

2023 Update to
EVIDENCE LAW:
PRACTICE, PROBLEMS, AND POLICY

LAURIE L. LEVENSON

PROFESSOR OF LAW AND

DAVID W. BURCHAM CHAIR IN ETHICAL ADVOCACY

LOYOLA LAW SCHOOL

HON. BRIAN M. HOFFSTADT

ASSOCIATE JUSTICE

CALIFORNIA COURT OF APPEAL



Copyright © 2023 Laurie L. Levenson and Brian M. Hoffstadt.

This Update is made available as a courtesy to law teachers with the understanding that it will not be reproduced, quoted, or cited, except as indicated. Sale or distribution of this Update is strictly prohibited. In the event that anyone would like to cite the Update for thoughts drawn from it, a reference to the relevant page number of the materials text (with the formula “suggested by”) is appropriate. For information about permissions or to request permissions online, visit us at www.AspenPublishing.com, or a written request may be faxed to our permissions department at 212-771-0803.

To contact Customer Service, e-mail customer.service@aspublishing.com, call 1-800-950-5259, or mail correspondence to:

Aspen Publishing
Attn: Order Department
1 Wall Street
Burlington, MA 01803

Note on Coverage

This Update reflects developments in the law as of September 1, 2023.

Page 14. Replace the paragraph starting with “Interestingly,” with the following.

Interestingly, FRE 615 does not specifically prohibit a party from telling excluded witnesses what other witnesses have stated while testifying and does not specifically prohibit a party from sharing a transcript of that testimony. The federal courts are split over whether an exclusion order reaches such conduct. *See United States v. McClendon*, 362 Fed. Appx. 475, 483 (6th Cir. 2010) (concluding it does not). However, an amendment adopted by the U.S. Supreme Court and set to take effect on December 1, 2023, unless Congress intervenes, would clarify that an exclusion order under FRE 615 “operates only to exclude witnesses from the courtroom,” but that the trial court may also, “by order,” “prohibit disclosures of trial testimony to witnesses who are excluded from the courtroom” and “prohibit excluded witnesses from accessing trial testimony.” Even as currently drafted, FRE 615’s bar only applies to the evidentiary portion of the trial; it does not apply to opening statements. *United States v. West*, 607 F.2d 300, 306 (9th Cir. 1979).

Page 14. Replace footnote 9 with the following.

An amendment adopted by the U.S. Supreme Court and set to take effect on December 1, 2023, unless Congress intervenes, would explicitly limit the entity’s representative to “one officer or employee.”

Page 44. In the paragraph beginning with “Does the rule of completeness”, replace the sentence beginning with “This open issue” with the following, and delete footnote 2 at the end of that sentence.

This open issue regarding whether the rule of completeness overcomes a possible hearsay objection will be resolved by an amendment adopted by the U.S. Supreme Court and set to take effect on December 1, 2023, unless Congress intervenes, by the addition of a further sentence to FRE 106 stating “The adverse party may do so over a hearsay objection.”

Page 46. Replace the first sentence in footnote 4 with the following.

This statutory limitation may be eliminated if the amendment adopted by the U.S. Supreme Court takes effect on December 1, 2023 (as it will unless Congress intervenes), because that amendment would extend FRE 106 to any “statement” (without limiting the rule to a “written or recorded” statement).

Page 195. Add the following new paragraph after the list of bullet points under the heading “*Categories of Opposing Party Admissions*”.

A proposed amendment to FRE 801(d)(2) would extend this category of “not hearsay” to admit not only the statements made by an opposing party directly or through others, but also to admit the statements made by a non-party declarant if “a party’s claim, defense, or potential liability is directly derived from [the] declarant or the declarant’s principal.” For example, under this amendment, statements made by a decedent that would be admissible against that decedent would also be admissible against the estate standing in the decedent’s proverbial shoes as a party.

Page 329. Add the following language to the end of the second paragraph under heading “(b)”.

A proposed amendment to FRE 804(b)(3) would spell out that the corroborating circumstances clearly indicating trustworthiness should be

evaluated “after considering the totality of circumstances under which [the statement] was made and any evidence that supports or undermines it.”

Page 381. Add the following language at the end of the bullet point starting with “*Redaction.*”

The U.S. Supreme Court balanced these competing interests in *Samia v. United States*, 143 S. Ct. 2004 (2023). In a 6-3 decision, the majority held that a redaction that replaced the second defendant’s name with the phrase “the other person” allayed any *Bruton* concern—even when it was obvious from the evidence and argument at trial that the other person *was* the second defendant—because the confession only “indirectly” “implicate[d]” the second defendant and because deleting all reference to a second person would exaggerate the first defendant’s role. The dissenting Justices argued that the majority’s result undermined *Bruton* because substituting in the phrase “the other person” in this case was no different than inserting a blank space or an asterisk.

Page 455. Add the following language at the end of the bullet point beginning with “The witness must be given”.

A proposed amendment to FRE 613 would flip this timing requirement, mandating that extrinsic evidence of a prior inconsistent statement generally be excluded (1) “until after” the witness is given the opportunity to explain or deny it and the adverse party is given the opportunity to examine the witness about it, or (2) “[u]nless the court orders otherwise.”

Page 478. Replace the paragraph starting with “Read together,” with the following.

Read together, these rules impose three distinct prerequisites to the admission of expert testimony. Whether these requirements have been met is a question for the judge under FRE 104(a) and not for the jury. An amendment to FRE 702 that has been adopted by the U.S. Supreme Court

and will take effect on December 1, 2023, unless Congress intervenes, would clarify that these prerequisites are “more likely than not” met.

Page 489. Replace footnote 5 with the following.

An amendment to FRE 702 adopted by the U.S. Supreme Court and set to take effect on December 1, 2023, unless Congress intervenes, would modify the second requirement to clarify that the “expert’s opinion reflects a reliable application of the principles and methods to the facts of the case.”

Page 549. Add the following language to the end of the paragraph starting with “The summary itself”.

A proposed amendment to FRE 1006 would reaffirm that a court has the discretion to admit a summary as evidence, or to treat it as an illustrative aid that is not admitted as evidence.

Page 554. Add the following language to the end of the paragraph starting with “To be admissible”.

A new FRE 107 has been proposed that would specify how and when it is appropriate to use “Illustrative Aids,” which are defined as items that are meant to “help the trier of fact understand the evidence or argument” but that are “not evidence.” The proposed FRE 107 would obligate courts to allow the use of illustrative aids as long as “the aid’s utility in assisting comprehension is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time.” Under this new rule, illustrative aids would be part of the record but would not go back to the jury during deliberations absent the parties’ consent or “good cause.”