Summer 2023 Update: Memo for Instructors

Learning Evidence: From the Federal Rules to the Courtroom (fifth edition)

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Our short Summer 2023 Update to the fifth edition of *Learning Evidence* is available for students to download at no cost from eproducts.westacademic.com. In this instructor memo you will find:

- Brief notes on how you might incorporate the information from that update into your classes; and
- Information about amendments to the Federal Rules of Evidence that are likely to take effect on December 1, 2024.

Materials in the Summer 2023 Update

Chapter 15: Two amendments to Rule 615 (Excluding Witnesses) will take effect on December 1, 2023, unless Congress takes contrary action. We explain the changes in the Summer 2023 Update so that students will be aware of them. You may not even mention these amendments in class; they are minor from the perspective of the basic Evidence course.

Chapter 24: Two amendments to Rule 106 (Rule of Completeness) will also take effect on December 1, 2023, unless Congress acts. These amendments are important because they resolve two longstanding open issues related to the rule. We mention the Advisory Committee's attention to these issues in the text of the fifth edition, and the Summer 2023 Update reports the results of the committee's action. If you discuss Rule 106 in class, you will want to take account of these amendments.

Chapter 53: The Advisory Committee and courts have not made any changes in Rule 801(d)(2) (Statements by an Opposing Party), but the pending amendment to Rule 106 affects the application of 801(d)(2). To account for that impact, the Summer Update offers a new version of subsection C.1 in this chapter. As the material in the Summer Update explains, parties will be able to introduce portions of their own out-of-court statements if (1) an opponent has introduced part of that statement, and (2) fairness requires consideration of the additional portion of the statement.

This is a fairly modest caveat to the general approach of Rule 801(d)(2), but it is an important one. The material in the Summer Update offers an example of a situation in which amended Rule 106 would allow a party to introduce a portion of their own statement to correct a misleading impression left by the opponent's introduction of just part of that statement. As the Summer Update notes, other fact patterns will create closer questions. Over time, case law will reveal just how large this caveat is.

Chapter 54: In *Samia v. United States*, 2023 WL 4139001 (2023), the Supreme Court issued an important opinion construing the *Bruton* rule. Luckily for evidence instructors and students, this opinion simplifies application of *Bruton*. You will want to be sure that students read the paragraphs in the Summer 2023 Update so that they understand this simplified approach. If you have time,

you may also want to discuss the policy implications of *Samia*: that opinion undercuts much of the protection that *Bruton* offered to criminal defendants. For your convenience, we have included a PDF with all of the *Samia* opinions in the *Quizzes, Updates, and Other Materials* folder in the Teacher Resources section at eproducts.westacademic.com.

Chapter 58: We included a discussion of *Hemphill v. New York*, 142 S. Ct. 681 (2022), in last year's summer update and the same information appears in this year's update. The specifics of the opinion are too technical for a basic Evidence course, but the opinion is notable for its affirmation of *Crawford*. You will want your students, therefore, to read the brief discussion in the Summer 2023 Update.

If you are interested in knowing more about *Hemphill*, here is a brief overview of the case:

> The defendant in *Hemphill v. New York* was charged with murder. At trial, he claimed that a third party (Nicholas Morris) was responsible for that murder. Morris was unavailable during Hemphill's trial, so the State could not call him to rebut Hemphill's defense. Instead, the State attempted to introduce a plea allocution Morris made several years earlier. That statement undermined Hemphill's third-party defense to some extent.
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> The State in *Hemphill* conceded that Morris's plea allocution was testimonial and that Hemphill had no opportunity to cross examine Morris. It argued, however, that Hemphill waived any Confrontation Clause objection to introduction of the allocution by attempting to blame Morris for the murder. Without introduction of Morris's allocution, the State argued, Hemphill's defense was misleading.
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> The Supreme Court rejected this argument, finding that Hemphill had not waived his Confrontation Clause rights simply by raising a third-party defense. The Court, however, left open the possibility that other conduct might explicitly or implicitly waive those rights. The common-law rule of completeness, for example, allows a party to supplement a partial statement introduced by an opponent to correct any misleading impression created by the partial statement.
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> The majority did not address the intersection of the rule of completeness and the Confrontation Clause, noting that the parties agreed that the rule did not apply in Hemphill's case. Justice Alito (joined by Justice Kavanaugh), however, wrote separately to argue that defendants who introduce evidence subject to the rule of completeness *would* waive their rights under the Confrontation Clause.

This concurrence's discussion of the rule of completeness is particularly timely, given the amendments to Rule 106 that will take effect in December. It is possible, given those amendments, that application of the rule could raise Confrontation Clause issues. That inquiry, however, is rather complex for a basic Evidence course.

For your convenience, we have included a PDF of the *Hemphill* opinions in the *Quizzes, Updates, and Other Materials* folder in the Teacher Resources section at eproducts.westacademic.com.

Chapter 61: Many instructors leave the intricacies of expert testimony to advanced Evidence courses, but it is worth briefly noting the Rule 702 amendments in the basic course. The Advisory Committee has been concerned for some time about trial judge lenience in admitting questionable

expert testimony. The Rule 702 amendments respond to that concern by stressing the judge's gatekeeping role with respect to expert testimony. You may not want to say more than that in a basic Evidence course, but the point is worth making.

If you want to probe these amendments further, the first one allows you to revisit the standards that trial judges use when making preliminary determinations (discussed in Chapter 34). Students find that material difficult, and the amendment to Rule 702 might help them understand the two types of preliminary determinations. As the Summer 2023 Update explains, some judges had been applying the Rule 104(b) standard when deciding whether to admit expert testimony. They were asking, in other words, whether a reasonable jury would find that the elements of Rule 702 were met.

Instead, as the amendment clarifies, judges must make that determination themselves—without deferring to the findings a reasonable jury might make. The proponent of the expert testimony must persuade the judge, by a preponderance of the evidence, that the expert's knowledge will help the jury, that the proposed testimony is based on sufficient facts or data, that the testimony is the product of reliable principles and methods, and that the expert's opinion reflects a reliable application of those principles and methods to the facts of the case.

The second amendment to Rule 702 is also intended to underscore the trial judge's gatekeeping function. The revised language in Rule 702(d) stresses the importance of the second reliability requirement—one that some trial judges had overlooked. The expert's testimony must draw upon reliable principles and those principles must be reliably applied to the facts of the case.

The Committee Note accompanying the amended rule highlights one particular aspect of reliable application: statements about the expert's degree of certainty when the expert testifies about DNA evidence, fingerprints, or other types of forensic evidence. The Committee wrote:

> Forensic experts should avoid assertions of absolute or one hundred percent certainty—or to a reasonable degree of scientific certainty—if the methodology is subjective and thus potentially subject to error.

The amendment to Rule 702 does not mention this concern, but litigants and judges often look to the Advisory Committee Notes when applying a rule. It is worth knowing that judges may start reviewing more closely the assertions that experts make about their degree of certainty.

Amendments That Are Likely to Take Effect on December 1, 2024

The Advisory Committee on Evidence approved one new rule of evidence, along with amendments to four other rules, in April 2023. The Standing Committee has approved those proposals and transmitted them to the Judicial Conference. If the Judicial Conference and Supreme Court approve these proposals (which seems likely), and if Congress does not act (which also seems likely), these five proposals will take effect on December 1, 2024.

None of these changes will take effect during the 2023-24 academic year, and you are unlikely to discuss any of them with your students. We summarize them here so that you will be aware of changes on the horizon. We have posted a PDF, titled "2024 amendments as sent to the judicial conference," in the *Quizzes, Updates, and Other Materials* folder in the Teacher Resources section at eproducts.westacademic.com. If the pending amendments continue to progress, we will discuss them more fully in next summer's update.

New Rule 107—Illustrative Aids. This proposed rule attempts to govern the growing use of illustrative aids at trial. Those aids, the rule specifies, are not evidence. Instead, they are pedagogical aids used "to help the trier of fact understand the evidence or [an] argument." The rule offers several guidelines governing those aids, including application of a Rule 403-like test to their use.

As the rule and Committee Note suggest, it can be difficult to distinguish illustrative aids from both demonstrative evidence (which is admitted into evidence if compatible with the other rules of evidence) and Rule 1006 summaries (which are also introduced into evidence).

Discussion of illustrative aids, demonstrative evidence, and Rule 1006 summaries is better suited to a Trial Practice course than the basic Evidence course. If your students ask about these trial practice issues (or you are inclined to discuss them), however, you can note that the Advisory Committee has formulated a rule designed to govern illustrative aids and that the rule probably will take effect on December 1, 2024.

Rule 613(b)—Witness's Prior Statement. Rule 613(b), discussed on pp. 230-31 and 236-38 of the fifth edition, currently allows parties to introduce extrinsic evidence of a witness's prior statement without first giving the witness an opportunity to explain or deny the statement. The proposed amendment to Rule 613(b) would revert to the common-law rule, which requires the examiner to provide that opportunity before introducing the statement into evidence. As the fifth edition notes on p. 238, many trial judges already impose this requirement. The amendment, therefore, conforms the rule to widespread courtroom practice. The amendment also preserves the trial judge's discretion to take a contrary approach under appropriate circumstances.

Note that this change will not affect Rule 613(a), which governs *asking* a witness about their prior statement. Even after the amendment to 613(b) takes effect, an examiner will be able to ask a witness about a prior statement without first showing them the statement. The examiner, in other words, will still be able to surprise the witness by asking about the statement—but will then have to give the witness an opportunity to explain or deny before offering the statement into evidence.

This amendment will make a minor change in courtroom procedure that you are unlikely to discuss before the amendment goes into effect. Doing so might simply confuse students.

Rule 801(d)(2)—An Opposing Party's Statement. The pending amendment provides, in the words of the Advisory Committee Note, that "when a party stands in the shoes of a declarant or the declarant's principal, hearsay statements made by the declarant or principal are admissible against the party." This amendment resolves a circuit split on the admissibility of statements against successors in interest. The fifth edition does not discuss the question of successors, so you are unlikely to discuss this pending amendment in class during the current academic year.

Rule 804(b)(3)(B)--Statement Against Interest in Criminal Cases. This amendment will clarify the corroboration requirement for statements against interest offered in criminal cases. Most courts, as we explain on pp. 647-49 of the fifth edition, consider both the circumstances under which the statement was made and other evidence supporting or refuting the declarant's claim. The Advisory Committee, however, found that some courts were refusing to consider the latter evidence. The amendment will make clear that courts must consider both types of evidence. This point is already clear in the fifth edition, but you may want to underscore it in anticipation of the amendment taking effect.

Rule 1006—Summaries to Prove Content. The amendment will accomplish two goals. First, it will clarify that summaries offered under this rule are substantive evidence that may be examined by the jury. Second, it will provide that illustrative aids are governed by new Rule 107 rather than by this rule. Few instructors discuss Rule 1006 in class, so you are unlikely to touch upon this amendment during the current academic year. Even if you do discuss Rule 1006, there is no reason to mention this amendment until Rule 107 takes effect.