

WEISSENBERGER'S FEDERAL EVIDENCE

2009–2010

Cumulative Supplement

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New Rules Changes

By order dated April 28, 2010, the Supreme Court of the United States approved a change to Federal Rule of Evidence 804(b)(3). The change will take effect on December 1, 2010, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending. As amended, the rule will now provide as follows:

RULE 804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

- (b) Hearsay exceptions.—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * * * *

- (3) Statement against interest.—A statement that:
 - (A) a reasonable person in the declarant’s position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant’s proprietary or pecuniary interest or had so great a tendency to invalidate the declarant’s claim against someone else or to expose the declarant to civil or criminal liability; and
 - (B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

* * * * *

Committee Note

SUBDIVISION (b)(3). Rule 804(b)(3) has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest offered in criminal cases. A number of courts have applied the corroborating circumstances requirement to declarations against penal interest offered by the prosecution, even though the text of the Rule did not so provide. See, e.g., *United States v. Alvarez*, 584 F.2d 694, 701 (5th Cir. 1978) (“by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying Rule 804(b)(3)”; *United States v. Shukri*, 207 F.3d 412 (7th Cir. 2000) (requiring corroborating circumstances for against-penal-interest statements offered by the government). A unitary approach to declarations against penal interest assures both the prosecution and the accused that the Rule will not be abused and that only reliable hearsay statements will be admitted under the exception.

All other changes to the structure and wording of the Rule are intended to be stylistic only. There is no intent to change any other result in any ruling on evidence admissibility.

The amendment does not address the use of the corroborating circumstances for declarations against penal interest offered in civil cases.

In assessing whether corroborating circumstances exist, some courts have focused on the credibility of the witness who relates the hearsay statement in court. But the credibility of the witness who relates the statement is not a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the

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witness's credibility would usurp the jury's role of determining the credibility of testifying witnesses.

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ARTICLE I GENERAL PROVISIONS

Chapter 102

Rule 102. Purpose and Construction

Significant New Case

United States v. Dowdell, 595 F.3d 50 (1st Cir. 2010). A Federal Rule of Evidence need not be interpreted in accordance with its plain language, if a literal and unqualified enforcement of the rule would violate its plain purpose; a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute.

Chapter 103

Rule 103. Rulings on Evidence

Significant New Cases

United States v. Culver, 598 F.3d 740 (11th Cir. 2010). In child pornography prosecution, because the accused never elected to call any character witnesses, the Court of Appeals would not decide whether the district court erred in its pretrial ruling that his child pornography convictions could be used to impeach any character witnesses that he might have called.

United States v. Mardirosian, 602 F.3d 1 (1st Cir. 2010). Where defendant objected to a statement as hearsay and raised only general objections to the remainder of the disputed testimony, he did not preserve for appeal a challenge to the probative value of the evidence.

United States v. Mejia, 597 F.3d 1329 (D.C. Cir. 2010). In drug conspiracy prosecution, any error in admitting evidence that defendant, a former police officer, possessed a firearm permit and that two handguns were seized from his driver, was harmless, even though evidence had limited probative value and carried a risk that the jury would presume that guns and drug trafficking go together; the driver was not charged as a member of the conspiracy, the jury was made aware of fact that defendant did not possess a gun at any meetings, the defendant confessed, and there was other strong evidence of guilt.

United States v. Phillips, 596 F.3d 414 (7th Cir. 2010). Appellant could not rely on the denial of her motion in limine to preserve her objection to the admission of a redacted

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recording, even though the trial court denied the motion based on the government's representation that the complete recording would be available at the time of trial, when she never renewed that objection at the time the redacted version was offered at trial.

United States v. Phillips, 596 F.3d 414 (7th Cir. 2010). When accused objected to the admission of redacted audio recording merely on the grounds that it was redacted, she did not preserve for appeal her claim that the district court must review a complete recording before admitting a redacted version into evidence. The Court of Appeals could not say that her specific ground of objection, requiring the district court to review the complete recording in its entirety, was "apparent from the context" of her objection, especially since she pointed to no precedent requiring a district court to perform the *sua sponte* labor-intensive review she requested on appeal.

United States v. Valencia, 600 F.3d 389 (5th Cir. 2010). In a criminal case, evidentiary rulings are subject to a "heightened" level of appellate review and will therefore be more closely examined on appeal.

United States v. Wilder, 597 F.3d 926 (8th Cir. 2010). Even though an attorney objected to a document merely on hearsay grounds, the trial court acted within its power to exclude the evidence instead on the basis of its inadequate foundation. A trial court is allowed to exclude evidence for reasons not raised by the objecting party.

Chapter 104

Rule 104. Preliminary Questions

Significant New Cases

King v. McMillan, 594 F.3d 301 (4th Cir. 2010). In sexual harassment case by female deputy sheriff against her supervisor, testimony by other women who were sexually harassed by the same sheriff was properly admitted with a limiting instruction that it could be used to prove that the defendant's conduct was sufficiently severe or pervasive to create a hostile work environment, but only if the plaintiff was aware of the harassment described by those other women while she employed. Such testimony was also admissible, however, without regard to whether she was aware of such facts at the time of her employment, to prove her claim that the sheriff's unwelcome conduct was because of her sex.

United States v. Nadeau, 598 F.3d 966 (8th Cir. 2010). In assault prosecution, trial court did not err in admitting a metal pipe found in a car in which the accused was riding, because witnesses identified it as similar to a pipe they saw in the defendant's hands; the fact that no blood, tissue, or fingerprints were found on the pipe was something for the jury to consider in determining how much weight to give the pipe but did not make it inadmissible.

Al-Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2010). Because district judges are experienced and sophisticated fact finders, their eyes need not be protected from unreliable information in the manner in which the Federal Rules of Evidence aim to shield the eyes of

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impressionable juries. The law of evidence is “the child of the jury system” in that it seeks to exclude probative evidence because of its possible adverse effects on a lay jury.

Chapter 105

Rule 105. Limited Admissibility

Significant New Case

United States v. Lujan, 603 F.3d 850 (10th Cir. 2010). Because jurors can usually be trusted to follow the limiting instructions given by the trial judge, the risk of jury confusion should not normally justify exclusion of even potentially prejudicial evidence where there is some way to fashion an appropriate limiting instruction that will identify the proper use of the evidence.

Chapter 106

Rule 106. Remainder of or Related Writings or Recorded Statements

Significant New Cases

McCoy v. Augusta Fiberglass Coatings, Inc., 593 F.3d 737 (8th Cir. 2010). A party objecting to the partial reading of a document must specify the portion that is relevant and that qualifies or explains portions already admitted. When a lawyer objects under Rule 106 by merely requesting, “Your Honor, if counsel’s going to read part of the report, I request that he reads all of the report,” without specifying why the entire report should be admitted or which portions of the report would be relevant, the objecting party has not met its burden under Rule 106 and the district court does not err in refusing that request.

United States v. Lopez-Medina, 596 F.3d 716 (10th Cir. 2010). Even if evidence would otherwise be subject to a hearsay objection, that does not block its use when it is needed to provide context for a statement already admitted. The rule of completeness may be invoked to justify the introduction of otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously

United States v. Lopez-Medina, 596 F.3d 716 (10th Cir. 2010). While Rule 106 applies only to writings and recorded statements, the rule of completeness embodied in the Rule is substantially applicable to oral testimony, and by virtue of Rule 611(a), which obligates the court to make the interrogation and presentation effective for the ascertainment of the truth. But the rule of completeness does not require admission of an entire statement, writing or recording; rather, only those portions that are necessary to clarify or explain the portion already received need be admitted.

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United States v. Phillips, 596 F.3d 414 (7th Cir. 2010). Even if a redacted recording tells an incomplete story, this does not render the recording inadmissible; the proper remedy would not be to exclude the redacted recording but to supplement it with the other portions necessary to complete the context.

2009–2010 CUMULATIVE SUPPLEMENT**ARTICLE II
JUDICIAL NOTICE****Chapter 201*****Rule 201. Judicial Notice of Adjudicative Facts*****Significant New Cases**

N.D. v. Hawaii Department of Education, 600 F.3d 1104 (9th Cir. 2010). In action challenging closure of public schools on certain dates, the Court of Appeals would not take judicial notice of declarations filed on appeal by parents of disabled minor students, describing how their children were emotionally affected by the closure. “The status of the disabled children is not generally known throughout the jurisdiction of the Ninth Circuit nor are the parents sources whose accuracy cannot reasonably be questioned.”

United States v. Bari, 599 F.3d 176 (2d Cir. 2010). Where some matter falls within common knowledge—such as the fact that there are many different styles of yellow rain hats available for sale—a judge is allowed to conduct an internet search to confirm his intuition on that issue.

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ARTICLE IV RELEVANCY AND ITS LIMITS

Chapter 401

Rule 401. Definition of "Relevant Evidence"

Significant New Cases

United States v. Byers, 603 F.3d 503 (8th Cir. 2010). When accused was charged with possession of a firearm as a convicted felon, evidence that he was found in possession of particularly lethal "hollow tip" ammunition was relevant and properly admitted, even if only to show the "background" behind the charge offense.

United States v. Hofus, 598 F.3d 1171 (9th Cir. 2010). When accused was charged with attempting to coerce and entice a minor to engage in sexual activity, in violation of 18 U.S.C. § 2422(b), the government was merely required to prove that the accused tried to persuade a minor to assent to sexual contact; the trial court therefore properly excluded testimony from a defense expert that the accused engaged in sexual texting "in fantasy alone" and was unlikely to actually engage in sex with the minor victim, on the grounds that such facts, even if true, were not relevant.

Cameron v. City of New York, 598 F.3d 50 (2d Cir. 2010). If a party's *belief* as to some legal issue is relevant to the outcome of a case—or example, where a police officer is sued for false arrest, and claims that she believed she possessed probable cause to arrest—that party's testimony about her own subjective belief may be admissible. But opinions by other witnesses, such as a prosecutor, as to the existence of probable cause and the officers' credibility are irrelevant in virtually all malicious prosecution cases.

United States v. Wilder, 597 F.3d 926 (8th Cir. 2010). Defendant in drug conspiracy prosecution was properly precluded from playing for the jury a recording of exculpatory statements he made to a friend after the two were arrested and held in police car; even if his statements about the unfairness of the police actions were related to show his "state of mind," that issue was not relevant to the charges in the case.

2009–2010 CUMULATIVE SUPPLEMENT**Chapter 403*****Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time*****Significant New Cases**

Chamberlin v. Town of Stoughton, 601 F.3d 25 (1st Cir. 2010). District court properly excluded report that town commissioned from an attorney who concluded that explanation by the town’s chief of police was not credible, because the probative value of that attorney’s opinion was outweighed by its prejudicial effect; the report contained no factual details that were not otherwise available to plaintiffs, and attorney’s evaluation of what the jury was expected to decide served no useful purpose.

United States v. Cooper, 591 F.3d 582 (7th Cir. 2010). In prosecution for man charged with possession of heroin with the intent to distribute, the district court abused its discretion in allowing the Government to prove that many of those who purchased the defendant’s heroin died as a result, and that he exhibited a lack of remorse for the deaths. This evidence was “explosive” and the jury was probably repulsed by the evidence of his callousness about the consequences of his sales, and its potential for unfair prejudice greatly exceeded its probative value at the guilt stage of the trial—even though it would have been unquestionably admissible during the later sentencing proceeding, where the court would have been concerned with the nature and circumstances of his offense, his history and characteristics.

United States v. Diaz, 592 F.3d 467 (3d Cir. 2010). In prosecution for drug and firearms charges, the district court did not err in allowing limited testimony by Government witnesses that they feared being labeled a “snitch” and what members of their community would do to them in retaliation for their cooperation with the Government. The evidence had little probative value, as it only helped explain why those witnesses were uncooperative, but its potential for prejudice was not substantial, because none of the testimony stated directly that the defendant himself was violent, and merely reflected the general dangerousness of the housing project.

United States v. Nadeau, 598 F.3d 966 (8th Cir. 2010). In assault prosecution, trial court did not err in admitting a metal pipe found in a car in which the accused was riding, despite possible questions as to whether it was the same pipe used in the assault. The accused offered nothing to demonstrate that admission of the pipe was unfairly prejudicial, and there was “no reason to believe that the pipe would have lured the jury into declaring guilt on an improper basis.”

United States v. Vosburgh, 602 F.3d 512 (3d Cir. 2010). In prosecution for possession of child pornography, it was not an abuse of discretion to admit Government evidence that the accused was found in possession of “child erotica,” which suggested that he harbored a sexual interest in children, and tended to disprove any argument that he unknowingly

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possessed child pornography found on his computer, or that he had attempted to access a certain website by accident.

Chapter 404

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

Significant New Cases

United States v. York, 600 F.3d 347 (5th Cir. 2010). In arson prosecution, after defendant's former girlfriend testified against him and he sought to impeach her with the fact that some details of her testimony had not been disclosed earlier to the police, trial court properly allowed her to explain her silence by describing her fear of the accused and an assault he had once committed against her. This act was relevant to her credibility, and its potential for unfair prejudice was relatively low because of the lack of similarity between the domestic abuse episode and the charged offense of arson.

United States v. Becton, 601 F.3d 588 (D.C. Cir. 2010). In criminal drug conspiracy prosecution, Rule 404(b) did not bar the admission of evidence that the accused continued to manage the drug operation while he was incarcerated for two years on unrelated charges, since such evidence was direct evidence of his continuing participation in the charged conspiracy and was therefore "intrinsic evidence" outside the scope of Rule 404(b).

United States v. Cardinas Garcia, 596 F.3d 788 (10th Cir. 2010). When the Government's Rule 404(b) notice contained only the boilerplate assertion that an earlier drug sale was admissible to prove the defendant's "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident and his consciousness of guilt," this scattershot approach failed to adequately frame the issue for opposing counsel and the court.

United States v. Jenkins, 593 F.3d 480 (6th Cir. 2010). In prosecution for constructive possession of drugs and guns found all over a house shared by several individuals, the defendant's conviction for possession of marijuana with intent to distribute eight years earlier was more unfairly prejudicial than probative when allegedly offered to show the defendant's knowledge or intent. "We do not think the issue of knowledge was at issue in any meaningful sense. Whoever possessed all these drugs laying in plain view throughout the house obviously did not do so inadvertently."

United States v. Littlewind, 595 F.3d 876 (8th Cir. 2010). In prosecution of man for assaulting his girlfriend, the Government was properly allowed to prove that the accused had been convicted three times of assaulting the same woman, to rebut his claims that he lacked criminal intent and that she was possibly hurt in an accident; the probative value of prior crime evidence, when offered to prove the intent of the accused, is greatest when both offenses were under similar circumstances and associated with the same victim.

United States v. Lopez-Medina, 596 F.3d 716 (10th Cir. 2010). In trial on charges of

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possession with intent to distribute, evidence that the accused was present in the United States illegally was not admissible as proof that he committed the charged offense of possession of drugs with intent to distribute, but after he testified that he was a law-abiding citizen with a clean record, he opened the door for prosecutor to ask about the illegal immigration status to rebut that misleading suggestion.

United States v. Mahdi, 598 F.3d 883 (D.C. Cir. 2010). Rule 404(b) requires the Government to give notice of its intent to use propensity evidence of extrinsic acts to reduce surprise and promote early resolution on the issue of admissibility, but that notice requirement does not apply to other acts of misconduct that are intrinsic—that is, part of the charged offense. Evidence of drug conspiracy defendant’s threatening use of a knife was properly admitted, even without pretrial notification to the defense, since it showed his organizational management and how he kept his subordinates in line.

United States v. Mejia, 600 F.3d 12 (1st Cir. 2010). In drug conspiracy prosecution, the district court did not err in admitting the defendant’s alleged “drug ledgers” containing names, quantities and amounts that correspond to the market rate for drugs, as proof of the existence of the conspiracy; the evidence was highly probative given the defense claim that he was “merely present” at the drug deal and otherwise uninvolved in the conspiracy.

United States v. Rooks, 596 F.3d 204 (4th Cir. 2010). In prosecution for possession of crack with intent to distribute, defendant’s three earlier convictions for drug sales were admissible to prove his knowledge of the drug trade, as well as his intent to distribute the crack found in a small bag he threw away when chased by the police.

United States v. Schneider, 594 F.3d 1219 (10th Cir. 2010). In criminal prosecution for defendants charged with prescribing controlled medications without a legitimate medical purpose, thereby causing the death of over twenty patients, the trial court could not use its discretion under Rule 403 or 404 to shorten the trial by limiting the prosecution to proof of just a few deaths. Evidence of a doctor’s responsibility for the deaths of over twenty patients may have a profound effect on the jury, but when that is the precise conduct for which the defendant is charged, such facts are not collateral activity or prior bad acts, and while the evidence was certainly prejudicial, it was not unfairly prejudicial.

United States v. Seale, 600 F.3d 473 (5th Cir. 2010). In prosecution for conspiracy to commit kidnapping, evidence of other “bad acts” related to defendant’s racial animus and membership in the Ku Klux Klan was admissible to show his motive, intent, and his relationship with others in the conspiracy, where the evidence made it clear that victims were abducted because of the color of their skin by men who shared membership in a group hostile to African Americans and the Civil Rights movement.

United States v. Thomas, 593 F.3d 752 (8th Cir. 2010). In prosecution of man charged with drug offenses committed in 2004, district court properly admitted evidence of his “subsequent bad acts” consisting of his commission of highly similar drug transactions in the same vicinity in 2008. Even though the defense made a complete denial of any participation in the charged offense—as opposed to asserting that he had become embroiled in the charged offense through accident or ignorance—the evidence was properly admitted with a “limiting instruction” that the evidence “could be used only to establish [his] intent, knowledge, or lack of mistake.”

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Chapter 405

Rule 405. Methods of Proving Character

Significant New Case

United States v. Duran, 596 F.3d 1283 (11th Cir. 2010). In criminal prosecution for acting as agent of foreign government without notice to the Attorney General, evidence of defendant's payment of illegal kickbacks to Venezuelan government officials was admissible to counter his claim of entrapment by showing his predisposition to commit the crime charged. By raising the defense of entrapment, the defendant shifts to the Government the burden to show that he was predisposed to commit the offense charged beyond a reasonable doubt; the defendant therefore puts his character at issue by raising an entrapment defense.

Chapter 408

Rule 408. Compromise and Offers to Compromise

Significant New Cases

United States v. Davis, 596 F.3d 852 (D.C. Cir. 2010). Evidence of a an offer to settle a disputed claim is not admissible, regardless of whether settlement negotiations follow, and even if the other party immediately replies with a refusal to negotiate. "It makes no sense to force the party who initiates negotiations to do so at his peril."

United States v. Davis, 596 F.3d 852 (D.C. Cir. 2010). Evidence that the accused, after being confronted with allegation of missing fraternity funds, supposedly responded: "Can we just split this \$29,000.00 and make this situation just go away?" was not admissible as evidence of an attempt to obstruct a criminal investigation or to buy off a prosecution witness, since the amount of the offered payment was not excessive, and the circumstances made it reasonably certain that the speaker was offering to pay the money to the fraternity rather than as an attempt to bribe the other individual into silence.

United States v. Davis, 596 F.3d 852 (D.C. Cir. 2010). Trial court committed reversible error in permitting fraternity's new treasurer to testify that the defendant, after being confronted with allegation of \$29,000 in missing funds, supposedly responded: "Can we just split this \$29,000.00 and make this situation just go away?" Government's position that the evidence was admissible to show his consciousness of guilt was a concession that the evidence was improperly used as evidence of his criminal liability, explicitly forbidden by Rule 408.

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Chapter 412

Rule 412. Sex Offenses Cases; Relevance of Victim's Past Sexual Behavior or Alleged Sexual Predisposition

Significant New Case

United States v. Culver, 598 F.3d 740 (11th Cir. 2010). In prosecution for production of child pornography, the accused had no constitutional right to cross-examine the alleged victim, his 13-year old stepdaughter, on her sexual history or her relations with her boyfriend for the purpose of proving that the defendant was not the reason for the presence of condoms found beneath her bed. The admission of such evidence would have confused the jury and harassed the girl, and the explanation for the presence of the condoms was at best marginally relevant to the key issue in this case—whether the girl was the same young female shown on a tape and in photographs found in the possession of the accused.

Chapter 413

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

Significant New Cases

United States v. Batton, 602 F.3d 1191 (10th Cir. 2010). Although Rule 414 only authorizes admission of child molestation offenses committed under children under the age of 14, Rule 413 permits admission of evidence that the accused committed offenses of sexual assault against 14-year old victims, even though such offenses might still be described as episodes of child molestation. The two rules overlap in their scope, and episodes of sexual assault against child victims are therefore admissible under either of these two rules.

United States v. Batton, 602 F.3d 1191 (10th Cir. 2010). Evidence of earlier acts of sexual assault by the accused are most highly probative, and therefore most likely to be admitted, where the earlier assault is most similar to the details of the charged offense for which the accused is now on trial.

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ARTICLE V PRIVILEGES

Chapter 501

Rule 501. Privileges

Significant New Cases

United States v. Allmon, 594 F.3d 981 (8th Cir. 2010). A witness may refuse to testify under the Fifth Amendment if he fears that his testimony could be used to prove that he committed perjury in the past, but there is no Fifth Amendment privilege to refuse to testify based on the witness's fear that he will fail or refuse to testify truthfully (out of fear of reprisals, for example) and thus risk committing perjury at the present proceeding where he seeks to assert the privilege.

United States v. Banks, 556 F.3d 967 (9th Cir. 2009). District court erred in allowing the defendant's wife to testify to statements made by him during the course of their marriage as to why he created a pornographic video with their grandson, because such statements were protected by the marital privilege for confidential communications between spouses. There is an exception to the privilege in prosecutions for crimes committed against the minor child of either spouse or a child who is the "functional equivalent" of their child, but that was not the case for this grandchild, who was a frequent visitor to the home of the accused and his wife but was not raised by them.

United States v. Cartagena, 593 F.3d 104 (1st Cir. 2010). Criminal defendant, seeking pretrial discovery about information concerning confidential informants identified in wiretap affidavits, did not meet his heavy burden to overcome the Government's "informant privilege" as to the identity of persons who furnish information to law enforcement officers. The privilege is not absolute, and must give way when disclosure of an informant's identity, or of the contents of his communication, is relevant and helpful to the defense or essential to a fair determination of a cause. If disclosure of a communication's contents will also tend to reveal an informant's identity, the contents are also privileged. Especially at the pretrial stage, a defendant seeking to overcome the privilege must present concrete facts, not mere speculation, that might justify overriding both the public interest in encouraging the flow of information and the informant's interest in his own safety.

United States v. Seale, 600 F.3d 473 (5th Cir. 2010). Where the accused wished to impeach a Government witness by calling the witness's former attorney to testify that the witness had privately recanted a statement incriminating the accused, the trial court properly sustained an objection that such testimony would violate the attorney-client privilege. There was no basis for a finding that the witness had impliedly waived the privilege, even if he knew that his former lawyer was conferring with the attorney for the accused, since the witness did not

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personally disclose any confidential communications to the defendant’s lawyer.

United States v. Dunbar, 553 F.3d 48 (1st Cir. 2009). After a man and his wife were placed in the back of a police cruiser, statements made between them and secretly recorded without their knowledge were not protected as privileged, because the privilege only protects conversations that take place in a setting where the participants have a reasonable expectation of privacy, and “the back of a police car is not a place where individuals can reasonably expect to communicate in private.”

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ARTICLE VI WITNESSES

Chapter 602

Rule 602. Lack of Personal Knowledge

Significant New Case

United States v. Davis, 596 F.3d 852 (D.C. Cir. 2010). Rule 602's personal knowledge requirement and Rule 802's prohibition of hearsay intersect when a witness testifies to something he learned from someone else. Because the distinction between the two objections is based only on the form of the testimony—depending on whether he claims to be quoting someone else—an objection invoking either rule is sufficient.

Chapter 605

Rule 605. Competency of Judge as Witness

Significant New Case

United States v. Bari, 599 F.3d 176 (2d Cir. 2010). Although a judge presiding at a trial may not testify in that trial as a witness, he is not improperly “testifying” if he takes judicial notice of some fact within the bounds of Rule 201.

Chapter 609

Rule 609. Impeachment by Evidence of Conviction of Crime

Significant New Cases

United States v. Lopez-Medina, 596 F.3d 716 (10th Cir. 2010). Attorney allowed to cross-examine a witness about his criminal conviction is entitled to ask about the nature of the conviction—for example, that it was for possession of methamphetamines with intent to distribute—but has no right to inquire about the specific facts and circumstances involved in the commission of that offense.

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Chapter 611

Rule 611. Mode and Order of Interrogation and Presentation

Significant New Cases

Chamberlin v. Town of Stoughton, 601 F.3d 25 (1st Cir. 2010). District judge has wide latitude in regulating the order in which the proof is developed; even though evidence may be relevant and admissible, the district judge has the discretion to preclude a party from offering that evidence until after the jury first hears evidence about some other aspect of the case.

United States v. Fenner, 600 F.3d 1014 (8th Cir. 2010). The use of leading questions on direct is generally discouraged but not automatically improper; the district court has wide latitude to permit their use when that is needed to develop the testimony of the witness.

Chapter 613

Rule 613. Prior Statements of Witnesses

Significant New Case

United States v. De La Cruz Suarez, 601 F.3d 1202 (11th Cir. 2010). On cross-examination of a government witness, the defense had no right to impeach that witness with an allegedly inconsistent statement prepared by an FBI agent concerning his interview with the witness. A witness may not be impeached by a non-verbatim statement, such as one described in a summary prepared by a government investigator, which could not fairly be said to be the witness's own rather than the product of the investigator's selections, interpretations, and interpolations.

Chapter 614

Rule 614. Calling and Interrogation of Witnesses by Court

Significant New Cases

United States v. Barnhart, 599 F.3d 737 (7th Cir. 2010). A party that is prejudiced by a judge's questioning of witnesses must make an objection to preserve a claim of judicial bias

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for appeal, despite the possible awkwardness of such steps; the attorney is not required to make this objection in the jury's presence.

United States v. Barnhart, 599 F.3d 737 (7th Cir. 2010). Although district judges have broad discretion in conducting trials and may question witnesses during direct or cross-examination to clarify testimony or assist the jury's understanding of the evidence, the judge may not assume the role of an advocate for either side by either signaling through his questions that he thinks a witness is not credible or suggesting that he disbelieves a party's theory of the case. District judge erred in posing leading questions that "read like a cross-examination" and "served to emphasize uncontested facts that were highly unfavorable to the defense."

2009–2010 CUMULATIVE SUPPLEMENT**ARTICLE VII
OPINIONS AND EXPERT TESTIMONY****Chapter 701*****Rule 701. Opinion Testimony by Lay Witnesses*****Significant New Cases**

Cameron v. City of New York, 598 F.3d 50 (2d Cir. 2010). In malicious prosecution action against two arresting officers, it was reversible error to allow two prosecutors and a police lieutenant to testify to their opinions on the credibility of the officers and whether there was probable cause to arrest or charge the plaintiffs; the admission of such opinions “violated bedrock principles of evidence law that prohibit witnesses (a) from vouching for other witnesses, (b) from testifying in the form of legal conclusions, and (c) from interpreting evidence that jurors can equally well analyze on their own.”

United States v. Fenner, 600 F.3d 1014 (8th Cir. 2010). In drug prosecution, government’s confidential informants were properly permitted to explain slang terms and give their interpretations of what defendant and other conspirators said on recorded conversations, because the informants participated in the conversations and their explanations at trial were based on their perceptions.

United States v. York, 600 F.3d 347 (5th Cir. 2010). In criminal case, the defendant could not offer his father’s testimony that the son suffered from organic brain damage as the result of the circumstances of his birth. The father’s opinion was “speculative medical causation testimony” and not a proper topic for lay opinion because it was “not the type of opinion that one could reach as a process of everyday reasoning.”

Chapter 702***Rule 702. Testimony by Experts*****Significant New Cases**

Gayton v. McCoy, 593 F.3d 610 (7th Cir. 2010). A medical degree does not make a doctor qualified to opine on all medical subjects, but a physician in general practice is competent to testify about many problems even if they are typically treated by a medical specialist. The district court properly found a physician unqualified to offer expert testimony that inmate’s death from non-specific heart failure would have been prevented had she been given her

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congestive heart failure medication, because the witness lacked specific knowledge in cardiology and pharmacology, and provided no basis for his testimony except that inmate's medication treated heart disease. But the court erred in precluding the witness from offering expert opinion that the inmate's vomiting combined with her diuretic medication may have contributed to her tachycardia and heart failure, because that subject was not specialized knowledge held only by cardiologists, but rather was knowledge that any competent physician would generally possess.

Granfield v. CSX Transportation, Inc., 597 F.3d 474 (1st Cir. 2010). Differential diagnosis is a proper scientific technique for expert testimony from a medical doctor, even if the expert did not rely on peer-reviewed studies in his causation diagnosis. "The mere fact of publication, or lack thereof, in a peer-reviewed journal is not a determinative factor in assessing the scientific validity of a technique or methodology on which an opinion is premised."

Happel v. Walmart Stores, Inc., 602 F.3d 820 (7th Cir. 2010). Even though plaintiff's proposed expert was board certified in psychiatry and neurology, district court properly precluded him from testifying to an opinion that plaintiff's MS was aggravated by stress symptoms, because he had limited basis for that opinion, it was contradicted by some of the articles he cited, and his opinion amounted at best to little more than "an inspired hunch."

i4i Ltd. Partnership v. Microsoft Corp., 598 F.3d 831 (Fed. Cir. 2010). To qualify as admissible under this rule, expert testimony need only be reasonably reliable; there is no requirement that the court find the testimony to be correct. "*Daubert* and Rule 702 are safeguards against unreliable or irrelevant opinions, not guarantees of correctness."

United States v. Baptiste, 596 F.3d 214 (4th Cir. 2010). When a police officer testifies as both an expert and as a lay witness, the trial court should take steps to ensure that there is a clear demarcation in the jurors' minds between the witness's lay and expert roles, so they will not give the witness's lay testimony additional weight simply because of his dual-role as an expert. This should be accomplished by cautionary warnings or instructions, by requiring the witness to take separate trips to the stand in each capacity, or by ensuring that counsel makes clear when he is eliciting lay versus expert testimony.

United States v. Batton, 602 F.3d 1191 (10th Cir. 2010). Trial court did not abuse its discretion in permitting expert testimony concerning the methods used by sex offenders, including their use of "grooming" to prepare their victims, which was not necessarily common knowledge among jurors. The trial court properly limited the testimony to "the correction of possible juror misconceptions regarding how sex offenders behave and what they look like," did not allow the expert to express an opinion on the guilt of the accused or the credibility of his accuser.

United States v. John, 597 F.3d 263 (5th Cir. 2010). In most cases, in the absence of novel challenges, expert testimony on fingerprint comparisons is sufficiently reliable to be admissible without the need to conduct a *Daubert* hearing. The reliability of the technique has been tested in the adversarial system for over a century, has been routinely subject to peer review, and has a low rate of error rate.

2009–2010 CUMULATIVE SUPPLEMENT**Chapter 703*****Rule 703. Bases of Opinion Testimony by Experts*****Significant New Cases**

United States v. Ayala, 601 F.3d 256 (4th Cir. 2010). In gang prosecution, testimony of three Government experts did not violate the Confrontation Clause, even though the experts relied in part on interviews with unnamed declarants; the experts offered their independent judgments, most of which related to the gang's general nature as a violent organization and were not about the defendants in particular, these judgments resulted from many years of observing the gang and studying its methods, and experts "did not act as mere transmitters and in fact did not repeat statements of particular declarants to the jury."

United States v. Seale, 600 F.3d 473 (5th Cir. 2010). District court did not abuse its discretion during kidnapping prosecution by admitting opinion of government expert, a forensic pathologist, that deaths of victims were caused by fresh-water drowning, even though expert derived his opinion in part from statements by a conspirator; government expert also relied on autopsy reports, video footage of recovery of body, interviews with divers conducting recovery effort, FBI reports, and photographs of physical evidence.

Ward v. Dixie National Life Insurance Co., 595 F.3d 164 (4th Cir. 2010). In calculating the total damages suffered by the members of an insured class seeking compensation for cancer treatment, plaintiffs' certified public accountant could rely on hearsay evidence consisting of six spreadsheets containing actual charges for each patient's treatment, because the expert testified that such data was the type that was reasonably relied on by experts in his particular field in forming such opinions, and the defendants offered no evidence to the contrary.

United States v. Turner, 591 F.3d 928 (7th Cir. 2010). The Sixth Amendment Confrontation Clause does not demand that a chemist or other testifying expert must have done the lab work himself. In prosecution for dealing crack cocaine, trial court properly allowed the supervisor analyst at a laboratory to testify as an expert regarding his opinion that the substance sold by defendant was cocaine, even though he was not the analyst which conducted the testing; he reached the same conclusions as the testing analyst, whose work he was required to supervise and approve, and nothing from the testing analyst's notes, machine test results, or final report was introduced into evidence.

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Chapter 704

Rule 704. Opinion on Ultimate Issue

Significant New Case

United States v. Hofus, 598 F.3d 1171 (9th Cir. 2010). Where accused is charged with attempting to coerce and entice a minor to engage in sexual activity, in violation of 18 U.S.C. § 2422(b), the trial court properly excluded the opinion of a defense expert that the accused engaged in sexual texting with the minor “in fantasy alone” and was unlikely to actually engage in sex with the child; expert testimony is not admissible to prove that the accused “did not really intend to entice or persuade the young girls, which is precisely the question for the jury.”

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New Rules Changes

By order dated April 28, 2010, the Supreme Court of the United States approved a change to Federal Rule of Evidence 804(b)(3). The change will take effect on December 1, 2010, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending. As amended, the rule will now provide as follows:

RULE 804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

(b) Hearsay exceptions.—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * * * *

(3) Statement against interest.—A statement that:

(A) a reasonable person in the declarant’s position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant’s proprietary or pecuniary interest or had so great a tendency to invalidate the declarant’s claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

* * * * *

Committee Note

SUBDIVISION (b)(3). Rule 804(b)(3) has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest offered in criminal cases. A number of courts have applied the corroborating circumstances requirement to declarations against penal interest offered by the prosecution, even though the text of the Rule did not so provide. See, e.g., *United States v. Alvarez*, 584 F.2d 694, 701 (5th Cir. 1978) (“by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying Rule 804(b)(3)”; *United States v. Shukri*, 207 F.3d 412 (7th Cir. 2000) (requiring corroborating circumstances for against-penal-interest statements offered by the government). A unitary approach to declarations against penal interest assures both the prosecution and the accused that the Rule will not be abused and that only reliable hearsay statements will be admitted under the exception.

All other changes to the structure and wording of the Rule are intended to be stylistic only. There is no intent to change any other result in any ruling on evidence admissibility.

The amendment does not address the use of the corroborating circumstances for declarations against penal interest offered in civil cases.

In assessing whether corroborating circumstances exist, some courts have focused on the credibility of the witness who relates the hearsay statement in court. But the credibility of the witness who relates the statement is not a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the

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witness's credibility would usurp the jury's role of determining the credibility of testifying witnesses.

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§ 801.3

**ARTICLE VIII
HEARSAY****Chapter 801*****Rule 801. Definitions*****§ 801.2 Hearsay and the Confrontation Clause of the Sixth Amendment****Significant New Cases**

Melendez-Diaz v. Massachusetts, — U.S. —, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). Three certificates of analysis showing that a seized substance contained cocaine, prepared under oath by a state forensic analyst at the request of the police, were “quite plainly affidavits” and testimonial statements, because they were made under oath and under circumstances which would lead an objectively reasonable witness to believe that the statements would be used at a later trial. Moreover, these certificates were not business records, because the hearsay exception for business records does not extend to cases where “the regularly conducted business activity is the production of evidence for use at trial.”

United States v. Burden, 600 F.3d 204 (2d Cir. 2010). When a confidential informant wore a wire to record a conversation with others, the statements made in that conversation by the informant are not testimonial hearsay subject to the Confrontation Clause, even if the informant knew that the conversation was being recorded for use at a criminal trial. Such statements are not remotely equivalent to in-court testimony or its equivalent, and are even further from being formalized testimonial material. Nothing the informant said was spoken for the purpose of making an accusation, but rather to elicit inculpatory statements by others present.

United States v. Martinez-Rios, 595 F.3d 581 (5th Cir. 2010). In a prosecution for illegal reentry into the United States, a certificate of nonexistence of record (CNR), which reflected that a deported defendant had not received consent for readmission into the United States, was testimonial, and its admission therefore violated his rights under the Confrontation Clause, because the field office director who created the CNR did not testify.

United States v. Lopez-Medina, 596 F.3d 716 (10th Cir. 2010). Factual statements by a criminal defendant at a plea allocution are testimonial hearsay subject to the Confrontation Clause, and therefore normally may not be admitted at the trial of another criminal defendant.

§ 801.3 Definition of a Statement**Significant New Case**

United States v. Davis, 596 F.3d 852 (D.C. Cir. 2010). When man was accused of fraud by using fraternity funds for his personal purposes, the trial judge properly precluded him from

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offering bills that he had prepared to supposedly show the reason for the payments. A bill is hearsay if it is offered to prove the truth and the accuracy of the representation on its face as to what work was performed and for what purpose.

§ 801.18 Party's Own Statement**Significant New Cases**

Agere Systems, Inc. v. Advanced Environmental Technology Corp., 602 F.3d 204 (3d Cir. 2010). In action brought by several companies seeking to recover cleanup costs associated with environmental pollution, proposed stipulation signed by several of the companies was inadmissible hearsay against one company which had refused to sign it.

§ 801.20 Vicarious Admissions**Significant New Case**

Johnson v. Weld County, Colorado, 594 F.3d 1202 (10th Cir. 2010). In sex discrimination action against county employer, the plaintiff could not testify about damaging statements that were made by another man who was hired for the job denied to her. Even though he became an employee of the county defendant, his statements were not attributable to his employer as statements by a party-opponent because he was not involved in the decision-making process affecting the employment action at issue; he was merely another candidate for the position, not yet a County employee.

§ 801.21 Conspirator's Statements—In General**Significant New Cases**

United States v. Diaz, 597 F.3d 56 (1st Cir. 2010). Any alleged error in the admission of statements under the hearsay exception for statements by a conspirator is not preserved for appeal, and is therefore subject to review only for plain error, unless the defendant (1) asks the court to rule on whether it is more likely than not that the declarant and the defendant were members of a conspiracy and whether the challenged statement was in furtherance of that conspiracy, and (2) then makes an objection to the court's ruling.

United States v. Ayala, 601 F.3d 256 (4th Cir. 2010). A statement may be admissible under the hearsay exception for statements by a conspirator as long as it was made by a member of the conspiracy in furtherance of the purposes of that conspiracy; it does not matter whether the statement was made to a listener who was also a member of the conspiracy.

United States v. Ayala, 601 F.3d 256 (4th Cir. 2010). For a statement to be admissible under the hearsay exception for statements by a conspirator, it is not necessary for the prosecution to be able to identify the declarant by name; unsigned statements and statements made by someone in a group conversation are admissible as long as the offering party can show that the unknown declarant was more likely than not a member of the defendant's conspiracy.

United States v. Benson, 591 F.3d 491 (6th Cir. 2010). Requirement of the hearsay exception in Rule 801(d)(2)(E), which requires extrinsic corroboration of statements by the conspirators of the accused, only applies to the admission of hearsay statements made by conspirators out of court. Where the prosecution produces the live testimony of those conspirators at trial, such testimony is not even hearsay, and so there is no requirement that

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the defendant's involvement in the conspiracy be proved through "independent evidence" before those conspirators can testify against him at trial.

United States v. Wilder, 597 F.3d 926 (8th Cir. 2010). In drug conspiracy prosecution, defendant could not offer a recording of exculpatory statements he made to an alleged conspirator after the two were arrested and held in police car, because the hearsay exception for statements by conspirators only allows statements to be offered at trial against members of the conspiracy, not by them.

Chapter 803

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

§ 803.6 Excited Utterances—In General.

Significant New Case

Brunsting v. Lutsen Mountains Corp., 601 F.3d 813 (8th Cir. 2010). In skier's negligence action against ski resort, statement by resort employee that the skier had hit a tree stump before his accident was admissible as an excited utterance; witness saw skier's near-fatal traumatic accident from chairlift, immediately rushed to the scene where skier was unconscious and believed to be near dead, others were trying to stabilize the skier until medical assistance arrived, the witness described herself as "just frantic," and was so nervous, panicked, and anxious from what had just happened that she felt shaky.

§ 803.22 Recollection Recorded—In General

Significant New Case

United States v. Jones, 601 F.3d 1247 (11th Cir. 2010). Trial court did not err in allowing prosecution to play for the jury a videotape of an interview with a sixteen-year old witness as a past recollection recorded, because the witness viewed the video, verified the accuracy of the statements she made on the video, and established that she was no longer able to recall all the details that she described in that interview, but was available for the defense to cross-examine.

§ 803.34 Foundational Requirements: Custodian or Some Other Qualified Person—Rules 902(11) and (12)

Significant New Cases

United States CFTC v. Dizona, 594 F.3d 408 (5th Cir. 2010). To obtain admission of business records under Rule 803(6), authentication of those records is not enough; even if the records have been properly authenticated, the party seeking their admission must also establish that it was the regular practice of that business activity to make those notes. Moreover, although the witness who lays the foundation need not be the author of the record or be able to personally attest to its accuracy, the witness must be one who can explain the record keeping system of the organization and vouch that the requirements of Rule 803(6) are

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met. A summary witness could not properly lay such a foundation when she did not have any knowledge regarding the keeping of the records, whether they were made at or near the time of the trade, or whether they were made by a person with knowledge of the trade.

Brawner v. Allstate Indemnity Co., 591 F.3d 984 (8th Cir. 2010). The custodian or other qualified witness called to lay the foundation for the admission of a business record under Rule 803(6) is not required to have personal knowledge regarding its creation, or to have personally participated in its creation, or even to know who actually recorded the information. A record created by a third party and integrated into another entity's records is admissible as the record of the custodian entity, so long as the custodian entity relied upon the accuracy of the record and the other requirements of Rule 803(6) are satisfied. A record prepared by the Veterans' Administration was properly admitted based on the testimony of a bank employee who could establish that she received and integrated those VA documents into the bank's record, that the bank relied on the accuracy of the documents, and that the documents were kept in the course of the bank's regularly conducted business.

§ 803.45 Use Restrictions on Public Records and Reports in Criminal Cases, Rule 803(8)(B) and Rule 803(8)(C)**Significant New Cases**

United States v. Caraballo, 595 F.3d 1214 (11th Cir. 2010). Routinely and mechanically kept INS records, such as warrants of deportation, are admissible under Rule 803(8)(B) and are not "testimonial" hearsay subject to exclusion under the Confrontation Clause, because they are routinely completed by Customs and Border Patrol agents in the course of their non-adversarial duties, not in the course of preparing for a criminal prosecution. In prosecution for illegally smuggling aliens into the country, the court did not err in admitting an INS form that contained only routine biographical information—such as the entrant's name, date and place of birth, parents' names, height, weight, address, country of citizenship, and information concerning whether the entrant had an immigration visa.

United States v. Dowdell, 595 F.3d 50 (1st Cir. 2010). Although the plain language of the so-called "law enforcement exception," Rule 803(8)(B), seems to categorically bar the prosecution's introduction of all documents prepared by the police against the accused in a criminal case, ministerial and non-adversarial police records such as a booking sheet are admissible under the Rule, because they are not created in the adversarial and confrontational setting with which that rule is concerned.

Chapter 804***Rule 804. Hearsay Exceptions; Declarant Unavailable*****Significant New Cases**

United States v. Guzman, 603 F.3d 99 (1st Cir. 2010). Statement by a person admitting his role in commission of arson was admissible at the request of the defense as a "statement

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against interest,” even though the witness who heard the statement described it as “joking”; that allegation went to the weight of the evidence and not its admissibility.

United States v. Hatfield, 591 F.3d 945 (7th Cir. 2010). The trial court erred in refusing to admit out-of-court statements recorded in a police report by a man who admitted that he and three other persons, rather than either of the defendants, had committed one of the burglaries that the defendants were accused of. The statement was against the speaker’s penal interest, and the circumstances sufficiently confirmed its trustworthiness, even though he changed his story twice before admitting his involvement in the burglary, because there was no suggestion that he knew the defendants; in none of his versions of the burglary did he implicate them; and his ultimate version was corroborated by the fact that he had dialed 911 while the burglary was in progress and by the accuracy of certain information in his initial statement to the police.

Chapter 805***Rule 805. Hearsay Within Hearsay*****Significant New Case**

Nooner v. Norris, 594 F.3d 592 (8th Cir. 2010). In civil action against Arkansas Department of Corrections, a statement by the Department’s spokeswoman would be admissible against it as a statement by a party-opponent, but that would not allow a plaintiff to offer a newspaper article which quoted one of the defendant’s spokeswomen. Newspaper articles are “rank hearsay.”

Chapter 807***Rule 807. Residual Exception*****Significant New Case**

United States v. Smith, 591 F.3d 974 (8th Cir. 2010). To determine whether the recorded interview of a child victim is admissible under the residual hearsay exception of Rule 807, the district court must consider the training and experience of the interviewer; whether the child was interviewed using open-ended questions; the age of the child and whether the child used age-appropriate language in discussing the abuse; the length of time between the incident of abuse and the making of the hearsay statement; and whether the child repeated the same facts consistently to adults.

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ARTICLE IX

AUTHENTICATION AND IDENTIFICATION

Chapter 901

Rule 901. Requirement of Authentication or Identification

Significant New Cases

United States v. Cook, 600 F.3d 847 (7th Cir. 2010). A police officer was properly permitted to identify the defendant as one of several individuals whose voice could be heard on a wiretapped phone conversation, even if his familiarity was only based on having heard the defendant speaking several sentences totaling 62 words at a few pretrial hearings; a witness may identify a voice even if he has only “minimal familiarity” with the speaker’s voice, and questions about the basis for the identification generally go to the weight of the testimony rather than its admissibility.

United States v. Mejia, 597 F.3d 1329 (D.C. Cir. 2010). Although a break in the chain of custody may sometimes require exclusion of the evidence, exclusion was not required of a note found by a DEA agent in the defendant’s wallet about ten minutes after the wallet was seized, apparently by Salvadoran police; the brief ten-minute gap between defendant’s arrest and the agent’s taking possession of the list made it implausible that the list was planted, tampered with or misidentified.

United States v. Smith, 591 F.3d 974 (8th Cir. 2010). A witness can authenticate a DVD or an audio recording, even if the recording was not marked, if the witness can verify that she participated in the conversation that is shown or heard on the recording.

United States v. Turner, 591 F.3d 928 (7th Cir. 2010). Cocaine samples allegedly taken from the accused were admissible even though the Government did not present any witness who had personal knowledge of how they were handled by the lab analyst after she received them from the police. The government is not required to call every witness who handled an exhibit before that exhibit may be admitted into evidence; the proponent of the evidence need only make a showing that the physical exhibit is in substantially the same condition as when the crime was committed. In making this determination, there is a “presumption of regularity,” presuming that the government officials who had custody of the exhibits discharged their duties properly. The chain of custody need not be perfect; gaps in the chain go to the weight of the evidence, not its admissibility. In addition, the government does not have to exclude all possibilities of tampering with the evidence, as long as it took reasonable precautions to preserve the original condition of the evidence.

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ARTICLE X
CONTENTS OF WRITINGS, RECORDINGS, AND
PHOTOGRAPHS

Chapter 1006

Rule 1006. Summaries

Significant New Case

United States v. Isaacs, 593 F.3d 517 (7th Cir. 2010). Rule 1006 requires a party seeking to introduce a summary of voluminous records to provide copies of those records to the opposing party at a reasonable time and place, which means that the opposing party must be given adequate time to examine the records to check the accuracy of the summary.

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ARTICLE XI
MISCELLANEOUS RULES

Chapter 1101

Rule 1101. Applicability of Rules

Significant New Case

United States v. Bari, 599 F.3d 176 (2d Cir. 2010). The Federal Rules of Evidence do not apply with their normal force in supervised release revocation hearings, but nevertheless provide some useful guidelines to ensure that any findings made by a district court at such hearings are based on “verified facts” and “accurate knowledge.” The evidentiary constraints in such proceedings should be loosened, although not altogether absent.