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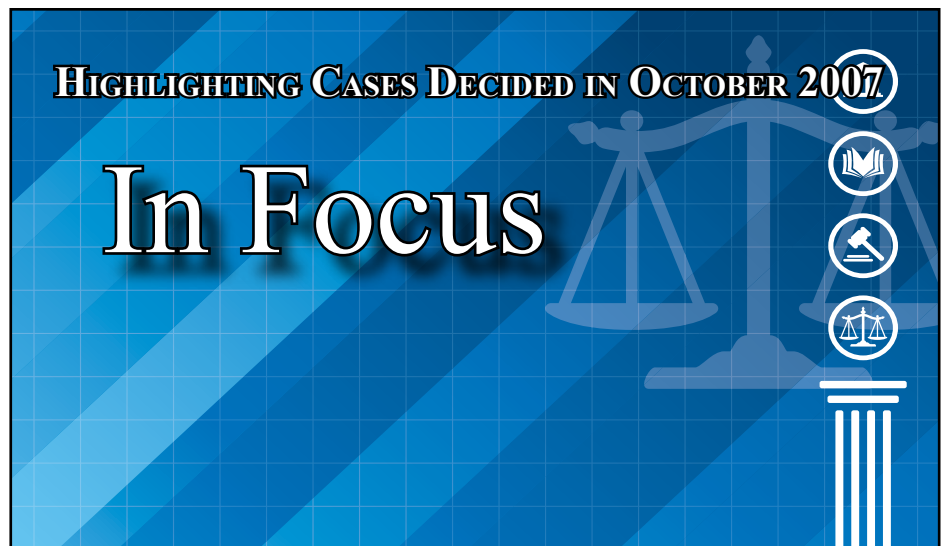
### Cases Covered This Issue:

• Reviewed	27
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**Grand Jury Testimony Used For Business Record Foundation:** In health care fraud case, Fifth Circuit holds that grand jury testimony may be used as a foundation to authenticate business records admitted at trial without violating the Confrontation Clause since the business records were not testimonial in nature – 5th Cir. (p. 1641)

**Admitting Chat Logs:** In prosecution involving the possession and receipt or distribution of material involving the sexual exploitation of minors, chat logs were relevant to show the defendant knew the images on his computer depicted minors and were not unfairly prejudice since the government held the burden to prove intent beyond a reasonable doubt – 9th Cir. (p. 1674)

**Developing Consensus:** Tenth Circuit joins nine other circuits holding that a case agent normally is not subject to the witness exclusion rule under FRE 615(2) – 10th Cir. (p. 1637)

**FRE 404(b) Rebuttal Evidence:** In health fraud trial, evidence concerning the defendant's disregard about her pretrial condition disallowing her from opening a new bank account and the steps she took to open an account in her daughter's name was admissible under FRE 404(b) to rebut her defense that she lacked fraudulent intent – 5th Cir. (p. 1685)

**Open Issue:** Fifth Circuit Holds That Grand Jury Testimony May Be Used As Foundational Evidence To Authenticate Business Records Admitted At Trial Without Violating The Confrontation Clause – 5th Cir. (p. 1641)

**Lead Story:** FRE 403: Balancing Probative Value and Unfair Prejudice: Ten Common Questions & Misconceptions (p. 1613)

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## Lead Story: FRE 403: Balancing Probative Value and Unfair Prejudice: Ten Common Questions & Misconceptions

**F**RE 403 is a key rule of evidence. Under the rule, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or five other specified bases. In this Lead Story, some common questions and misconceptions concerning this important and frequently invoked rule are reviewed.



under the rule. FRE 403 specifically states that:

“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, the danger of confusion the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

### Q1: What is FRE 403 and how does FRE 403 operate?

FRE 403 is a central and unique rule which bars the admission of evidence that may otherwise be relevant. *See, e.g., United States v. Mende*, 43 F.3d 1298, 1302 (9th Cir. 1995) (“Rule 403 . . . is ‘an extraordinary remedy to be used sparingly because it permits the trial court to exclude otherwise relevant evidence.’”) (citation omitted); *Lewy v. Southern Pacific Trans. Co.*, 799 F.2d 1281, 1286 n.4 (9th Cir. 1986) (“Rule 403 provides a basis for excluding ‘relevant’ evidence”; contrasting Rule 403 and Rule 402, which excludes evidence that is not relevant).

The most common challenge to the admission of relevant evidence is that the evidence is unfairly prejudicial and accordingly should be excluded. The Advisory Committee Notes for FRE 403 provide the policy justification for the rule”

“The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission.” ACN (citations omitted).

There are five other grounds for exclusion provided

Consequently, before relevant evidence may be excluded under FRE 403, it must be “substantially outweighed” by any of six specified adverse effects. FRE 403 permits the exclusion of relevant evidence if its probative value is substantially outweighed by [1] the danger of [a] unfair prejudice, [b] confusion of the issues, or [c] misleading the jury, or [2] by considerations of [a] undue delay, [b] waste of time, or [c] needless presentation of cumulative evidence.

Application of the Rule 403 factors and the required balancing analysis to decide if evidence should be excluded is a fact-specific process. *See, e.g., United States v. Layton*, 767 F.2d 549, 554 (9th Cir. 1985) (“The considerations which arise under Rule 403, such as the potential for undue prejudice or confusion of the issues, are susceptible only to case-by-case determinations, requiring examination of the surrounding facts, circumstances, and issues.”) (citations omitted). On one side of the balance, the trial court assesses the probative value of the relevant evidence. On the other side, the court considers whether any of the six grounds (e.g., unfair prejudice) *substantially* outweighs the probative value. In applying FRE 403, there is an appreciation that the factors to be balanced can be illusive.

The courts recognize that application of the rule is far from a matter of mathematical certainty. *See, e.g., Shows v. M/V Red Eagle*, 695 F.2d 114, 118–119 (5th Cir. 1983) (In civil suit for maritime injuries, admission of evidence that the plaintiff was convicted for armed robbery over a decade earlier violated FRE 403 because “we are left