January 2023 Update for Instructors
Revised 1/23/2023

** Update: The Supreme Court has dismissed the writ of certiorari in *In re Grand Jury*, discussed below, as improvidently granted **

Learning Evidence: From the Federal Rules to the Courtroom (Fifth Edition)

Deborah Jones Merritt
Ric Simmons

This Update notes several developments related to the Federal Rules of Evidence. The Supreme Court accepted two cases related to evidence law this Term; the Judicial Conference has approved amendments to three Federal Rules of Evidence that are likely to take effect on December 1, 2022; and the Conference's Committee on Rules of Practice and Procedure is seeking public comment on proposed amendments to five other Federal Rules of Evidence.

We do not believe that it is necessary to cover any of these developments in Spring 2023 courses. But we have prepared this update to alert you to the developments and provide suggestions for discussing some of the material in class if you want to do so. We tie each development to the book chapter in which the related material appears. All page references are to the Fifth Edition of *Learning Evidence*.

I. Pending Cases at the Supreme Court of the United States

Chapter 54: Statements by Opposing Parties in the Context of Multiple Parties. This chapter discusses the *Bruton* case on pp. 678-84. The Supreme Court has granted certiorari in a case that explores the type of redactions that satisfy *Bruton*, an issue that we discuss on pp. 182-84. That case, *Samia v. United States*, No. 22-196, will be argued and decided before the end of this Term—although an argument date has not yet been set.

As the Fifth Edition recognizes on pp. 182-84, the Court has already decided two cases related to *Bruton* redactions. In *Richardson v. Marsh*, 481 U.S. 200 (1987), the Court held that admission of a defendant's out-of-court statement did not violate a codefendant's Sixth Amendment rights because the statement had been redacted to eliminate any reference to the codefendant's existence. The codefendant's own testimony, when combined with the redacted statement, linked her to the crime—but that did not violate the Sixth Amendment.

Conversely, in *Gray v. Maryland*, 523 U.S. 185 (1998), the Supreme Court held that the government could not redact a defendant's out-of-court statement by simply substituting a blank or the word "deleted" for the codefendant's name. That type of obvious deletion makes clear that another person was involved in the crime, and the jury is likely to assume that a codefendant sitting in the courtroom was that person.

Samia presents a redaction that falls in a gray space between *Gray* and *Richardson*. The government's redaction of a defendant's out-of-court statement in *Samia* maintained several references to "somebody else" and an "other person" who participated in the crime. Although these references were not obvious redactions like the blanks or word "deleted" used in *Gray*, petitioner Samia argued in his cert petition that the jury likely assumed that he—the codefendant—was that other person.

The government vigorously opposed a grant of certiorari, defending the type of redaction it used in *Samia*. The Court nonetheless agreed to hear the case. A schedule has not yet been established for briefing and oral argument, but both are likely to occur before the end of the spring semester—and the Court is likely to decide the case before the end of June 2023.

Samia involves just one element of a rule that students already find difficult to apply. Rather than discuss the case in class, you may want simply to note that the Court is reviewing the lines drawn by the *Richardson* and *Gray* cases. But if you want to involve your class more deeply in analyzing the dispute, you will find links to the merits briefs (once they are filed) at https://www.scotusblog.com/case-files/cases/samia-v-united-states/. The petition for certiorari, respondent's brief in opposition, and petitioner's reply brief are already available on that page.

It is possible that the Court will use *Samia* as an opportunity to revisit *Gray*, *Richardson*, or *Bruton* itself. The briefs filed so far do not hint at that possibility. We will circulate another update if the merits briefs or oral argument suggest that *Samia* might do more than refine the lines drawn by *Gray* and *Richardson*.

Chapter 67: Attorney-Client Privilege. As the Fifth Edition recognizes on pp. 880-81, the attorney-client privilege shields only communications related to legal services; it does not protect communications related to a client's business, political, or other concerns. In particular, as the case summarized on those pages reflects, the privilege does not cover many communications related to the preparation of tax returns. If a client seeks assistance in interpreting ambiguous sections of the Internal Revenue Code, or in understanding judicial opinions applying that Code, those communications are shielded by the attorney-client privilege. But if a client simply provides information to an attorney that allows the attorney to prepare a tax return, those communications are not protected. Sweeping the latter communications within the attorney-client privilege would, as a court quoted in the Fifth Edition explained, "impede tax investigations, reward lawyers for doing nonlawyers' work, and create a privileged position for lawyers in competition with other tax preparers."

Our text does not address the more complex issue of how a court disentangles communications to a lawyer that seek tax advice (protected) and also provide information needed to complete a return (not protected). The Supreme Court heard argument on this issue on January 9, 2023, in *In re Grand Jury*, No. 21-1397. Two weeks later, the Court dismissed its grant of certiorari as improvidently granted. The case thus adds little to the Evidence course but we offer background on the case (and the probable reason why the Court dismissed the grant) below.

The petitioner in the case is a law firm that provides tax advice to clients and also prepares their returns. The respondent, the United States, convened a grand jury to investigate one of the petitioner's clients for criminal violations of the tax code. In response to a grand jury subpoena, the petitioner withheld some documents as protected by the attorney-client privilege. The United

States filed a motion to compel production of those documents, the district court ordered production (with some redactions), and the court of appeals affirmed.

The parties agreed that the withheld documents had a dual purpose: the client shared them with the law firm both to obtain legal advice and to assist in preparing the client's tax returns. They differed in the standard that they believe judges should apply to determining whether the attorney-client privilege covers "dual purpose" communications like the ones in this case. The United States argued that documents are protected only if the client's "primary purpose" in making the communication was to obtain legal advice; that is the prevailing standard in the lower courts. The petitioner law firm urged the Court to apply a more lenient test that would shield communications even if seeking legal advice was secondary to providing information for other purposes. The firm initially proposed a "significant purpose" test, then shifted to a "bona fide purpose" test.

Two weeks after hearing oral arguments the Court dismissed the writ of certiorari as improvidently granted. The Court's order did not explain the reason for the dismissal. Most likely, the Justices agreed with the "primary purpose" test followed by most lower courts and concluded that any deviation from that standard should be left for further development in the lower courts. They may also have found that the petitioner failed to articulate a coherent alternative to the "primary purpose" standard.

If you omit the privilege chapters from your course (as some Evidence instructors do), you may not mention this case at all to students. Even if you do cover the privilege material, the case may warrant only a passing mention. You might, for example, note that some client communications have mixed purposes and courts sometimes struggle to determine the extent that the attorney-client privilege shields communications of that nature. You could note that the Supreme Court granted certiorari on this issue, but then apparently concluded that the prevailing standard in the lower courts offers sufficient guidance for now.

Given the Court's dismissal of the writ of certiorari, this case does not offer a promising opportunity for classroom debate. But if any students are interested in the issue, you can point them to these sources:

- Stephen Gillers wrote an excellent column for Scotusblog discussing the case: https://www.scotusblog.com/2023/01/court-will-mull-scope-of-attorney-client-privilege-when-lawyers-give-both-legal-and-nonlegal-advice/.
- Links to all of the briefs in the case (including many amicus briefs) are available at https://www.scotusblog.com/case-files/cases/in-re-grand-jury/.
- Professor Gillers summarized the oral argument in another of his columns, https://www.scotusblog.com/2023/01/justices-debate-test-for-attorney-client-privilege-when-lawyers-advice-has-multiple-purposes/.

II. Amendments to the FRE Likely to Take Effect on December 1, 2023

The Judicial Conference has approved amendments to three of the Federal Rules of Evidence and transmitted those proposed amendments to the Supreme Court. If the Court adopts the amendments and Congress lodges no objections, the amended rules will take effect on December 1, 2023. The proposed amendments do not appear controversial, so they are likely to take effect.

We have posted redlined versions of each of these rules, together with the Advisory Committee's Note on each proposed change, in the "Teacher Resources" section for our book. Look for those documents in the "Update Memos" folder. The PDFs are taken directly from the Judicial Conference's memo transmitting the proposed amendments to the Supreme Court. We explain briefly below how each proposed amendment relates to material in the Fifth Edition.

Chapter 15: Examining Witnesses. This chapter includes discussion of Rule 615 (Excluding Witnesses) on pp. 193-94. A proposed amendment to that rule would make two changes. First, the proposed amendment would restrict entity parties to designating a single person to represent them in the courtroom. Most courts already follow that practice; the proposed amendment codifies it. Second, the proposed amendment would allow judges to issue orders that prevent excluded witnesses from learning about trial testimony by reviewing transcripts, talking with trial attendees, or other means. Some judges have used the current rule to issue broad orders of that nature, but other judges have concluded that the current rule restricts their power to physically excluding witnesses from the courtroom.

Both of these changes relate to trial details that few professors cover in the basic Evidence course, but we offer the details for your information.

Chapter 24: Rule of Completeness. Proposed amendments to Rule 106 (Rule of Completeness) would broaden that rule in two ways. The Fifth Edition already notes these proposals on p. 298 as ones that the Advisory Committee has been considering. The Judicial Conference has now approved those proposals, and they are likely to take effect on December 1, 2023. The text already discusses the substance of the proposed amendments, so your students will be aware of them. You may want to update your students on the progress of the proposals mentioned in the text. In addition to informing them about pending changes in Rule 106, an update offers a way to review the rulemaking process outlined in Chapter 3.

Chapter 61: What Subjects Are Appropriate for Expert Testimony? Members of the Advisory Committee have worried for several years that some judges were admitting unreliable expert testimony. To underscore the gatekeeping function of Rule 702, the Committee crafted two amendments to the rule. First, new language makes explicit that the proponent of expert testimony must establish each element of Rule 702 by a preponderance of the evidence. Second, a small shift in wording stresses the importance of the rule's "reliable application" element.

The Advisory Committee Note acknowledges that neither of these amendments alters the original thrust of Rule 702. Instead, the amendments clarify language that some judges have misunderstood. The Fifth Edition interprets existing Rule 702 as the Committee intended it to be interpreted, so the proposed amendments do not alter any of our discussion. We already note on p. 789 that the "party offering expert testimony . . . must persuade the judge by a preponderance of the evidence that the testimony satisfies" all of the elements laid out in Rule 702. Similarly, the discussion on pp. 793-94 discusses the "reliable application" element fully.

Exploration of expert testimony often merits a course of its own in the law school curriculum. In the basic Evidence course, you may simply want to highlight the discussions on the pages cited above and note that a pending amendment will confirm the correctness of these points.

III. Proposed Amendments Released for Public Comment

In August 2022, the Judicial Conference Committee on Rules of Practice and Procedure released proposed amendments to five Federal Rules of Evidence for public comment. The comment period extends through February 16, 2023. If your students are interested in tracking comments on any of the proposed amendments, they may do so at https://www.regulations.gov/docket/USC-RULES-EV-2022-0004. They may also submit comments by clicking the "Comment" button at https://www.regulations.gov/docket/USC-RULES-EV-2022-0004/document.

We discuss each of the proposed amendments briefly below. We have also posted PDFs of the proposed amendments in the "Update Memos" folder of our online "Teacher Resources." The earliest that any of these amendments could take effect is December 1, 2024. The Advisory Committee, however, may alter—or even withdraw—some proposed amendments after reviewing public comments. If you discuss any of the proposed amendments in class, therefore, you should make clear that adoption of these amendments is not certain.

Chapter 2: Types of Courtroom Evidence. At pp. 9-10, we discuss "demonstrative evidence" that parties "create after the disputed event to illustrate concepts or facts to the jury." The Conference Committee has proposed an amendment to Rule 611 (discussed below in connection with Chapter 15) that urges using the phrase "illustrative aid" rather than "demonstrative evidence" for this type of evidence. If the amendment is adopted, we will use that phrase in the next edition of *Learning Evidence*. The new phrase is useful because it stresses the "illustrative" purpose of these courtroom aids and distinguishes them from "evidence" that the jury may consult during deliberations.

For now, however, most judges and attorneys continue to use the phrase "demonstrative evidence." You may not want to confuse your students with this semantic change while the proposed rule amendment is still under consideration.

Chapter 15: Examining Witnesses. The Judicial Conference Committee has proposed a new subdivision (d) within Rule 611 to govern the use of "illustrative aids." These aids, which are sometimes called "pedagogical devices," are not admitted into evidence. Instead, they are used to help the jury understand testimony or other admissible evidence. Examples include drawings, PowerPoint presentations, and computer simulations.

Judges currently oversee the use of these illustrative aids using their general authority under Rule 611(a) to "exercise reasonable control over the mode and order of examining witnesses and presenting evidence." The proposed new subdivision would create more uniform standards governing the use of these aids. These standards include four components:

- Judges would balance the aid's "utility in assisting comprehension" against "the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time."
- A party could use an illustrative aid only if other parties were "given notice and a reasonable opportunity to object to its use" (although the court would retain discretion to waive this requirement "for good cause").
- An illustrative aid would not be given to the jury during deliberations unless all parties consented or the court found good cause to provide the aid.
- "When practicable," illustrative aids would be entered into the trial record.

Discussion of this amendment may be more suitable in a Trial Advocacy course than in the basic Evidence course, but some students may be interested in the courtroom use of illustrative aids.

Chapter 18: Using Prior Statements to Impeach Witnesses. As we note on p. 227 of the Fifth Edition, common-law rules required lawyers to show a prior inconsistent statement to a witness before impeaching the witness with it. This was the *Rule in Queen Caroline's Case*, adopted by most American colonies and states. Rule 613 overturned this rule, giving attorneys much more flexibility when impeaching a witness with a prior inconsistent statement. Under Rule 613(a), an attorney may ask a witness about a prior inconsistent statement without first showing the statement to the witness. And under Rule 613(b), an attorney may even introduce extrinsic evidence of a prior inconsistent statement without first showing it to the witness. When extrinsic evidence is introduced, the witness must have some "opportunity to explain or deny the statement"—but that opportunity may occur after the statement has already been introduced into evidence. We discuss these aspects of Rule 613 on pp. 227-30 and 234-38.

The Judicial Conference Committee has released for public comment an amendment to Rule 613(b) that would restore some aspects of the *Rule in Queen Caroline's Case*. Under the proposed amendment, attorneys could still *ask* a witness about a prior inconsistent statement without first showing the statement to the witness, but an attorney would have to give the witness "an opportunity to explain or deny the statement" before introducing extrinsic evidence of the statement.

The Committee Note explains the policies motivating this change. In addition to the points outlined there, the Advisory Committee noted during its discussions that many trial judges already exercise their discretion to require the prior disclosure that the amendment would mandate. The Committee viewed the amendment as simply aligning the rule with common practice—and making that practice visible to the uninitiated.

The Fifth Edition discusses the tendency of judges to use their discretion in this manner, so you need not discuss the proposed amendment at length. But you may want to note that an amendment has been proposed to make this practice the default rule. Under the proposed amendment, judges would retain discretion to allow introduction of an extrinsic statement before examining the witness on it, but that would be the exception rather than the rule.

Chapter 51: Statement Against Interest. Rule 804(b)(3) requires evidence of "corroborating circumstances" when a statement against interest is "offered in a criminal case" and "tends to expose the declarant to criminal liability." As the Fifth Edition notes on pp. 647-49, most courts interpret the phrase "corroborating circumstances" broadly to include both circumstances suggesting that the declarant was truthful (such as the extent of the declarant's exposure to criminal liability) and circumstances independently supporting the truth of the declarant's claim (such as forensic evidence tying the declarant to a confessed crime). A few courts, however, will consider only the first type of corroboration.

The Conference Committee has proposed an amendment that would codify the majority approach to corroboration. If you discuss the corroboration issue in class, you might note that a proposed amendment will codify the majority approach discussed in the book. But since the text already outlines this approach, further discussion of the proposed amendment may be unnecessary.

Chapter 53: Statements by an Opposing Party. The Conference Committee has proposed an addition to Rule 801(d)(2) that would govern the situation in which a party "stands in the shoes of a declarant or the declarant's principal." Under those circumstances, statements that would be admissible against the declarant or declarant's principal would also be admissible against the party.

Federal courts are currently split over the admissibility of statements that fall in this category. Some courts, for example, allow a decedent's statements to be admitted against the decedent's estate; others do not. The proposed amendment would resolve this split in favor of admission. It would also support admission in situations involving an assignor/assignee or debtor/trustee.

These circumstances are sufficiently specialized that you are unlikely to discuss them in class—at least until the amendment is adopted. Even then, the provision is unlikely to warrant extensive discussion in a basic Evidence course.

Chapter 70: Best Evidence. This chapter briefly discusses Rule 1006, which allows parties to introduce a "summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs." Those summaries are not mere illustrative aids (discussed above). Instead, they are evidence that the jury may review during deliberations.

Some courts, however, have treated Rule 1006 summaries as illustrative aids and have refused to admit them into evidence. The Conference Committee has proposed an amendment that would eliminate that misinterpretation of the rule. The proposed amendment distinguishes between summaries and illustrative aids, making clear that the former are admissible (if they meet the requirements set out in Rule 1006) while the latter are subject to the proposed addition to Rule 611.

Some professors omit this chapter from the basic Evidence course, so you may have no need to discuss this proposed amendment. If you do assign the chapter, you may want to note that Rule 1006 summaries are a type of admissible evidence, not an illustrative aid. That may avoid the type of confusion that the proposed amendment aims to cure.