801(d), courts do not restrict the plaintiff to evidence of ageist, racist, or sexist statements by the plaintiff's immediate supervisor. *Maher v. City of Chicago*, 406 F. Supp. 2d 1006 (N.D. Ill. 2006), *aff'd*, 547 F.3d 817 (7th Cir. 2008). However, the cases vary on the question of which types of agents may make admissible vicarious statements: *Grizzell v. City of Columbus Div. of Police*, 461 F.3d 711, 722 (6th Cir. 2006) (deputy chief charged with managing the promotional process); *Carter v. University of Toldeo*, 349 F.3d 269 (6th Cir. 2003) (vice provost whose responsibilities included ensuring compliance with the university affirmative action program); *Yates v. Rexton, Inc.*, 267 F.3d 793 (8th Cir. 2001) (significant involvement, either as an advisor or participant, in the process leading to the challenged decision); *Wolotka v. School Town of Munster*, 399 F. Supp. 2d 885 (N.D. Ind. 2005) (involvement in the decision making process

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affecting the employment decision). As a trial judge, where would you draw the line? A coworker? Another, coordinate supervisor? Another supervisor in the same department? The vice president with responsibility for personnel management? The CEO? A member of the board? More importantly, where did Congress draw the line? Consider the precise wording of Rules 801(d)(2)(C)–(D).

Page 532: ***Insert at the end of Note 6:***

See In re Cornfield, 365 F. Supp. 2d 271, 277 (E.D.N.Y. 2004) (holding that "Rule 801(d)(2)(A) altered the common law rule by providing only for the admission of statements made by a party to the action. Privity-based admissions were abolished. Rule 801(d)(2)(A) . . . does not include any provision concerning privity-based admissions," but acknowledging a split of authority on the question), *aff'd*, 156 Fed. Appx. 343 (2d Cir. 2005).

2. Criminal Cases

Page 534: ***Add at the end of the carryover paragraph on the top of the page:***

The statement need not further the conspiracy; it suffices if the co-conspirator intended that the statement would have that effect. *United States v. Smith*, 441 F.3d 254 (4th Cir. 2004), *cert. denied sub nom. Reep v. United States*, 549 U.S. 903 (2006). Thus, a co-conspirator's statement to an undercover agent would be admissible if the co-conspirator mistakenly believed that the agent was a criminal negotiating for the purchase of illegal drugs.

Chapter 20

HEARSAY: EXCEPTIONS THAT DO NOT REQUIRE PROOF OF UNAVAILABILITY

B. EXCEPTIONS DERIVED FROM THE "RES GESTAE" THEORY

1. Excited or Startled Utterances

Page 546: ***Add at the end of Note 1:***

In addition to this "trigger" or "re-excitement" theory, some courts have admitted statements involving threats on the theory that the exciting event — being threatened — continued for the period of time during which the declarant remained or felt under threat. In *United States v. Pursley*, 577 F.3d 1204 (10th Cir. 2009), the declarant was attacked in a prison holding cell; during the attack, one of the assailants warned him "not to try to get help." The court suggested that, to the extent that the declarant remained subject to this threat of future violence, there was "no lapse in time" because "it was not until [the declarant] decided to relay the inculpatory statements . . . that he experienced the immediate and direct stress of the threat of violence." See also United States v. Ledford, 443 F.3d 702 (10th Cir. 2005) (where police officer testified to declarant's statement that defendant had threatened to kill her if she spoke to the police, speaking to police officer could be viewed as the exciting event).

Page 547: ***Add in the middle of the first full paragraph, after the citation to Peavey v. State:***

However, the critical inquiry is not the duration of time between the event and the statement, but rather whether the declarant remained in a state of excitement caused by the event. This statement of the requirement by the Court of Appeals for the Sixth Circuit is typical: "our cases do not demand a precise showing of the lapse of time between the starling event and the out-of-court statement. The exception may be based solely on 'testimony that the declarant still appeared nervous or distraught and that there was a reasonable basis for continuing [to be] emotional[ly] upset.' " *United States v. Davis*, 577 F.3d 660, 669 (6th Cir. 2009). The Advisory Committee Note to Rule 803(2) similarly states that "[w]ith respect to the *time element* . . . the standard of measurement is the duration of the state of excitement."

Page 547: ***Add at the end of the first full paragraph:***

Another potential factor is the age of the declarant. Many courts have been fairly liberal in admitting statements by children in sexual molestation cases under the excited utterance exception. See, for example, United States v. Rivera, 43 F.3d 1291 (9th Cir. 1995) (affirming admission of a statement made by a child the day after the alleged molestation where the child was described as frightened and on the verge of tears at the time of the statement); United States v. Jennings, 496 F.3d 344 (4th Cir. 2007), *cert. denied*, 128 S.Ct. 1300 (2008) (where alleged acts of abuse occurred during the course of a long airplane flight an hour or two

before the young declarant made hearsay statement after she left the plane, court held that she was still under the stress of excitement caused by the event because she remained afraid the entire time that she was on the same flight with defendant). Note that admission of such statements in criminal cases may raise serious questions under the Confrontation Clause, as discussed *infra* in Chapter 32.

3. Declarations of Bodily Condition

Page 560: ***Add at the end of Note 1:***

See also U.S. v. Bercier, 506 F.3d 625 (8th Cir. 2007) (in the case of an 18 year old victim's statement to a medical professional disclosing the identity of the abuser, holding that such statements may be admissible upon the proponent's showing that "(i) the physician made clear to the victim that inquiry into the abuser's identity was essential to diagnosis and treatment, and (ii) 'the victim manifest[ed] such an understanding.' " In this case, such a showing was not made and admission of the statements was therefore error.)

4. Declarations of State of Mind

b. Declarations of Present State of Mind Used to Prove Subsequent Conduct

Page 568: ***Add at the end of Note 1:***

In the federal courts, there is a split of authority on the question. The Ninth Circuit, following *Pheaster*, has rejected the House Committee limitation on the *Hillmon* doctrine and thus allows statements of intent to do a future act together with a third party as evidence that the declarant did the act with the third party (and hence as evidence of what the third party did). In contrast, the First and Fourth Circuits have adopted the narrower reading of Rule 803(3) and do not permit inferences of third-party behavior. The Second Circuit has developed a compromise position, whereby it permits the statements so long as there is corroboration of the third party's acts by independent evidence. See U.S. v. Best, 219 F.3d 192, 197–99 (2d Cir. 2000).

Page 568: ***Add Note 3.1:***

3.1. Recently, law professor Marianne Wesson and biological anthropologist Dennis Van Gerven attempted to answer once and for all the question of who was killed at Crooked Creek. They were granted permission to disinter the body buried in Hillmon's grave and they obtained DNA material from living descendants of both Hillmon and Walters. Unfortunately, because of water damage there was no recoverable DNA in the grave. However, Van Gerven used an alternative technique of photo comparison and reported his opinion that the corpse indeed was that of Mr. Hillmon. *See* Dennis Van Gerven, *A Digital Photographic Solution to the Question of Who Lies Buried in Oak Hill Cemetery* (2007), available at http://thehillmoncase.com/results.html. After a lengthy historical investigation, Professor Wesson concluded that the Walters letter at issue in the *Hillmon* case was most likely a fraudulent creation of the defendant insurance companies, and argued that statements admissible under the excep-

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tion created by the Supreme Court are of questionable reliability. *See* Marianne Wesson, *The Hillmon Case, The Supreme Court, and The McGuffin*, in EVIDENCE STORIES (Richard Lempert, ed. 2006).

C. EXCEPTIONS FOR WRITTEN STATEMENTS

1. Business Entries

Page 582: ***Add Note 5 at the end of the [Notes and] Problems section:***

5. The holding of *Palmer v. Hoffman* is generally understood as grounded upon the lack of trustworthiness of the records. In *Palmer*, the records were prepared in anticipation of litigation; this was the basis of the Court's holding that the records were not prepared in the regular course of business. Though accident reports are sometimes admitted under the business records exception, courts continue to scrutinize them for trustworthiness and, sometimes, to exclude them for this reason. *See, e.g.*, *Wilkins v. Kmart Corp.*, 487 F. Supp. 2d 1216, 1222–23 (D. Kan. 2007).

2. Official Records

Page 591: ***Add at the end of Note 1:***

Most courts that have addressed the issue have agreed with the narrow holding of *Oates* — that a police report excluded by 803(8)(B) should not be admitted through the "back-door" of 803(6). *See, e.g.*, *Air Land Forwarders, Inc. v. United States*, 172 F.3d 1338, 1344–45 (Fed. Cir. 1999). However, courts have generally rejected the broad *Oates* dicta to the effect that an 803(8) exclusion should bar admissibility of the report under *any* hearsay exception. Given that much of the *Oates* reasoning rested on concerns about defendants' confrontation rights, these cases sensibly distinguish admission under exceptions that do not raise confrontation concerns. *See United States v. Picciandra*, 788 F.2d 39 (1st Cir.), *cert. denied*, 479 U.S. 847 (1986) (Rule 803(5), Recorded Recollection); *United States v. Metzger*, 778 F.2d 1195 (6th Cir. 1985) (Rule 803(10), Absence of Public Record or Entry). Based on similar reasoning, courts have admitted such records under Rule 803(6) where the author of the report testifies at trial. Indeed, the Second Circuit has itself diverged from the broad *Oates* dicta in subsequent cases. *See United States v. Yakabov*, 712 F.2d 20, 26–27 (2d Cir. 1983) (admitting evidence under Rule 803(10)).

With respect to the *Oates* court's interpretation of the term "law enforcement personnel," most courts, including the Second Circuit in subsequent cases, have read the term more narrowly so as to permit introduction of various government reports under Rule 803(8)(B). *See United States v. Rosa*, 11 F.3d 315, 331–34 (2d Cir. 1993) (autopsy report). However, the Supreme Court's recent decision in *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), calls this narrow interpretation into question. Addressing the government's argument that the drug analyst's affidavit at issue in the case was a business record and/or public record and therefore was not testimonial hearsay barred by the Confrontation Clause, the Court stated:

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> Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. See Fed. Rule Evid. 803(6). But that is not the case if the regularly conducted business activity is the production of evidence for use at trial. Our decision in Palmer v. Hoffman, 318 U. S. 109 (1943), made that distinction clear. There we held that an accident report provided by an employee of a railroad company did not qualify as a business record because, although kept in the regular course of the railroad's operations, it was "calculated for use essentially in the court, not in the business." Id., at 114. The analysts' certificates [in this case] — like police reports generated by law enforcement officials — do not qualify as business or public records for precisely the same reason. See Rule 803(8) (defining public records as "excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel").

This passage strongly suggests that the document at issue in *Oates* — also a drug analyst's report — properly was held in that case to fall within the exclusion for "matters observed by . . . other law enforcement personnel." When we consider the Confrontation Clause in Chapter 32, we will look more closely at *Melendez-Diaz* and its holding that a government report of this sort may not be introduced against a criminal defendant absent an opportunity to cross-examine the author of the report.

Chapter 21

HEARSAY: EXCEPTIONS THAT REQUIRE PROOF OF UNAVAILABILITY

B. PROOF OF THE DECLARANT'S UNAVAILABILITY

Page 608: ***Add at the end of the carryover paragraph on the top of the page:***

Although this provision appears in 804(b) rather than 804(a), it in effect creates a new ground for unavailability and then broadly permits the introduction of any statements by a declarant whose unavailability is due to a party's conduct "that was intended to, and did, procure the unavailability. . . ." Given the party's inequitable conduct, courts have tended to apply the provision liberally. For example, some courts apply the provision even in a trial for the murder of the witness. *United States v. Johnson*, 403 F. Supp. 2d 721, 811 (N.D. Iowa 2005).

Following the Supreme Court's decision in *Giles v. California*, 554 U.S. ___ (2008), such liberal application of the forfeiture by wrongdoing hearsay exception against the defendant in criminal cases is questionable. As discussed further in Chapter 32, the Supreme Court in *Giles* reversed a homicide conviction where the California courts had found that the defendant forfeited his Confrontation Clause claim by killing the victim and thus preventing her availability as a witness. The Supreme Court held that forfeiture of the confrontation right requires a showing of a specific intent to prevent the witness's testimony; simple knowledge that unavailability would result from the act is insufficient. The Court's discussion suggests that Rule 804(b)(6) should be interpreted in the same way.

C. EXCEPTIONS REQUIRING PROOF OF UNAVAILABILITY

1. Former or Prior Testimony

Page 612: ***After the quotation of California Evidence Code § 1292(a):***

In analyzing identity of party issues, it is usually best to focus initially on hearing #2. At hearing #2, against whom is the evidence being offered? Then back up to hearing #1. Now ask this question: Was the party the evidence is now being offered against in hearing #2 a party to hearing #1, in privity with a party to hearing #1, or similarly situated to a party to hearing #1?

Page 618: ***Add at the end of Note 5:***

However, the Second Circuit's decision does not necessarily imply that the government's motive at trial can never be sufficiently similar to its motive at trial. *See United States v. McFall*, 558 F.3d 951 (9th Cir. 2009) (government had the same motive and opportunity to question the witness when it brought him before the grand jury).

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2. Declarations Against Interest

Page 626: ***Add at the end of Note 1:***

Although *Williamson* involved declarations against penal interest, later cases have read *Williamson* as applying to declarations against other types of interest. *Silverstein v. Chase*, 260 F.3d 142 (2d Cir. 2001) (pecuniary interest), *aff'd*, 61 Fed. Appx. 743 (2d Cir. 2003).

Page 630: ***Add at the end of Note 3:***

Article, *Rethinking the Limits of the Interpretive Maxim of Constitutional Avoidance: The Case Study of the Corroboration Requirement of Inculpatory Declarations Against Penal Interest (Federal Rule of Evidence 804(b)(3))*, 44 GONZAGA L. REV. 187 (2008/2009) (arguing that the Supreme Court's adoption of a textualist approach to statutory construction undermines the argument that the statute ought to be construed as imposing a similar corroboration requirement on prosecution evidence).

Page 639: ***Add before Section D:***

5. Depositions Otherwise Admissible Under Federal Rule of Civil Procedure 32(a)

Federal Rule of Civil Procedure 32(a) contains provisions authorizing the use of pretrial depositions at later trials in the same civil proceeding. Under Rule 32(a)(3)(B), a party may introduce the deposition so long as "the witness is at a greater distance than 100 miles from the place of trial or hearing. . . ." That showing of unavailability does not satisfy Rule 804(a). However, some courts have held that "Federal Rule of Civil Procedure 32(a) 'creates of its own force an exception to the hearsay rule' with respect to deposition testimony." *Orr v. Bank of America*, 282 F.3d 1099, 1113 (9th Cir.), *substituted opinion*, 285 F.3d 764 (9th Cir. 2002). These courts reason that the provision creates an "independent" (*id.*), "freestanding exception to the hearsay rule." *Ueland v. United States*, 291 F.3d 993 (7th Cir. 2002). If Rule 804 makes no mention of such a hearsay exception, how can these courts justify recognizing the exception? Note the reference to "other rules" in Federal Rule of Evidence 802.

Chapter 22

THE FUTURE OF THE RULE AGAINST HEARSAY: RESIDUAL EXCEPTION

B. FUTURE LEGISLATIVE CHANGES

3. Creating Broad Exceptions to the Hearsay Rule

Page 651: ***Add at the end of the carryover paragraph on the top of the page:***

See also United States v. Hunt, 521 F.3d 636 (6th Cir. 2008) (finding no corroborating circumstances), *cert. denied*, 129 S.Ct. 2157 (2009); *United States v. Hawley*, 562 F. Supp. 2d 1017, 1053–54 (N.D. Iowa 2008)("nor is the court convinced that the plea agreements are more probative than direct testimony by declarants. . . .").

Page 652: ***Add after the carryover paragraph on the top of the page:***

Although most of the recent opinions cautiously applying the residual exception are criminal cases, the same incipient trend is evident in a number of civil opinions. *Romstad v. Contra Costa County*, 103 Fed. Appx. 108 (9th Cir. 2004) (residual exception must be narrowly construed); *Messer v. Indiana State Police*, 586 F. Supp. 2d 1044 (N.D. Ind. 2008) (party invoking Rule 807 must rebut the presumption of unreliability); *Hall v. C.I.A.*, 538 F. Supp. 2d 64, 70 (D.D.C. 2008) ("the residual exception 'is extremely narrow and require[s] testimony to be very important and very reliable' "). The courts are not only beginning to enforce the exception's substantive requirements more rigorously; they are also putting teeth into the statute's notice requirement. *Rowland v. American General Finance, Inc.*, 340 F.3d 187 (4th Cir. 2003); *Herrick v. Garvey*, 298 F.3d 1184 (10th Cir. 2002). The courts' inclination to apply the residual exception conservatively will make it all the more important that the proponent attempt to justify the introduction of the testimony under one of the specific hearsay exceptions codified in Rules 803 and 804.

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Chapter 23
OPINION EVIDENCE: LAY AND EXPERT

A. THE NORM EXCLUDING LAY OPINION TESTIMONY

1. The Rationale for Exclusion

Page 657: ***Add new Note 3:***

3. A potent objection can sometimes be advanced that lay opinion is not needed to guide the jury. *United States v. Garcia-Ortiz*, 528 F.3d 74, 80–81 (1st Cir. 2008). A similar objection can be raised as to expert opinion testimony. *See, e.g.*, *Bly v. State*, 283 Ga. 453, 660 S.E.2d 713 (2008) (where average person can draw conclusion from facts, no expert opinions are needed to guide the jury).

2. The Acceptable Types of Lay Opinion Testimony

a. Collective Fact, Composite Fact or Shorthand Rendition Lay Opinions

Page 659: ***Add at end of page:***

In keeping with this requirement of a basis in personal observation, lay opinion based upon the observations of others will not be allowed. *United States v. Freeman*, 498 F. 3d 893, 904 (9th Cir. 2007). In contrast, expert witnesses are routinely permitted to advance opinions based upon findings, conclusions or reports supplied by other persons.

Page 661: ***Add to Problem 23-5:***

In re Mosley, 494 F.3d 1320 (11th Cir. 2007) (testimony by litigant about his depression, back pain and side effects of medication permitted; objection that only expert can testify about party's medical prognosis was overruled).

c. Other "Lay" Opinion Testimony

Page 665: ***Add to Note at bottom of page:***

Similarly, the owner or officer of a business may testify to the projected profits of the business; a corporate employee may give an opinion about the value of corporate property, and a business owner may testify to the damages done to his business as the result of another's action. *E.g.*, *Craig v. Outdoor Advertising v. Viacom Outdoor, Inc.*, 528 F.3d 1001 (8th Cir. 2008); *Downeast Ventures, LTD v. Washington County*, 450 F. Supp. 2d 106 (D. Me. 2006). However, the owner of the business may not speculate. *United States Salt, Inc. v. Broken Arrow, Inc.*, 563 F.3d 687 (8th Cir. 2009).

B. EXPERT OPINION TESTIMONY

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2. The Rationale for Admitting Expert Opinion

Page 672: ***Add to Note 2:***

One writer observes: "In the recent Duke University lacrosse scandal, three white team members were indicted on rape charges based largely on photographic lineups. The African-American accuser admitted that all the team members looked the same . . . Unfortunately, erroneous eyewitness identifications, including cross-racial misidentifications, are rarely this obvious. Eyewitness identifications are often reliable and persuasive evidence. Yet 30 years of social science research and the contributions of the Innocence Project, a national organization dedicated to exonerating wrongfully convicted persons through DNA testing, have shown that erroneous eyewitness identifications are the single greatest cause of wrongful convictions nationwide." D. Aaronson, *Cross-Racial Identification of Defendants in Criminal Cases*, 23 CRIM. JUSTICE 4 (Spr. 2008).

3. The Foundation for an Opinion Evaluating or Interpreting Underlying Data

b. The Principles and Theories to Be Applied to Evaluate the Facts in the Case

Page 681: ***Add as new second paragraph to Note 3:***

Frequently, this determination turns on the reliability of the expert's methods of reasoning. Where the proponent demonstrates that the expert used a reliable methodology, the expert opinion is likely to be admitted. *E.g.*, *Pineda v. Ford Motor Co.*, 520 F.3d 237 (3d Cir. 2008).

c. The Factual Bases or Data to which the Expert Will Apply the Theory

Page 684: ***Add after first paragraph in section c:***

By and large, however, court are deferential toward the expert in determining the basis for her opinion. The rule also broadly permits the expert to base her opinion on the work product of other professionals. *See Ohio Environmental Development v. Envirotest Systems*, 478 F. Supp. 2d 963 (N.D. Oh. 2007).

Page 688: ***Add before the first full paragraph on page:***

The impropriety of the government's using Rule 703 to place such documents before the jury was recently reinforced by the Supreme Court's recent decision in *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009). There, the Court ruled that where lab reports are used directly against a defendant, such as in criminal cases where the documents show that items found on defendant were narcotics, the Sixth Amendment Confrontation Clause requires that the trial testimony of the lab analyst who actually prepared the report. We will look more closely at the Confrontation Clause in Chapter 32.

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Page 692: *Add new Note:*

12. The wisdom of the Advisory Committee in enacting the December 1, 2000 amendment becomes apparent when we look at states laboring without the guidance of such an amendment. For example, Maryland adopted Rule 703 in 1994. While Maryland Rule 5-703(a) tracks the first part of the federal rule, Maryland Rule 703(b) was new and invited introduction of otherwise inadmissible evidence when that data is relied upon by an expert. Maryland did not adopt the 2000 federal amendment. In 2008, a Maryland case raised the issue of when a jury could receive otherwise inadmissible evidence under Maryland Rule 5-703. Although parts of an environmental testing report contained some allegedly irrelevant and prejudicial data, an unredacted version was admitted into evidence. The proponent of the report argued that since a trial expert had relied on the document, the jury could see it in its entirety. The Court of Special Appeals agreed, stating that "even data that might not otherwise be admissible, may . . . be properly admitted if it is relied upon by an expert." *Brown v. Daniel Realty Co.*, 180 Md. App. 102, 118, 949 A.2d 6 (2008). In civil cases, this interpretation opens the process to abuse, as described above. In criminal trials, such an approach might raise *Crawford* violations.

5. The Future of Expert Opinion Testimony

Page 699: *Add to Note:*

On the partisan battles between experts in modern trials, see J. Mnookin, *Idealizing Science and Demonizing Experts: An Intellectual History of Expert Evidence*, 52 Vill. L. Rev. 763 (2007).

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Chapter 24

THE BEST EVIDENCE RULE: THE ADMISSIBILITY OF COPIES, SUMMARIES, ETC.

A. INTRODUCTION

Page 701: ***Add at the beginning of the section:***

As pointed out in Chapter 18, the hearsay, opinion, and best evidence rules are kindred: they all are designed to implement a particular model of reliability that prefers live testimony to hearsay, statements of fact to opinions, and the production of writings to testimony about their contents. The "best evidence doctrine" is the preferential rule implementing the last element of this model. *United States ex rel. El-Amin v. George Washington Univ.*, 522 F. Supp. 2d 135, 145 (D.D.C. 2007).

C. WHEN ARE THE DOCUMENT'S TERMS "IN ISSUE"?

2. When the Proffered Testimony Contains an Express or Implied Reference to the Contents of the Document

Page 708: ***Add new Note 4:***

4. In *United States v. Smith*, 566 F.3d 410 (4th Cir. 2009), the prosecution sought to prove that the firearms in question were manufactured outside North Carolina. To do so, the prosecution called an A.T.F. agent who testified on the basis of certain reference materials. The defense challenged the testimony as a violation of Rule 1002. The trial judge rejected the challenge, and the Court of Appeals for the Fourth Circuit affirmed. The court wrote:

> In this case, the government never sought to prove the content of any writing or recording relating to the firearms or their places of manufacture. It sought only to prove the fact that the firearms were manufactured in States other than North Carolina, where they were recovered during the search of Smith's apartment. The place of the firearms' manufacture was a fact existing independently of the content of any book, document, recording, or writing. Just because Special Agent Cheramie consulted books and computer databases in reaching his conclusion about the firearms' place of manufacture does not mean that his testimony was offered "to prove the content" of the books and computer files. Accordingly, Rule 1002 did not require submission of the books and computer files into evidence.

Do you agree with the court's analysis? The defendant is seeking certiorari.

D. THE DEFINITION OF "ORIGINAL" AND "DUPLICATE"

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2. The Definition of "Duplicate" or "Counterpart"

Page 712: ***Add at the end of Note 3:***

A recent article asserts that, since the enactment of Rule 1003, duplicates have been admitted more often than originals in reported decisions. *See* Miller, *Even Better Than the Real Thing: How Courts Have Been Anything But Liberal in Finding Genuine Questions as to the Authenticity of Originals Under Rule 1003*, 68 Md. L. Rev. 160 (2008). According to the author, courts "almost never" find a genuine issue as to authenticity of the original. He argues that courts should be more liberal in finding such questions. For one thing, the report of the House Committee on the Judiciary indicates that Congress expected the courts to be "liberal in deciding" that a genuine question existed. The article concludes that courts ought to find a genuine question when there are "inconsistencies within and between witnesses' testimony or between the testimony and the duplicate itself" and when there is "expert evidence questioning the authenticity of [the] originals."

E. ADEQUATE EXCUSES FOR THE NONPRODUCTION OF THE ORIGINAL

Page 714: ***Add at the end of the second full paragraph on the page:***

Page 715: ***Add after the first full paragraph on the page:***

However, distinguish Rule 1006 summaries from pedagogic charts used for illustrative purposes. The use of the latter is governed by Rule 611(a), not Rule 1006. Unlike Rule 1006 charts, mere pedagogical aids are not substantive evidence and cannot be sent to the jury room during deliberations. *United States v. Ogba*, 526 F.3d 214, 225 (5th Cir.), *cert. denied*, 129 S.Ct. 220, 172 L.Ed.2d 168 (2008); *United States v. Milkiewicz*, 470 F.3d 390 (1st Cir. 2006). However, such charts can be used for purposes other than summarizing documents; they can, for instance, be used to summarize testimony. *United States v. Ollison*, 555 F.3d 152 (5th Cir. 2009). Further, although Rule 1006 summaries should not be "argumentative," pedagogic aids are allowed to "reflect . . . , through captions of other organizational devices of descriptions, the inferences and conclusions drawn from the underlying evidence." *Milkewicz, supra*. It is quite common for counsel to use such charts during closing argument.

F. IF THERE IS AN ADEQUATE EXCUSE FOR NONPRODUCTION, WHAT TYPES OF SECONDARY EVIDENCE ARE ADMISSIBLE?

Page 719: ***Add after Problem 24-10:***

To summarize, a proponent encountering a best evidence argument can argue alternatively that:

- The testimony does not relate to a writing.
- Although the testimony relates to a writing, the writing's terms are not in issue.

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- The evidence qualifies as an "original."
- The evidence qualifies as a "duplicate."
- There is an adequate excuse for the non-production of the writing, and the proffered testimony qualifies as an admissible type of secondary evidence.

"Because of [the] numerous avenues of escape from the mechanical application of the requirement of the original, a party is rarely precluded from producing significant relevant evidence because of the best evidence rule." *United States ex rel. El-Amin v. George Washington Univ.*, 522 F. Supp. 2d 135, 145–46 (D.D.C. 2007).

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Chapter 25

PRIVILEGE: A GENERAL ANALYTICAL APPROACH

B. THE CRITERIA FOR DETERMINING WHETHER TO RECOGNIZE A PRIVILEGE

Page 728: ***Add a new paragraph at the bottom of the page:***

The reference in the text of Rule 501 to "reason" is certainly broad enough to permit the courts to rely on a humanistic rationale in evolving privilege doctrine. It is true that many witnesses appealed to instrumental arguments during the Congressional hearings leading up to the adoption of the Federal Rules of Evidence. However, there were also pointed attacks on the traditional instrumental theory. The most explicit was made by Professor Kenneth Graham, Jr., who argued that the instrumental theory had inadequate empirical support. Further, several members of Congress and witnesses explicitly invoked humanistic arguments. For example, Representative Holtzman invoked privacy considerations as an alternative basis for formulating privilege doctrine, and some of the academic witnesses similarly employed humanistic arguments. Professor Charles Black submitted a letter assailing the original draft of Article V as a "diminishment of human privacy." There was never any suggestion — either by members of Congress present at the hearings or even by opposing witnesses — that humanistic arguments ought to be rejected out of hand.

Page 730: ***Add at the end of the last paragraph on the page:***

The psychological literature on self-disclosure also undermines the empirical assumptions behind the instrumental rationale. Article, *A Psychological Critique of the Assumptions Underlying the Law of Evidentiary Privileges: Insights from the Literature on Self-Disclosure*, 38 Loy. L.A.L. Rev. 707 (2004). That literature paints a much more complex picture of self-disclosure than the simplistic model posited by the instrumental theory.

C. AN ANALYTICAL OUTLINE

5. Has There Been a Waiver of the Privilege?

a. Whether There Has Been a Waiver

Page 746: ***Add a new paragraph after the carryover paragraph on the top of the page:***

Congress approved proposed Rule 502 in 2008. Rule 502(b) contains the general provision that inadvertent disclosure in a federal judicial or administrative proceeding does not effect a waiver. In addition, several other provisions of the new Rule specify fact situations in which there is no waiver. For instance, Rule 502(d) states that there is no waiver if the prior disclosure was connected to litigation pending in federal court and the federal court entered an order that

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the disclosure in question would not waive the privilege. Federal court discovery orders sometimes include "quick peek" or "claw back" provisions. In a "quick peek" situation, the party with custody of the information produces the documents to enable the other party to determine which materials it would like to copy. The former party then conducts a privilege review of only those materials. In a "claw back" situation, the producing party can request the return of documents until the status of the documents is resolved by the court.

Page 747: ***Add after (f):***

(g) During preparation for the trial of Ms. Hill's lawsuit, Ms. Hill's attorney shares one of her letters to him with another attorney or paralegal in the firm in order to get suggestions for conducting her direct examination. Does the attorney's disclosure effect a waiver? What if the disclosure occurred outside the law firm? Suppose that, to prepare the part of her direct examination related to her personal injuries resulting from the accident, the attorney shared the letter with a physician. According to California Evidence Code § 952, a disclosure does not result in a waiver if it "is reasonably necessary for . . . the accomplishment of the purpose for which the lawyer is consulted."

b. The Extent of the Waiver

Page 749: ***Add at the end of Note 2:***

In the end, the drafters deleted the authorization for selective waiver from new Rule 502. While a few cases, such as *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977), endorse the selective waiver concept, the vast majority reject the concept. However, new Rule 502(a) does impose a restriction on the scope of waivers. Under that provision, a waiver effected by the disclosure of certain information extends to other, as yet undisclosed information only if three conditions concur:

- The previous waiver was "intentional."
- The "disclosed and undisclosed communications or information concern the same subject matter. . . ."
- The disclosed and undisclosed information "ought in fairness to be considered together." This is the same fairness test codified in Rule 106.

Page 749: ***Add at the end of the first paragraph in Note 3:***

In a 2008 decision, the Court of Appeals for the Second Circuit was highly critical of the automatic waiver rule. *In re County of Erie*, 546 F.3d 222 (2d Cir. 2008) (the "test cuts too broadly").

Chapter 26

PRIVILEGE: SPECIALIZED ASPECTS

A. CONFIDENTIAL FAMILY COMMUNICATIONS

2. Spousal Communications Privilege

a. The Types of Information Protected by the Spousal Communications Privilege

2) The Requirement that the Communication Occur Between Properly Related Parties

Page 763: ***Add at the end of Note 3:***

At present, there are only a few jurisdictions in which same-sex couples may enter into a marriage or civil union. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

3. A Parent-Child Privilege?

Page 767: ***Add at the end of the last paragraph:***

On the other hand, given the divorce rate in the United States, a person's parent-child relationship can be much longer lasting than a spousal relationship. As we shall see on page 805 in the main text, in *Jaffee v. Redmond*, 518 U.S. 1 (1996), Justice Scalia remarked: "Would your mental health be more significantly impaired by preventing you from seeing a psychotherapist, or by preventing you from getting advice from your mom?"

B. LEGAL PRIVILEGE: ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE

1. The Attorney-Client Privilege: An Overview

b. The Scope of the Privilege

2) The Requirement that the Communication be Confidential

Page 775: ***Add new Note 3:***

3. Many courts limit the scope of the common interest extension of the privilege to communications in the presence of the attorney. *In re Teleglobe Communications Corp.*, 493 F.3d 345 (3d Cir. 2007). They refuse to apply the extension to communications directly between the clients. Schaffzin, *An Uncer-*

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tain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It, 15 B.U. PUB. INT. J. 49, 78–81 (2005). After all, the privilege protects only "attorney-client" communications. But what if one client is relaying a message from his or her attorney to the other client about coordinating their legal strategies?

3) The Requirement that the Confidential Communication Occur Between Properly Related Parties

The involvement of an intermediary.

Page 782: ***Add Note 3:***

3. Today some jurisdictions go farther and extend the privilege to any communication necessary for the attorney to prepare his or her legal advice to the client even when the subject matter is not private information emanating from the client. Beardslee, *The Corporate Attorney-Client Privilege: Third-Rate Doctrine for Third-Party Consultants*, 62 S.M.U.L. REV. 727 (2009). For example, some urge that the privilege ought to apply to an attorney's communications with a public relations consultant in a high profile case. Should the privilege extend that far? Admittedly, such communications enable the attorney to better prepare for trial, but that is the mission of the work product protection. In any realistic sense, are those communications attorney-client communications?

4) Special Exceptions to the Attorney-Client Privilege

Page 788: ***Add at the end of Note 2:***

(In truth, by case law, even California allows the trial judge ruling on a privilege claim to examine the alleged privileged communication to resolve a waiver or exception issue. *Costco Wholesale v. Superior Court*, 161 Cal. App. 4th 488, 74 Cal. Rptr. 3d 345, 355–56 (2008)(collecting cases), *modified*, 2008 Cal. App. LEXIS 628 (App. Apr. 28, 2008), *corrected*, 2008 Cal. App. LEXIS 632 (App. Apr. 29, 2008), *review granted, depublished*, 79 Cal. Rptr. 3d 1, 186 P.3d 392 (Cal. 2008)).

2. The Work Product Doctrine

Page 797: ***Add Note 6:***

6. In some respects, the waiver rules for work product resemble those for the attorney-client privilege. Indeed, on its face, new Rule 502 applies to the work product protection as well as the privilege. However, courts will more readily infer waiver of attorney-client privilege than of work product protection. As we have seen, the holder generally waives the privilege upon disclosure to anyone outside the circle of confidence. In contrast, work product protection is waived only when the holder makes a disclosure under circumstances making it likely that the information will fall into the hands of a current or potential adversary. *United States v. Textron, Inc.*, 553 F.3d 87, 102 (1st Cir.), *vacated, opinion withdrawn, rehearing en banc granted*, 560 F.3d 513 (1st Cir. 2009).

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D. GOVERNMENT SECRETS

2. Military and State Secrets

Page 823: ***Add Note 4:***

4. Since the 9/11 terrorist attacks, there have been claims that the Executive branch has asserted the privilege at an unprecedented rate. According to SECRECY REPORT CARD 2007, "[s]ince 2001, the 'state secrets privilege has been invoked 39 times, an average of six times per year in 6.5 years, which is more than double the average in the previous 24 years." *But see* Coyle, *Balancing the Force of State Secrets*, NAT'L L.J., Mar. 24, 2008, at 21 (research by Professor Robert Cheney "has rebutted claims that the Bush Administration has used the state secrets privilege more broadly than prior administrations"). In any event, these concerns have led to proposals to alter the privilege. For example, some suggest that trial judges should always examine the allegedly secret material in camera. Note, *In Furtherance of Transparency and Litigants' Rights: Reforming the State Secrets Privilege*, 77 GEO. WASH. L. REV. 458 (2009). In addition, seizing upon the factual distinctions between *Totten* and *Reynolds*, some courts have taken the position that unless the pleadings themselves refer to the alleged secret, it is improper for the judge to dismiss the case prior to discovery. *Mohammed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992 (9th Cir. 2009).

Chapter 27

COMPROMISE

B. THE RULE EXCLUDING THE PARTIES' CONDUCT DURING AN ATTEMPT TO COMPROMISE A CIVIL ACTION

1. Statements Made During Compromise Negotiations

a. "Compromise" Negotiations

Page 833: ***Add Note 4:***

4. Assume that the party objecting under Rule 408 was a party to the negotiations. Does Rule 408 apply even if the negotiations were with someone other than the current opponent? *C & E Services, Inc. v. Ashland Inc.*, 539 F. Supp. 2d 316, 319 (D.D.C. 2008)(the court answers the question in the affirmative although it acknowledges that there is "[s]ome [contrary] modern authority"). Is the statutory language limited to negotiations between the parties to the current lawsuit?

b. Protected Statements

Page 836: ***Add at the end of Note 4:***

The amendment creates an acute danger for a party involved in parallel civil and criminal actions. Thompson, *To Speak or Not to Speak? Navigating the Treacherous Waters of Parallel Investigations Following the Amendment to Federal Rule of Evidence 408*, 76 U. Cin. L. Rev. 940, 949–50 (2008) ("[t]he [Advisory Committee] Notes state that where a defendant seeks to protect statements made during compromise negotiations with the government, the defendant should seek to enter into an agreement with the government agency that would prohibit subsequent disclosure").

c. The Permissible Uses of Compromise Statements

Page 838: ***Add at the end of Note 2:***

But see Stockman v. Oakcrest Dental Center, 480 F.3d 791 (6th Cir. 2007) ("under both federal and Michigan law, a defendant may raise the defense that the plaintiff failed to mitigate his damages by seeking and accepting employment. The goal of mitigation is the prevention of unnecessary economic loss, and therefore mitigation [evidence] necessarily goes to the amount of the claim" and is consequently inadmissible under Rule 408).

C. THE RULE EXCLUDING STATEMENTS MADE DURING CRIMINAL PLEA BARGAINING

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1. Offers and Statements

b. Protected Statements

Page 848: ***Add at the end of the carryover paragraph on the top of the page:***

Graham, *Plea Bargaining Pursuant to Fed. R. Evid. 410: "Criminal Defendant Beware!!!!"*, 44 CRIM. L. BULL. 960, 977–79 (Nov.-Dec. 2008)(acknowledging that "several cases hold that statements made subsequent to the entering of a cooperation plea agreement . . . are not protected by Fed. R. Evid. 410," but arguing that "[a]s a matter of textual interpretation, the Fed. R. Evid. 410(3) proviso of 'made in the course of plea discussions' is plainly broad enough to encompass and, as a matter of fairness, should be interpreted to encompass subsequently made cooperation statements when a plea of guilty for any reason is not eventually entered and not withdrawn and/or the accused fails to fulfill his obligations pursuant to a cooperation plea bargaining agreement. If the prosecution desires to employ statements made at any time during the plea bargaining process, . . . it is perfectly free to obtain such a concession from the defendant as a prerequisite to the entering of a plea bargain").

Chapter 28
REMEDIAL MEASURES

A. INTRODUCTION

Page 854: ***Add at the end of the Note:***

This approach is followed by eight federal circuits. *See Millenium Partners, L.P. v. Colmar Strorage, LLC*, 494 F.3d 1293, 1303 (11th Cir. 2007) ("Today, we join the seven Circuits that have agreed that such evidence is not barred").

B. THE CURRENT STATUS OF THE EXCLUSIONARY RULE

1. The Exclusionary Rule

Page 856: ***Add at the end of Note 4:***

See Martin v. Norfolk Southern Railway Co., 271 S.W.3d 76 (Tenn. 2008) (noting the continuing split of authority over the question of whether subsequent remedial measures are inadmissible "if the implementation of the remedy began before the accident but was not completed until after the accident").

Page 857: ***Add at the end of Problem 28-1:***

Chlopek v. Federal Ins. Co., 499 F.3d 692 (7th Cir. 2007) (the plaintiffs "seek to sidestep Federal Rule of Evidence 407 by insisting that the change was not a subsequent 'remedial' measure because . . . the change was not prompted by safety concerns. But Defendant's motive for making the change is irrelevant. All the rule requires is that the measure 'would have made the injury or harm less likely to occur' ").

2. The "Exceptions" to the Exclusionary Rule

Page 860: ***Add at the end of Problem 28-5:***

Baker v. Canadian National/Illinois Central R.R., 536 F.3d 357, 366–67 (5th Cir. 2008) (distinguishing a case in which numerous experts described a rifle's safety in superlative terms, the court noted that in the instant case a single lay witness, a locomotive engineer, gave much more limited testimony about the safety of a railroad crossing), *cert. denied*, 129 S.Ct. 1317, 173 L.Ed.2d 585 (2009).

C. THE CURRENT CONTROVERSY OVER THE SCOPE OF THE EXCLUSIONARY RULE

Page 865: ***Add at the end of the last full paragraph on the page:***

But see Stephenson, *Alone and Out of Excuses: The Tenth Circuit's Refusal to Apply Federal Rule of Evidence 407 to Product Liability Actions*, 36 N.M.L.

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REV. 391 (2006) (faulting the Tenth Circuit for refusing to give Rule 407 a plain meaning reading).

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Chapter 30
THE INITIAL BURDEN OF GOING FORWARD

B. THE INITIAL BURDEN OF GOING FORWARD: AN OVERVIEW

1. The General Mechanics of the Burden

Page 888: *Add new Note 1.1:*

1.1. Presumptions can be highly useful. One common presumption is that if a letter is properly stamped, addressed, and mailed, the addressee received the letter. *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 148 n. 1 (1984) (presuming receipt within three days). There is a related presumption that the letter was mailed on the date shown. *Celestine v. Cold Crest Care Center*, 495 F. Supp. 2d 428 (S.D.N.Y. 2007). Although the presumption applies to regular mail, it is particularly strong in the case of certified mail. *Dunn v. Watson*, 211 W.Va. 418, 566 S.E.2d 305, 308 (2002). However, in the case of certified mail, the presumption does not arise unless the sender receives the requested return receipt. *Busquets-Ivars v. Ashcroft*, 333 F.3d 1008 (9th Cir. 2003). Recently, courts have extended the presumption to apply to the use of telegrams and email (*Am. Boat Co. v. Unknown Sunken Barge*, 418 F.3d 910, 913–14 (8th Cir. 2005), *aff'd*, 567 F.3d 348 (8th Cir. 2009), and even private courier service, *Murray v. TXU Corp.*, 279 F. Supp. 2d 799 (N.D. Tex. 2003).

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Chapter 31

THE ULTIMATE BURDEN OF PERSUASION

C. THE MEASURE OF THE BURDEN OF PERSUASION

1. The Common Law

Clear and convincing evidence.

Page 924: ***Add after the first full paragraph on the page:***

Although courts continue to repeat the generalization that the clear and convincing standard applies only "in a limited number of civil cases," a cursory review of recent opinions demonstrates that the generalization is breaking down. Different courts have now prescribed this standard of proof for a wide variety of factual propositions, including the alter ego doctrine, an attorney's lack of settlement authority, the bad faith of an insurer, breach of contract, civil contempt, commercial frustration in contract law, the reasonableness of a covenant not to compete, an alien's deportability, diversity jurisdiction, change of domicile, equitable estoppel, the existence of a fiduciary relationship, the elements of forum non conveniens, willful patent infringement, transmutation of separate property into community property, negligent misrepresentation, obviousness in a patent challenge, subsequent oral modification of a written contract, the facts warranting a preliminary injunction, promissory estoppel, revocation of citizenship, trademark abandonment, and a resulting trust. What might account for this trend? Do you think that these courts believe that all of these various factual issues implicate exceptionally important social stakes? If not, should we suspect that the courts are beginning to fear that juries are applying the preponderance standard too laxly?

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Chapter 32

CONSTITUTIONAL OVERRIDES: CONFRONTATION, COMPULSORY PROCESS AND DUE PROCESS

B. NEGATIVE OVERRIDES: EXCLUDING OTHERWISE ADMISSIBLE EVIDENCE

Page 958: ***Add at the end of Note 9:***

In *Melendez-Diaz v. Massachusetts*, the United States Supreme Court addressed this question and held that the introduction at trial of affidavits reporting the results of a forensic drug analysis, absent testimony by the analysts who prepared the reports, violated the defendant's Confrontation rights. In an opinion once again authored by Justice Scalia, the Court stated:

> There is little doubt that the documents at issue in this case fall within the "core class of testimonial statements" thus described [in *Crawford*]. Our description of that category mentions affidavits twice. . . . The documents at issue here, while denominated by Massachusetts law "certificates," are quite plainly affidavits: "declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths." Black's Law Dictionary 62 (8th ed. 2004). They are incontrovertibly a " 'solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " . . . The fact in question is that the substance found in the possession of Melendez-Diaz and his codefendants was, as the prosecution claimed, cocaine — the precise testimony the analysts would be expected to provide if called at trial. The "certificates" are functionally identical to live, in-court testimony, doing "precisely what a witness does on direct examination." Davis v. Washington, 547 U. S. 813, 830 (2006) (emphasis deleted).
>
> Here, moreover, not only were the affidavits " 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,' " Crawford, supra, at 52, but under Massachusetts law the sole purpose of the affidavits was to provide "prima facie evidence of the composition, quality, and the net weight" of the analyzed substance, Mass. Gen. Laws, ch. 111, § 13. We can safely assume that the analysts were aware of the affidavits' evidentiary purpose. . . .
>
> In short, under our decision in Crawford the analysts' affidavits were testimonial statements, and the analysts were "witnesses" for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to " 'be confronted with' " the analysts at trial. Crawford, supra, at 54.

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Considering the Court's reasoning, consider once again whether the outcome would be affected by the public or private nature of the forensic lab.

The Court's 5-4 decision in *Melendez-Diaz* has generated much discussion and controversy. The dissent predicted that the Court's ruling "threatens to disrupt if not end many prosecutions where guilt is clear but a newly found formalism now holds sway." In an unusual move, the Supreme Court in June granted review in *Briscoe v. Virginia*, a case that presented essentially the same question that was decided in *Melendez-Diaz*. The Court's action led to speculation that the Court, with new Justice Sotomayor having replaced Justice Souter (a member of the *Melendez-Diaz* majority), might overrule the case just one term after it had been decided. However, after a spirited oral argument in January 2010, the Court handed down a one-paragraph per curiam order that left *Melendez-Diaz* intact.

Page 959: *Add new Note 13:*

13. Where testimonial hearsay is at issue, the rule set down in *Crawford* strictly requires exclusion absent an opportunity to cross-examine by the defendant. As we have seen, based on its historical analysis the Court left open the possibility of a dying declaration exception to this otherwise uncompromising rule. In another part of the opinion, the Court mentioned one other possible exception: that a defendant might waive or forfeit his confrontation right by procuring the unavailability of the witness whose testimonial hearsay is offered against him.

In the wake of *Crawford*, prosecutors and advocates for domestic and child victims expressed concern that the new rule would make successful prosecution of these cases much more difficult because of the reluctance — and sometimes inability — of many of these victims to testify against their abusers. Given these circumstances, and seizing upon *Crawford*'s forfeiture suggestion, several commentators argued that the exception should apply to allow testimonial statements by victims to be admitted against defendants in such cases. They argued that the particular dynamics of an ongoing abusive relationship serve to make many victims unavailable sufficient to satisfy the constitutional and evidentiary forfeiture rules (for a discussion of the forfeiture by wrongdoing exception to the rule against hearsay, see Chapter 21). According to this argument, where the abuser actually kills the victim and is prosecuted for homicide, the victim's testimonial hearsay statements should be admissible if the court finds that the defendant caused the witness's unavailability by killing her. In response, others argued that such a rule would intrude upon the defendant's right to a jury trial by permitting the trial judge's determination of guilt to bootstrap the testimonial hearsay of the victim into evidence.

In *Giles v. California*, the Supreme Court resolved this debate over the proper contours of the constitutional forfeiture rule. The Court held that it is not sufficient that the judge find that the defendant's wrongful act caused the witness's unavailability. Rather, the judge must find that the defendant's *purpose* was to cause the witness to be unavailable to testify. On the other hand, language in the opinion suggested that a history of abuse could be relevant to this inquiry:

> The domestic-violence context is, however, relevant for a separate reason. Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent

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> testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution — rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.

554 U.S. ___, 128 S.Ct. 2678 (2008).

C. AFFIRMATIVE OVERRIDES: ADMITTING OTHERWISE INADMISSABLE EVIDENCE

Page 981: ***Add new Note 8:***

8. Does a convicted defendant have a due process right to access DNA evidence that he claims would prove his "actual innocence?" In *District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. ___ (2009), the Supreme Court answered the question in the negative, holding that neither procedural nor substantive due process required the state to permit Osborne to test DNA evidence at his own expense. Furthermore, the Court noted that it has yet to decide the question whether a convicted defendant has a "federal constitutional right to be released upon proof of 'actual innocence' " where he can show no constitutional defect in his trial.

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