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LEARNING EVIDENCE

FROM THE FEDERAL RULES TO THE COURTROOM

Fifth Edition

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LEARNING SERIES

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Summer 2023 Update

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

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The fifth edition, published in late 2021, contains up-to-date rule language and judicial interpretations for most of the Federal Rules of Evidence. This update provides all the necessary edits to the fifth edition, including (1) the Supreme Court decisions in *Hemphill v. New York* (2022) and *Samia v. United States* (2023), and (2) information about amendments to three rules that will take effect on December 1, 2023, if Congress does not act.

Chapter 15 – Examining Witnesses

The Supreme Court has transmitted to Congress two amendments to Rule 615. If Congress does not reject or modify these amendments, they will take effect on December 1, 2023. The first amendment clarifies that a party who is not a natural person may designate only one person to attend the full trial as the party's representative. Multiple representatives will not be allowed.

The second amendment adds a new section to the rule, allowing judges to enter orders prohibiting excluded witnesses from accessing courtroom testimony in other ways.

Here is the amended rule, with the new language underlined:

Rule 615. Excluding Witnesses <u>from the Courtroom; Preventing an Excluded Witness's Access to Trial Testimony</u>

(a) <u>Excluding Witnesses</u>. At a party's request, the court must order witnesses excluded <u>from the courtroom</u> so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

(1) a party who is a natural person;

(2) <u>one</u> officer or employee of a party that is not a natural person <u>if that officer or employee has been</u> designated as the party's representative by its attorney;

(3) <u>any</u> person whose presence a party shows to be essential to presenting the party's claim or defense; or

(4) a person authorized by statute to be present.

(b) <u>Additional Orders to Prevent Disclosing and Accessing Testimony. An order under (a) operates only to exclude witnesses from the courtroom. But the court may also, by order:</u>

<u>(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and</u>

<u>(2) prohibit excluded witnesses from accessing trial testimony.</u>

Chapter 24 – Rule of Completeness

As mentioned on p. 298, the Advisory Committee was considering two amendments to Rule 106. The Supreme Court has now approved those amendments and transmitted them to Congress. If Congress does not reject or modify these amendments, they will take effect on December 1, 2023. Here is the language that probably will take effect at that time:

> **Rule 106. Remainder of or Related Statements**
>
> If a party introduces all or part of a statement, an adverse party may require the introduction, at that time, of any other part—or any other statement—that in fairness ought to be considered at the same time. The adverse party may do so over a hearsay objection.

The underlined language highlights the two amendments. The single word "statement" replaces the phrase "writing or recorded statement," signifying that the rule includes oral statements as well as written or recorded ones. The sentence added to the end of the rule makes clear that the rule is not simply one of timing. If a statement satisfies other elements of the rule, it is admissible over any hearsay objection.

Chapter 53 – Statements by an Opposing Party

On pp. 661-62, replace subsection C.1 with the following material:

1. Opponents. Rule 801(d)(2) establishes a very broad exemption from the hearsay rule, allowing introduction of most out-of-court statements by parties. The rule, however, contains one very important limit: Parties cannot introduce evidence of their own statements under this rule—they can only offer evidence of an opponent's statements.

This limit forces parties to testify live in court rather than relying upon out-of-court statements. As one court of appeals observed, allowing parties to introduce their own out-of-court statements would "effectuate an end-run around the adversarial process by, in effect, testifying without swearing an oath, facing cross-examination, or being subjected to firsthand scrutiny by the jury."[1] Rule 801(d)(2) avoids this self-serving strategy.

Amendments to Rule 106 (the Rule of Completeness),[2] however, add an important caveat to the operation of Rule 801(d)(2). If a litigant introduces portions of an opposing party's statement and "fairness" requires consideration of other portions of that statement, then the opposing party may introduce those other portions without violating the hearsay rule.

> **Example:** Derek Donnell was on trial for murder. The murder weapon, left at the scene, was an unusual knife with the initials "DD" engraved on the hilt. Police interrogated Donnell at length, and the prosecution introduced a portion of that interrogation in which Donnell admitted: "Yes, I recognize that knife. My uncle gave it to me as a gift." Defense counsel immediately moved to introduce another portion of the interrogation in which

[1] United States v. McDaniel, 398 F.3d 540, 545 (6th Cir. 2005).
[2] See Chapter 24, in both the fifth edition and this supplement, for further discussion of Rule 106.

> Donnell stated, "I sold that knife several years ago when I was short on cash." The prosecution objected to admission of the latter statement as hearsay.
>
> **Analysis:** The trial judge overruled the prosecution's objection and admitted Donnell's statement about selling the knife. This statement was hearsay, and Donnell could not introduce his own statement under Rule 801(d)(2). But Rule 106 allowed Donnell to correct the misleading impression created by the prosecution's selective evidence. Amended Rule 106 specifically allows a party to introduce portions of a statement "that in fairness ought to be considered . . . over a hearsay objection."

This example draws upon one offered by the Advisory Committee in its Note to amended Rule 106. The unfairness in this example is manifest. As the Advisory Committee observes, "admitting only the statement of ownership creates a misimpression because it suggests that the defendant implied that he owned the weapon at the time of the crime—when that is not what he said." Other fact patterns will create closer questions, requiring the courts to balance the policies underlying Rule 801(d)(2) with those informing Rule 106.

Chapter 54 – Statements by Opposing Parties in the Context of Multiple Parties

On pp. 682-84, replace subsection D.2. with the following material:

2. Redacted Statements. After *Bruton*, prosecutors began looking for ways to admit a defendant's out-of-court confession that implicated a codefendant. In one post-*Bruton* case, *Gray v. Maryland*,[3] the prosecutor simply replaced the codefendant's name with the word "deleted" when the police detective read the confession to the jury, and replaced the codefendant's name with a blank line when the written confession was admitted into evidence.

The Supreme Court held that this redaction was insufficient, since "[a] juror somewhat familiar with criminal law would know immediately that the blank refers to [the codefendant]. A juror who does not know the law and who therefore wonders to whom the blank might refer need only lift his eyes to [the codefendant], sitting at counsel table, to find what will seem the obvious answer…."[4] In other words, such a blatantly obvious redaction still "directly implicates" the codefendant, and therefore violates the codefendant's Confrontation Clause rights if the confessing defendant does not take the stand.

However, if the prosecutor redacts the confession in a way that only "indirectly" refers to the codefendant, the confession will be admissible:

> **Example:** Adam Samia, Joseph Hunter, and Carl Stillwell were charged with killing Catherine Lee as part of a murder-for-hire scheme. The government tried the three men jointly, arguing that Hunter had arranged for Samia and Stillwell to shoot Lee while transporting her in a van. Stillwell had confessed that he was driving that van when Lee was killed but claimed that Samia was the one who shot her. At trial, the prosecutor had a police detective recount Stillwell's confession. Throughout that testimony, the detective

[3] 523 U.S. 185 (1998).
[4] *Id.* at 193.

referred to an "other person" rather than naming Samia. Here is the most damaging part of the colloquy between the prosecutor and the detective:

> Q. Did Stillwell say where the victim was when she was killed?
>
> A. Yes. He described a time when the other person he was with pulled the trigger on that woman in a van that he and Mr. Stillwell was driving.[5]

Stillwell did not take the stand, so he was not subject to cross-examination by counsel for his codefendants.

The trial judge instructed the jury that the detective's testimony was only admissible as to Stillwell and should not be considered as to Samia or Hunter. Samia was convicted and he appealed, arguing that the jury could easily infer from other prosecution evidence that Samia was the "other person" mentioned in Stillwell's confession. For example, the evidence showed that Samia and Stillwell lived together at the time Lee was killed, and that Samia owned a gun like the one that killed Lee. Thus, Samia contended that the detective's recounting of Stillwell's confession, even as modified, violated the *Bruton* rule.

Analysis: The Court rejected Samia's argument, finding first that Stillwell's confession "was not obviously redacted in a manner resembling the confession in *Gray*; the neutral references to some 'other person' were not akin to an obvious blank or the word 'deleted.'"[6] Second, the Court refused to extend *Bruton* to situations in which a redacted confession "[becomes] incriminating only when linked with evidence introduced later at trial."[7] That rule would burden the prosecution too heavily, the Court concluded, because "all evidence that supports the prosecution's theory of the case is, to some extent, mutually reinforcing."[8]

Samia gives prosecutors a relatively easy way to redact statements and avoid a *Bruton* problem. In addition, the opinion uses language that subtly calls into question the very foundation of *Bruton*'s holding. The Court, for example, noted that "[e]vidence at trial is often admitted for a limited purpose, accompanied by a limiting instruction. And, our legal system presumes that jurors will attend closely the particular language of [such] instructions in a criminal case and strive to understand, make sense of, and follow them."[9] The Court also provided several examples of when limiting instructions are deemed sufficient even though the statements they refer to are "substantially more credible and inculpatory than a codefendant's confession."[10]

For now, however, *Bruton* is still good law. If prosecutors choose to admit confessions that mention codefendants, they must follow these guidelines:

1. A statement that explicitly names a codefendant and implicates that codefendant on its face violates *Bruton*. The statement cannot be admitted in this form.

[5] Samia v. United States, 2023 WL 4139001, *4 (2023) (edited slightly for clarity).
[6] *Id.* at *10.
[7] *Id*. at *9 (internal quotations omitted).
[8] *Id.* at *10.
[9] *Id.* at *6 (internal quotations omitted).
[10] *Id*. at *7

2. A statement that simply replaces the codefendant's name with blanks or other obvious marks of deletion also violates *Bruton*. A statement in this form inevitably will tempt the jury to fill in the blanks with the codefendant's name.
3. A statement that does not refer explicitly to a codefendant, and that contains no obvious omissions tempting the jury to fill in the gaps, satisfies *Bruton*. The prosecutor can admit statements that satisfy this condition in their initial form or that can be redacted to reach this form. These statements still are admissible only against the defendant who made the out-of-court statement, and the judge will instruct the jury not to consider these statements in connection with any codefendants. The form of the statement makes it plausible that the jury will follow those instructions, resolving the Sixth Amendment concerns raised by *Bruton*.

These guidelines, of course, apply only when the government tries the defendants jointly and the defendant who made the out-of-court statement fails to take the stand at trial. Most prosecutions raise no *Bruton* issues.

Chapter 58 – The Sixth Amendment and Hearsay

On p. 755, replace the last paragraph with this material:

In January 2022, however, the Court reaffirmed *Crawford*'s approach to the Confrontation Clause. In *Hemphill v. New York*,[11] the Court held that the defendant had not waived his Confrontation Clause rights when he raised a defense that blamed the declarant for his crime. In reaching that result, the Court stressed "*Crawford*'s emphatic rejection of the reliability-based approach of *Ohio v. Roberts*."[12] "If *Crawford* stands for anything," the Court continued, "it is that the history, text, and purpose of the Confrontation Clause bar judges from substituting their own determinations of reliability for the method the Constitution guarantees."[13]

Eight Justices joined this opinion, and the only dissenter (Justice Thomas) took no issue with the Court's characterization of *Crawford.* Justice Thomas dissented only on the ground that the defendant had not preserved his claim in the lower court. *Hemphill*, therefore, offers a resounding endorsement of *Crawford*'s focus on cross-examination rather than reliability.

Hemphill did not require the Court to determine if the contested statement was testimonial; the State conceded that it was. It is possible that the Court's apparent consensus in *Hemphill* will fracture in a case presenting a more difficult determination of whether a statement is testimonial. For now, however, *Crawford* appears once again ascendant.

Chapter 61 – What Subjects Are Appropriate For Expert Testimony?

The Supreme Court has transmitted to Congress two amendments to Rule 702. If Congress does not reject or modify these amendments, they will take effect on December 1, 2023. The first

[11] 142 S. Ct. 681 (2022).
[12] *Id.* at 691.
[13] *Id.*

amendment clarifies that judges must use the standard contained in Rule 104(a) to determine whether the requirements of Rule 702 are met. In the words of the amended Rule 702, an expert witness may testify only "if the proponent demonstrates to the court that it is more likely than not that" each of the requirements of Rule 702 have been met. The Advisory Committee proposed this amendment to stress the gatekeeping function that judges play under Rule 702.

The second amendment alters the language of Rule 702(d) slightly to emphasize the importance of the rule's second reliability requirement. In the Committee Note accompanying the amendment, the Advisory Committee offered this observation:

> The amendment is especially pertinent to the testimony of forensic experts in both criminal and civil cases. 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. In deciding whether to admit forensic expert testimony, the judge should (where possible) receive an estimate of the known or potential rate of error of the methodology employed, based (where appropriate) on studies that reflect how often the method produces accurate results. Expert opinion testimony regarding the weight of feature comparison evidence (i.e., evidence that a set of features corresponds between two examined items) must be limited to those inferences that can reasonably be drawn from a reliable application of the principles and methods. This amendment does not, however, bar testimony that comports with substantive law requiring opinions to a particular degree of certainty.

Here is the amended rule, with the new language underlined:

> **Rule 702. Testimony by Expert Witnesses**
>
> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if <u>the proponent demonstrates to the court that it is more likely than not that</u>:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the <u>expert's opinion reflects a reliable application of</u> the principles and methods to the facts of the case.