



Evidence Case Docket

Evidence Case Docket – Volume 6, Number 12 (December 2009) (Reporting Cases Decided In November 2009)

- The *Evidence Case Docket* provides a “snapshot” of published evidence cases from November 2009, including the evidence principle and link to the case as issued by the U.S. Court of Appeals.
- The *Evidence Case Docket* organizes the published evidence opinions from the prior month by the Federal Rules of Evidence (FRE).
- The *Evidence Principle Number* is a consecutive number (in the right column) used as a cross-reference.
- The *Circuits At A Glance* section presents the published cases decided during the prior month organized by circuit and also includes a full report of all the evidence issues in the case. A hyperlink is included to coverage of the case in the *Circuits At A Glance*.
- A *case citation* in the FEDERAL REPORTS 3D (F.3d) is provided when the citation is available at the time of publication.
- The panel that decided a case is listed at the end of the citation, and the author of the published opinion is underlined.
- For suggestions on using the *Evidence Case Docket*, see pages 1075-76.

Rule	Evidence Principle	Cases
Fifth Amendment Due Process Clause	<p>In trial for bank fraud and tax evasion, as a sanction for failing to provide reciprocal discovery under FED. R. CRIM. P. 16(c), excluding defense evidence (photocopies of check stubs that defendant claimed showed she took money from her employer to repay herself for prior loans she made to company)</p> <p>✓ <i>Right To Present Defense And Harmless Error</i>: The exclusion of defense evidence did not deprive the defendant of his right to present a defense, under the Fifth and Sixth Amendments, since the excluded evidence did not “create[] a reasonable doubt that did not otherwise exist” (quoting <i>United States v. Blackwell</i>, 459 F.3d 739, 753 (6th Cir. 2006) (citation omitted); consequently, any error in excluding the defense evidence was harmless beyond a reasonable doubt and based on overwhelming evidence</p>	<p><i>United States v. Hardy</i>, 586 F.3d 1040 (6th Cir. Nov. 20, 2009) (No. 08-5421) (Kennedy, Rogers, <u>Hood</u>)</p> <p>Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_Hardy.pdf</p> <p>Case Result: Affirming convictions</p> <p>Cross-Reference: Sixth Amendment, FRE 103(a), FRE 1101</p> <p>Evidence Principle No.: 1</p> <p>Circuits At A Glance: p. 1137</p>



Evidence Case Docket

Rule	Evidence Principle	Cases
<p>Fifth Amendment Due Process Clause</p>	<p>In bank robbery trial, reversing denial of defense motion for inquiry into the validity of conviction based on post-conviction e-mail from juror to defense counsel reporting that another jury stated during deliberations: “I guess we’re profiling but they cause all the trouble”</p> <p>✓ <i>Remanding Case</i>: While FRE 606(b) precludes the trial court from taking juror testimony about ethnically biased and prejudiced comments during the course of their deliberations, the trial court has discretion to conduct an inquiry to protect the defendant’s Fifth Amendment Due Process and Sixth Amendment Impartial Jury rights and case is remanded</p> <p>✓ <i>Primacy Of Constitutional Claims Over FRE 606(b)</i>: Circuit notes: “While the issue is difficult and close, we believe that the rule against juror impeachment cannot be applied so inflexibly as to bar juror testimony in those rare and grave cases where claims of racial or ethnic bias during jury deliberations implicate a defendant’s right to due process and an impartial jury”</p> <p>✓ <i>Factors To Consider</i>: FRE 606(b) may be displaced where “the four protections relied on by the <i>Tanner</i> Court do not provide adequate safeguards in the context of racially and ethnically biased comments made during deliberations [<i>e.g.</i>, the <i>voir dire</i> process, the ability of the court and counsel to observe jurors during the trial, the ability of jurors to make pre-verdict reports of misconduct, and the availability of post-verdict impeachment through non-juror evidence of misconduct.]”</p>	<p><i>United States v. Villar</i>, 586 F.3d 76 (1st Cir. Nov. 10, 2009) (No. 08-1154) (Torruella, Boudin, <u>Saris</u> (DJ))</p> <p>Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_Villar.pdf</p> <p>Case Result: Reversing district court’s order denying appellant’s motion to make an inquiry into the validity of the verdict, and remanding</p> <p>Blog Post: http://federalevidence.com/node/566</p> <p>Cross-Reference: FRE 606(b), Sixth Amendment</p> <p>Evidence Principle No.: 2</p> <p>Circuits At A Glance: 1127</p>



Evidence Case Docket

Rule	Evidence Principle	Cases
<p>Sixth Amendment Confrontation Clause</p>	<p>In bench trial for possession of cocaine with intent to distribute and related firearms offenses:</p> <p>✓ <i>Confrontation Clause</i>: Admission of drug lab report without the testimony of the authoring analyst violated the Confrontation Clause because even “sworn certificates of analysis detailing the results of forensic analyses on suspected drugs are testimonial statements for purposes of the Confrontation Clause” (citing <i>Melendez-Diaz v. Massachusetts</i>, 129 S.Ct. 2527, 2532 (2009) and <i>Crawford v. Washington</i>, 541 U.S. 36, 59 (2004) (testimonial statements by a non-testifying witness inadmissible unless the witness is unavailable and was previously subject to cross-examination by the defendant))</p> <p>✓ <i>Any Error Not Plain</i>: Any error from the admission of a drug lab test that reported the presence of cocaine was not plain error despite failure of the reporting analyst to testify at trial because the lab supervisor who reviewed and signed the report did testify, was subject to cross-examination, and the defendant failed to object to supervisor’s testimony or to the report (despite ambiguity as to whether the supervisor had personal knowledge of tests performed)</p> <p>✓ <i>Rose Limited To Its Facts</i>: The circuit noted the result was limited to the facts of the case including that the lab tests were ambiguous and that the <i>Melendez-Diaz</i> Court “wrote of the non-testifying analysts in terms of whose names appeared on the reports” and they “expressly rejected the notion ‘that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution’s case.’” (citing <i>Melendez-Diaz v. Massachusetts</i>, 129 S.Ct. 2527, 2532 n.1 (2009)); however the circuit clarified “that we do not hold that the prosecution may avoid confrontation issues through the in-court testimony of any witness who signed a lab report without regard to that witness’s role in conducting tests or preparing the report. Instead, we refer to the above language from <i>Melendez-Diaz</i> to illustrate that any error that may have arisen from the facts of this case ... was not plain as required by our standard of review”</p>	<p><i>United States v. Rose</i>, 587 F.3d 695 (5th Cir. Nov. 6, 2009) (No. 08-10813) (King, Davis, Benavides) (<i>per curiam</i>)</p> <p>Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_Rose.pdf</p> <p>Case Result: Affirming convictions</p> <p>Blog Post: http://federalevidence.com/node/567</p> <p>Cross Reference: FRE 103(d)</p> <p>Evidence Principle No.: 3</p> <p>Circuits At A Glance: p. 1135</p>



Evidence Case Docket

Rule	Evidence Principle	Cases
<p>Sixth Amendment Right to Impartial Jury</p>	<p>In bank robbery trial, reversing denial of defense motion for inquiry into the validity of conviction based on post-conviction e-mail from juror to defense counsel reporting that another juror stated during deliberations: “I guess we’re [race] profiling but they [defendant’s ethnic group] cause all the trouble”</p> <p>✓ <i>Remanding Case</i>: While FRE 606(b) precludes the trial court from taking juror testimony about ethnically biased and prejudiced comments during the course of deliberations, the trial court has discretion to conduct an inquiry to protect the defendant’s Fifth Amendment Due Process and Sixth Amendment Impartial Jury rights</p> <p>✓ <i>Primacy Of Constitutional Claims Over FRE 606(b)</i>: Circuit notes: “While the issue is difficult and close, we believe that the rule against juror impeachment cannot be applied so inflexibly as to bar juror testimony in those rare and grave cases where claims of racial or ethnic bias during jury deliberations implicate a defendant’s right to due process and an impartial jury”</p> <p>✓ <i>Factors To Consider</i>: FRE 606(b) may be displaced where “the four protections relied on by the <i>Tanner</i> Court do not provide adequate safeguards in the context of racially and ethnically biased comments made during deliberations [<i>e.g.</i>, the <i>voir dire</i> process, the ability of the court and counsel to observe jurors during the trial, the ability of jurors to make pre-verdict reports of misconduct, and the availability of post-verdict impeachment through non-juror evidence of misconduct.]”</p>	<p><i>United States v. Villar</i>, 586 F.3d 76 (1st Cir. Nov. 10, 2009) (No. 08-1154) (Torruella, Boudin, <u>Saris</u> (DJ))</p> <p>Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_Villar.pdf</p> <p>Case Result: Reversing district court’s order denying appellant’s motion to make an inquiry into the validity of the verdict, and remanding</p> <p>Blog Post: http://federalevidence.com/node/566</p> <p>Cross-Reference: Fifth Amendment, FRE 606(b)</p> <p>Evidence Principle No.: 4</p> <p>Circuits At A Glance: 1132</p>



Evidence Case Docket

Rule	Evidence Principle	Cases
<p>Sixth Amendment Compulsory Process Clause</p>	<p>In trial for bank fraud and tax evasion, as a sanction for failing to provide reciprocal discovery under FED. R. CRIM. P. 16(c), excluding defense evidence (photocopies of check stubs that defendant claimed showed she took money from her employer to repay herself for prior loans she made to company)</p> <p>✓ <i>Compulsory Process Clause</i>: Circuit notes that constitutional argument did not trump discovery rules: “Defendant’s Sixth Amendment right to compulsory process was not violated by the exclusion of evidence because the district court has discretion to exclude evidence when one party fails to comply with the Federal Rules of Criminal Procedure. FED. R. CRIM. P. 16(d).”</p> <p>✓ <i>Right To Present Defense And Harmless Error</i>: The exclusion of defense evidence did not deprive the defendant of his right to present a defense, under the Fifth and Sixth Amendments, since the excluded evidence did not “create[] a reasonable doubt that did not otherwise exist” (quoting <i>United States v. Blackwell</i>, 459 F.3d 739, 753 (6th Cir. 2006) (citation omitted); consequently, any error in excluding the defense evidence was harmless beyond a reasonable doubt and based on overwhelming evidence</p>	<p><i>United States v. Hardy</i>, 586 F.3d 1040 (6th Cir. Nov. 20, 2009) (No. 08-5421) (Kennedy, Rogers, <u>Hood</u>)</p> <p>Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_Hardy.pdf</p> <p>Case Result: Affirming convictions</p> <p>Cross-Reference: Fifth Amendment, FRE 103(a), FRE 1101</p> <p>Evidence Principle No.: 5</p> <p>Circuits At A Glance: p. 1137</p>
<p>FRE 103(a) Effect Of Erroneous Ruling: Harmless Error</p>	<p>In conspiracy to possess with intent to distribute heroin resulting in serious bodily injury trial, admitting evidence of a prior heroin conviction, prior methamphetamine arrest and arrest after officers observed defendant conducting cell phone heroin transaction while in police custody</p> <p>✓ <i>Harmless Error</i>: Even if admitting the cell phone arrest evidence was “duplicative and unnecessary,” under FRE 403, the defendant was “entitled to no relief because he has made absolutely no showing of prejudice”</p>	<p><i>United States v. Cockrell</i>, 587 F.3d 674 (5th Cir. Nov. 6, 2009) (No. 08-41008) (King, <u>Garza</u>, Haynes)</p> <p>Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_Cockrell.pdf</p> <p>Case Result: Affirming conviction</p> <p>Cross-Reference: FRE 403, FRE 404(b)</p> <p>Evidence Principle No.: 6</p> <p>Circuits At A Glance: p. 1132</p>



Evidence Case Docket

Rule	Evidence Principle	Cases
<p>FRE 103(a) Effect Of Erroneous Ruling: Harmless Error</p>	<p>In litigation for failure to warn in action for breast cancer risk from hormone replacement therapy, admitting plaintiff's expert's testimony about specific causation (that the defendant's hormone replacement drugs were the cause of the plaintiff's breast cancer)</p> <p>✓ <i>Differential Diagnosis</i>: The fact that plaintiff also had independent "breast cancer risk factors and a family history" of breast cancer did not undermine admissibility of the expert's differential diagnosis that the plaintiff's cancer "would not have developed without hormone replacement therapy"</p> <p>✓ <i>Lack Of Testimony In Conformity With Expertise</i>: On the issue of punitive damages, there was no error in striking the testimony of plaintiff's regulatory expert during the punitive damages portion of the trial where her testimony was "largely devoid of regulatory analysis" and she "simply read the contents of exhibits, thus undermining the asserted basis for expert testimony" and the expert failed to "relate" her testimony to specific FDA regulatory guidelines as directed by the trial judge</p> <p>✓ <i>Prejudicial Error</i>: Admission of regulatory expert's testimony which was "largely devoid of regulatory analysis" was prejudicial error requiring a new trial on punitive damages</p>	<p><i>In re Prempro Products Liability Litigation</i>, 586 F.3d 549 (8th Cir. Nov. 2, 2009) (Nos. 08-2555, 08-2711, 08-2713) (<u>Wollman</u>, Gibson, Murphy)</p> <p>Case Link: http://federalevidence.com/pdf/2009/11-Nov/In_re_Prempro_Products_Liability_Litigation.pdf</p> <p>Case Result: Affirming judgment against defendants on compensatory damages, vacating judgment for one defendant on punitive damages claim and remanding on punitive damages</p> <p>Blog Post: http://federalevidence.com/node/558</p> <p>Cross-Reference: FRE 702</p> <p>Evidence Principle No.: 7</p> <p>Circuits At A Glance: p. 1140</p>



Evidence Case Docket

Rule	Evidence Principle	Cases
<p>FRE 103(a) Effect Of Erroneous Ruling: Harmless Error</p>	<p>In mortgage fraud scheme based on fraudulent documents concerning appraised value and a straw purchaser's financial standing:</p> <p>✓ <i>Lay Testimony</i>: Error in admitting lay witness testimony about the legality of the defendant's scheme, which required specialized knowledge of an expert, was harmless because of the extensive evidence that the transactions were fraudulent</p> <p>✓ <i>Other Uncharged Fraud Conduct</i>: Even if the trial court erred in admitting evidence of five uncharged fraudulent real estate transactions that were "materially indistinguishable" from the charged schemes to show "intent, knowledge, motive, and plan", it was harmless because the defendant failed to show that the evidence affected his substantial rights</p>	<p><i>United States v. Cooks</i>, ___ F.3d ___ (5th Cir. Nov. 23, 2009) (No. 07-11151) (Higginbotham, Stewart, Englehardt (DJ))</p> <p>Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_Cooks.pdf</p> <p>Case Result: Affirming convictions</p> <p>Cross-Reference: FRE 404(b), FRE 701, FRE 702</p> <p>Evidence Principle No.: 8</p> <p>Circuits At A Glance: p. 1135</p>
	<p>In tax and fraud trial involving the operation of temporary employment agencies, even if the court erred in admitting hearsay statement identifying that the defendant was present near witness's office ("That's Aimee King" with another person), the error was harmless because it played a minor role in the prosecution and in light of the other evidence of conspiracy</p>	<p><i>United States v. McElroy</i>, 587 F.3d 73 (1st Cir. Nov. 20, 2009) (Nos. 08-2088, 08-2471) (Torruella, Ripple (7th), Boudin)</p> <p>Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_McElroy.pdf</p> <p>Case Result: Affirming conviction</p> <p>Cross-Reference: FRE 403, FRE 803(1), FRE 611(a), FRE 1006</p> <p>Evidence Principle No.: 9</p> <p>Circuits At A Glance: p. 1128</p>



Evidence Case Docket

Rule	Evidence Principle	Cases
<p>FRE 103(a) Effect Of Erroneous Ruling: Harmless Error</p>	<p>In trial for bank fraud and tax evasion, as a sanction for failing to provide reciprocal discovery under FED. R. CRIM. P. 16(c), excluding defense evidence (photocopies of check stubs that defendant claimed showed she took money from her employer to repay herself for prior loans she made to company)</p> <p>✓ <i>Right To Present Defense And Harmless Error</i>: The exclusion of defense evidence did not deprive the defendant of his right to present a defense, under the Fifth and Sixth Amendments, since the excluded evidence did not “create[] a reasonable doubt that did not otherwise exist” (quoting <i>United States v. Blackwell</i>, 459 F.3d 739, 753 (6th Cir. 2006) (citation omitted))</p> <p>✓ <i>Any Error Harmless</i>: Any error in excluding the defense evidence was harmless beyond a reasonable doubt in light of the otherwise overwhelming evidence of guilt</p>	<p><i>United States v. Hardy</i>, 586 F.3d 1040 (6th Cir. Nov. 20, 2009) (No. 08-5421) (Kennedy, Rogers, <u>Hood</u>)</p> <p>Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_Hardy.pdf</p> <p>Case Result: Affirming convictions</p> <p>Cross-Reference: Fifth Amendment, Sixth Amendment, FRE 1101</p> <p>Evidence Principle No.: 10</p> <p>Circuits At A Glance: p. 1137</p>
	<p>In SEC enforcement action seeking civil penalties for securities fraud in a scheme for investments by a state pension fund, admission of evidence of prior bad acts by the manager of the state fund was admissible, even if erroneous because it was harmless as there was other substantial evidence of the defendant’s violations and the court “instructed the jury three times” at different trial stages not to “impute” the witness’s previous wrongdoing” on to the defendant</p>	<p><i>S.E.C. v. DiBella</i>, 587 F.3d 553 (2d Cir. Nov. 25, 2009) (Nos. 08-1673-CV (L), 08-3797-CV (CON)) (Miner, <u>Wesley</u>, Stanceu (Ct of Int. Trade))</p> <p>Case Link: http://federalevidence.com/pdf/2009/11-Nov/SEC_v_DiBella.pdf</p> <p>Case Result: Civil penalties and disgorgement remedy</p> <p>Cross-Reference: FRE 404(b)</p> <p>Evidence Principle No.: 11</p> <p>Circuits At A Glance: p. 1130</p>



Evidence Case Docket

Rule	Evidence Principle	Cases
<p>FRE 103(a) Effect Of Erroneous Ruling: Harmless Error</p>	<p>In diversity negligent traffic accident case, harmless error resulted when trial court limited plaintiff's cross-examination of defense expert regarding whether an extensive search by the defendant failed to produce evidence that would refute plaintiff's version of how the accident occurred; exclusion of plaintiff's inquiry into absence of record that would support the defendant's contention as to cause of accident was harmless because evidence of no record is of little probative value and was "not ... very strong evidence"</p>	<p><i>Dortch v. Fowler</i>, ___ F.3d ___ (6th Cir. Nov. 30, 1009) (No. 08-5476) (O'Connor (US SupCt), <u>Gilman</u>, Gibbons)</p> <p>Case Link: http://federalevidence.com/pdf/2009/11-Nov/Dortch_v_Fowler.pdf</p> <p>Case Result: Affirming summary judgment for defendant driver's employer and jury's finding for the defendant truck driver on the underlying negligence claim)</p> <p>Cross-Reference: FRE 401, FRE 803(8)</p> <p>Evidence Principle No.: 12</p> <p>Circuits At A Glance: p. 1135</p>
	<p>In possession of crack and illegal possession of a firearm case, admission of testimony by defendant's girlfriend that although she had never seen the defendant with a gun, he "brag[ged] about ... the weapons he had"; even if erroneously admitted this prior act evidence was harmless because the evidence of his possession "was very strong" since the defendant himself told officers he stored guns in his girlfriend's bedroom and personally directed officers to the storage container there where guns were found</p>	<p><i>United States v. Harris</i>, 587 F.3d 861 (7th Cir. Nov. 25, 2009) (No. 07-4017) (Easterbrook, <u>Williams</u>, Sykes)</p> <p>Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_Harris_7th.pdf</p> <p>Case Result: Affirming conviction</p> <p>Cross-Reference: FRE 403, FRE 404(b)</p> <p>Evidence Principle No.: 13</p> <p>Circuits At A Glance: p. 1139</p>



Evidence Case Docket

Rule	Evidence Principle	Cases
<p>FRE 103(d) Plain Error</p>	<p>In methamphetamine distribution trial:</p> <ul style="list-style-type: none"> ✓ Detective's testimony about hearing defendant's name mentioned by the cooperating witness as the supplier of the drugs in a controlled buy was inadmissible hearsay because it was offered for its truth that the defendant was a drug supplier and was not necessary to provide "a coherent story about" the investigation of the defendant; the error was not plain error as it did not affect the outcome of the trial based on other evidence presented ✓ <i>Not Background Evidence</i>: The testimony was inadmissible non-hearsay background evidence concerning the investigation because the testimony "was entirely unnecessary to explain the context of the police investigation" and "the only purpose ... was to bolster the government's claim that Hinson was, in fact, Pingry's drug supplier" which was inadmissible hearsay ✓ <i>Not Plain Error</i>: The admission of the hearsay testimony was not plain error because it did not "affect the outcome" of the trial as the cooperating witness also testified that the defendant was his supplier which was corroborated by the evidence obtained during the controlled buy; consequently, the hearsay was unlikely to have had "any serious impact" on the conviction ✓ Any error in introducing evidence that the defendant was carrying more than \$40,000 in cash at the time of his arrest, which may have been inadmissible under the exclusionary rule did not affect the outcome of the trial and was not plain error ✓ <i>Plain Error Elements</i>: "Plain error occurs when there is (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." (quoting <i>United States v. Alapizco-Valenzuela</i>, 546 F.3d 1208, 1222 (10th Cir. 2008)) 	<p><i>United States v. Hinson</i>, 585 F.3d 1328 (10th Cir. Nov. 3, 2009) (No. 08-3086) (Lucero, <u>Ebel</u>, Tymkovich)</p> <p>Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v._Hinson.pdf</p> <p>Case Result: Affirming conviction</p> <p>Cross-Reference: FRE 401, FRE 801(c), FRE 1101</p> <p>Evidence Principle No.: 14</p> <p>Circuits At A Glance: p. 1142</p>



Evidence Case Docket

Rule	Evidence Principle	Cases
<p>FRE 103(d) Plain Error</p>	<p>In a bench trial for possession of cocaine with intent to distribute and related firearms offenses prosecution:</p> <p>✓ <i>Confrontation Clause</i>: Admission of drug lab report without the testimony of the authoring analyst violated the Confrontation Clause because even “sworn certificates of analysis detailing the results of forensic analyses on suspected drugs are testimonial statements for purposes of the Confrontation Clause” (citing <i>Melendez-Diaz v. Massachusetts</i>, 129 S.Ct. 2527, 2532 (2009) and <i>Crawford v. Washington</i>, 541 U.S. 36, 59 (2004) (testimonial statements by a non-testifying witness inadmissible unless the witness is unavailable and was previously subject to cross-examination by the defendant))</p> <p>✓ <i>Any Error Not Plain</i>: Any error from the admission of a drug lab test that reported the presence of cocaine was not plain error despite failure of the reporting analyst to testify at trial because the lab supervisor who reviewed and signed the report did testify, was subject to cross-examination, and the defendant failed to object to supervisor’s testimony or to the report (despite ambiguity as to whether the supervisor had personal knowledge of tests performed)</p>	<p><i>United States v. Rose</i>, 587 F.3d 695 (5th Cir. Nov. 6, 2009) (No. 08-10813) (King, Davis, Benavides) (<i>per curiam</i>)</p> <p>Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_Rose.pdf</p> <p>Case Result: Affirming convictions</p> <p>Blog Post: http://federalevidence.com/node/567</p> <p>Cross Reference: Sixth Amendment</p> <p>Evidence Principle No.: 15</p> <p>Circuits At A Glance: p. 1132</p>
	<p>In methamphetamine distribution trial, detective’s testimony about hearing defendant’s name mentioned by the cooperating witness as the supplier of the drugs in a controlled buy was inadmissible hearsay because it was offered for its truth that the defendant was a drug supplier and was not necessary to provide “a coherent story about” the investigation of the defendant; the error was not plain error as it did not affect the outcome of the trial based on other evidence presented</p>	<p><i>United States v. Hinson</i>, 585 F.3d 1328 (10th Cir. Nov. 3, 2009) (No. 08-3086) (Lucero, Ebel, Tymkovich)</p> <p>Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_Hinson.pdf</p> <p>Case Result: Affirming conviction</p> <p>Cross-Reference: FRE 801(c), FRE 1101</p> <p>Evidence Principle No.: 16</p> <p>Circuits At A Glance: p. 1142</p>



Evidence Case Docket

Rule	Evidence Principle	Cases
<p>FRE 401 Definition of “Relevant Evidence”</p>	<p>In diversity negligent traffic accident case, trial court erroneously limited plaintiff’s cross-examination of defense expert regarding whether an extensive search by the defendant failed to produce evidence that would refute plaintiff’s version of how the accident occurred</p> <p>✓ <i>Central Issue Was Cause Of Road Gouge Marks</i>: The “trial boiled down to whether the accident occurred in Dortch’s or Fowler’s lane of travel. Central to that inquiry is whether either of the two gouges (one in each lane) was caused by the underlying accident” – the gouge on one side would suggest the defendant caused the accident, the gouge on the opposite side would suggest the plaintiff caused the accident</p> <p>✓ <i>“Extremely Liberal” Test of Relevance</i>: As FRE 401 defines relevant evidence as that having “any tendency” to make the existence of a fact of consequence more or less probable, proof of the absence of evidence is admissible under FRE 401 because “a piece of evidence does not need to carry a party’s evidentiary burden in order to be relevant; it simply has to advance the ball”</p> <p>✓ <i>Relevance Of No Record Found</i>: Circuit distinguishes between evidence that a record was searched for and was not found (which would be relevant if there was a practice of keeping “extensive” records of accidents), from where nobody searched for a record and so nothing was found (in which case the fact nothing was found would not be relevant)</p> <p>✓ <i>FRE 103(a) (Harmless Error)</i>: Exclusion of plaintiff’s inquiry into absence of record that would support the defendant’s contention as to cause of accident was harmless because evidence of no record is of little probative value and was “not ... very strong evidence”</p>	<p><i>Dortch v. Fowler</i>, __ F.3d __ (6th Cir. Nov. 30, 1009) (No. 08-5476) (O’Connor (US SupCt), <u>Gilman</u>, Gibbons)</p> <p>Case Link: http://federalevidence.com/pdf/2009/11-Nov/Dortch_v_Fowler.pdf</p> <p>Case Result: Affirming summary judgment for defendant driver’s employer and jury’s finding in favor of the defendant truck driver on the underlying negligence claim)</p> <p>Cross-Reference: FRE 803(8)</p> <p>Evidence Principle No.: 17</p> <p>Circuits At A Glance: p. 1136</p>



Evidence Case Docket

Rule	Evidence Principle	Cases
<p>FRE 402 Relevant Evidence Generally Admissible</p>	<p>In trial for attempting to entice a minor to engage in sexual activity and transferring obscene material to a minor, evidence of the defendant's 2001 conviction for soliciting a minor and of his 2005 conduct of attempting to have sexual contact with a minor was erroneously excluded</p> <p>✓<i>FRE 402 Application:</i> Defendant's previous conviction for sexual solicitation of a minor as well as his prior conduct of engaging in sexually explicit Internet conversations with a 14-year-old girl were relevant to show the defendant intended to send the charged obscene picture that the minor received and intended to persuade the minor to engage in sexual acts; the prior crime or act evidence would establish a motive (to satisfy his desire for engaging in sexual activity with a minor or having done it before, was more likely to do so again)</p> <p>✓<i>Role Of FRE 403 Balancing:</i> A trial judge's decision to exclude FRE 413 evidence "based on the prejudicial effect of the propensity inference" is "problematic" as the court in conducting a FRE 403 balance must "acknowledge the probative value of the propensity inference" as well as "explain what about [defendant's] particular prior sexual offenses made them more prejudicial than probative"</p>	<p><i>United States v. Rogers</i>, 587 F.3d 816 (7th Cir. Nov. 18, 2009) (No. 08-1516) (Cudahy, Flaum, <u>Wood</u>)</p> <p>Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_Rogers.pdf</p> <p>Case Result: In interlocutory appeal by government, reversing and remanding exclusion order</p> <p>Cross-Reference: FRE 403, FRE 413</p> <p>Evidence Principle No.: 18</p> <p>Circuits At A Glance: p. 1138</p>



Evidence Case Docket

Rule	Evidence Principle	Cases
<p>FRE 403 Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time</p>	<p>Affirming denial of a new trial after conviction for soliciting murder of federal officials because the trial judge did not abuse his discretion by excluding the letter and military service file offered by the defendant to show that a key government witness misrepresented himself as having heroic military experience; <i>en banc</i> panel reverses three-judge panel</p> <p>✓ <i>Balancing Test</i>: Under FRE 403 the documentary evidence had limited probative value to impeach the witness, since the trial judge instructed the jury to disregard the witness's testimony about having a military award; the risk of confusing the jury about this "tangential evidence" and "the time it would take to authenticate and explain" the witness's military file created a "risk of undue prejudice [that] substantially outweighed the reward"</p> <p>✓ <i>Application Of Abuse Standard</i>: The risk of the evidence on the military award substantially outweighed the reward; this finding of unfair prejudice was not illogical nor implausible and was based on the record, and did not exceed the bounds of the district court's discretion in applying FRE 403</p>	<p><i>United States v. Hinkson</i>, 585 F.3d 1247 (9th Cir. Nov. 5, 2009) (No. 05-30303) (<i>en banc</i>) (Kozinski, Pregerson (dissenting), O'Scannlain, Kleinfeld, McLane, Wardlaw (dissenting), W.Fletcher (dissenting), Paez (dissenting), Callahan, <u>Bea</u>, Ikuta, Smith)</p> <p>Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_Hinkson.pdf</p> <p>Case Result: Affirming conviction</p> <p>Cross-Reference: Other Significant Evidence Issues (Abuse Of Discretion Standard)</p> <p>Evidence Principle No.: 19</p> <p>Circuits At A Glance: p. 1141</p>
	<p>In conspiracy to possess with intent to distribute heroin resulting in serious bodily injury trial, evidence of a prior heroin conviction, prior methamphetamine arrest and arrest after officers observed him conducting cell phone heroin transaction while in police custody</p> <p>✓ <i>FRE 103(a) Harmless Error</i>: Even if admitting the cell phone arrest evidence was "duplicative and unnecessary," under FRE 403, the defendant was "entitled to no relief because he has made absolutely no showing of prejudice"</p>	<p><i>United States v. Cockrell</i>, 587 F.3d 674 (5th Cir. Nov. 6, 2009) (No. 08-41008) (King, <u>Garza</u>, Haynes)</p> <p>Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_Cockrell.pdf</p> <p>Case Result: Affirming conviction</p> <p>Cross-Reference: FRE 103(a), FRE 404(b)</p> <p>Evidence Principle No.: 20</p> <p>Circuits At A Glance: p. 1132</p>



Evidence Case Docket

Rule	Evidence Principle	Cases
<p>FRE 403 Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time</p>	<p>In prosecution of defendant attorney for aiding her client (a seditious conspiracy convict) circumvent Special Administrative Measures designed to prevent the client's communications with terrorist organizations:</p> <ul style="list-style-type: none"> ✓ Admitting book and videotape by foreign terrorists (including Taha, Osama Bin Laden, and other members) encouraging violence which was relevant to the terrorist's intent to murder or kidnap, an element in aided the scheme, and to the existence of the charged conspiracy to murder persons in a foreign country ✓ Excluding news footage "purporting to depict Israeli violence against Palestinian demonstrators" which was of minimal relevance and highly prejudicial and confusing ✓ Excluding the defendant's statements to the FBI which were "essentially duplicative" of the defendant's testimony 	<p><i>United States v. Stewart</i>, __ F.3d __ (2d Cir. Nov. 17, 2009) (Nos. 06-5015-cr (L), 06-5031-cr (con), 06-5093-cr (con), 06-5131-cr (con), 06-5135-cr (con), 06-5143-cr (con)) (Walker (concurring and dissenting in part), Calabresi (concurring), <u>Sack</u>)</p> <p>Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v._Stewart.pdf</p> <p>Case Result: Affirming convictions, but remanding for resentencing</p> <p>Cross-Reference: FRE 501</p> <p>Evidence Principle No.: 21</p> <p>Circuits At A Glance: p. 1130</p>



Evidence Case Docket

Rule	Evidence Principle	Cases
<p>FRE 403 Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time</p>	<p>In trial for attempt to entice a minor to engage in sexual activity and transferring obscene material to a minor, evidence of the defendant's 2001 conviction for soliciting a minor and of his 2005 conduct of attempting to have sexual contact with a minor was erroneously excluded</p> <p>✓<i>FRE 402 (Relevant Evidence Generally Admissible)</i>: The defendant's previous conviction for sexual solicitation of a minor as well as his prior conduct of engaging in sexually explicit Internet conversations with a 14-year-old girl were relevant to show the defendant intended to send the charged obscene picture that the minor received and intended to persuade the minor to engage in sexual acts; the prior crime or act evidence would establish a motive (to satisfy his desire for engaging in sexual activity with a minor or having done it before, was more likely to do so again)</p> <p>✓<i>Role Of FRE 403 Balancing</i>: A trial judge's decision to exclude FRE 413 evidence "based on the prejudicial effect of the propensity inference" is "problematic" as the court in conducting a FRE 403 balance must "acknowledge the probative value of the propensity inference" as well as "explain what about [defendant's] particular prior sexual offenses made them more prejudicial than probative"</p> <p>✓<i>Application Of FRE 403 To FRE 413 Evidence</i>: FRE 413 prior act evidence is not <i>per se</i> non-prejudicial under FRE 403; where FRE 413 evidence "risk[s] a decision on the basis of something like passion or bias-that is, an improper basis" it is excludable under FRE 403 since all FRE 413 does is make a "propensity inference permissible" under FRE 403; thus where FRE 413 evidence risks a jury decision on the basis that "it is appalled by a prior crime the defendant committed rather than persuaded that he committed the crime charged," it is properly excluded under FRE 403 as unduly prejudicial</p> <p>✓<i>FRE 403 Balance Required</i>: FRE 413 "affects the Rule 403 analysis of past sexual offenses introduced in sexual assault cases"; FRE 413 serves as "an exception" to FRE 404(b) which identifies propensity inferences as improper";</p> <p><i>Case continued on next page</i></p>	<p><i>United States v. Rogers</i>, 587 F.3d 816 (7th Cir. Nov. 18, 2009) (No. 08-1516) (Cudahy, Flaum, <u>Wood</u>)</p> <p>Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v._Rogers.pdf</p> <p>Case Result: In interlocutory appeal by government, reversing and remanding exclusion order</p> <p>Cross-Reference: FRE 402, FRE 413</p> <p>Evidence Principle No.: 22</p> <p>Circuits At A Glance: p. 1138</p>



Evidence Case Docket

Rule	Evidence Principle	Cases
<p>FRE 403 Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time</p>	<p><i>Case continued from previous page</i></p> <p>✓ <i>Policy Promoted:</i> “Because Rule 413 identifies this propensity inference as proper, the chance that the jury will rely on that inference can no longer be labeled as ‘unfair’ for purposes of the Rule 403 analysis.”</p> <p>✓ <i>Differential Analysis:</i> “[A] court’s Rule 403 analysis of prior conduct differs if the evidence [also] falls under Rule 404(b) versus Rule 413; in the former analysis, the rule has decreed that the propensity inference is too dangerous [and would tend to be excluded], while in the latter [FRE 413 analysis], the propensity inference is permitted for what it is worth.”</p> <p>✓ <i>Circuit Split: Rejecting List Of Standard FRE 413 Factors:</i> The Seventh Circuit rejects the Ninth Circuit’s approach to determining if FRE 413 evidence is unfairly prejudicial under FRE 403; “unlike our colleagues in the Ninth Circuit, we believe that lists [of factors] are unhelpful in the end for this inquiry” (citing <i>United States v. LeMay</i>, 260 F.3d 1018 (9th Cir. 2001) (requiring district courts to consider five enumerated factors))</p>	<p><i>United States v. Rogers</i>, 587 F.3d 816 (7th Cir. Nov. 18, 2009) (No. 08-1516) (Cudahy, Flaum, <u>Wood</u>)</p>



Evidence Case Docket

Rule	Evidence Principle	Cases
<p>FRE 403 Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time</p>	<p>In tax evasion trial concerning defendant doctor's embezzlement of payments due to his health clinic employer, notwithstanding the marital communications privilege, the defendant's former wife could testify "regarding ongoing conversations with [defendant] Miller during their marriage in which they disagreed about Miller's decision not to file income tax returns" and that "she ultimately consented to Miller's decision, even though she believed that she was committing a crime by failing to file" and about how to process embezzled payments (even though only the defendant and not the former spouse witness was charged with that offense):</p> <p>✓ <i>Excluding Negotiated Settlement Agreement:</i> Evidence that the defendant and his employer negotiated a tentative settlement agreement about their dispute on employment contract payments was excluded because its probative value was minimal (as the negotiations dealt solely with disputed employment compensation contract payments and not later-learned evidence of defendant's embezzlement) and substantially outweighed by its potential to confuse the jury in determining the tax evasion charges</p> <p>✓ <i>Admitting Ex-Wife's Testimony:</i> The confidential marital communications privilege did not apply to the former wife's "belief that she and her husband were involved in joint criminal activity" as no communications were involved by testimony concerning her beliefs; the testimony was not unfairly prejudicial as it was "both highly probative and important for determining whether the marital privilege applies"; its probative value was not substantially outweighed by any danger of "guilt by association"</p>	<p><i>United States v. Miller</i>, ___ F.3d ___ (5th Cir. Nov. 20, 2009) (No. 08-31168) (Jones, Garza, Stewart)</p> <p>Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_Miller.pdf</p> <p>Case Result: Affirming tax evasion conviction</p> <p>Blog Post: http://federalevidence.com/node/575</p> <p>Cross-Reference: FRE 408, FRE 501</p> <p>Evidence Principle No.: 23</p> <p>Circuits At A Glance: p. 1134</p>



Evidence Case Docket

Rule	Evidence Principle	Cases
<p>FRE 403 Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time</p>	<p>In tax and fraud trial involving the operation of temporary employment agencies:</p> <p>✓ <i>Admitting Charts</i> and testimony of an IRS agent as a summary witness (based on examining defendant's companies' business records to calculate nearly \$10 million due in employment taxes)</p> <p>✓ <i>Admitting Summary Testimony</i> by an insurance fraud investigator (using reported payroll to determine lost workers comp premiums of about \$6.5 million due)</p> <p>✓ <i>Not Unfairly Prejudicial</i>: The summary evidence was not excludable under FRE 403 because it "was probative of the defendants' knowledge of their tax and insurance obligations and their intent to commit fraud" and its "alleged prejudice" in relying "on the contested testimony of" another witness "was minimal because the defendants had an opportunity to cross-examine both" the summary witness and the witness on which the summary was based</p>	<p><i>United States v. McElroy</i>, 587 F.3d 73 (1st Cir. Nov. 20, 2009) (Nos. 08-2088, 08-2471) (Torruella, <u>Ripple</u> (7th), Boudin)</p> <p>Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_McElroy.pdf</p> <p>Case Result: Affirming conviction</p> <p>Cross-Reference: FRE 103(a), FRE 803(1), FRE 1006</p> <p>Evidence Principle No.: 24</p> <p>Circuits At A Glance: p. 1128</p>



Evidence Case Docket

Rule	Evidence Principle	Cases
<p>FRE 403 Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time</p>	<p>In possession of crack and illegal possession of a firearm case, admission of testimony by police officer that the defendant told him in a post-arrest interview that the defendant “was having a dispute with a group of individuals from approximately 59th and Sangamon ... that that was why he had the firearms...” was not unduly prejudicial gang testimony, as the officer did not directly state the defendant belonged to a gang and the testimony was highly probative as to defendant’s motive for having the charged firearms</p> <p>✓ <i>“Toning Down” Gang-Related Testimony:</i> Because of its inflammatory potential, trial court should “consider carefully” whether to admit evidence of gang membership and gang activity” by, for example, [1] directing witnesses not to “directly state” that defendant was a gang member, [2] eliminating references to evidence developed through use of a technique designed to recover gang evidence and [3] allowing the prosecutor to lead the witness during testimony where the witness might mention gangs, so that the witness’s testimony is “far less inflammatory than it would have been” had the witness testified to the defendant’s “own words” regarding gang activities</p> <p>✓ <i>“Toning Down” Gang-Related Testimony Insufficient:</i> Efforts to tone-down gang-related testimony may be insufficient when there is no link between the gang activity and the charged criminal activity; in defendant’s case the gang activity was directly related to his motive to have the illegal weapon, so that introduction of “toned-down” gang testimony was not unduly prejudicial in rendering its verdict based on its “negative feelings toward gangs”</p>	<p><i>United States v. Harris</i>, 587 F.3d 861 (7th Cir. Nov. 25, 2009) (No. 07-4017) (Easterbrook, <u>Williams</u>, Sykes)</p> <p>Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_Harris_7th.pdf</p> <p>Case Result: Affirming conviction</p> <p>Cross-Reference: FRE 103(a), FRE 404(b)</p> <p>Evidence Principle No.: 25</p> <p>Circuits At A Glance: p. 1139</p>



Evidence Case Docket

Rule	Evidence Principle	Cases
<p>FRE 404(b) Other Crimes, Wrongs or Acts</p>	<p>In conspiracy to possess with intent to manufacture and distribute methamphetamine trial, admitting evidence of defendant's purchase of ten kilograms of cocaine five years earlier under FRE 404(b) as relevant to show intent, which the defendant's not guilty plea put in issue, and its "probative value ... outweighed the possible prejudice"</p> <p>✓ <i>Application Of FRE 403 Factors:</i> The other act evidence was relevant to the charge of conspiracy (requiring proof of defendant's intent) and the prior act evidence (conspiracy to sell a controlled substance) was similar to the charged crime, and because it occurred five years before the charged offense, was sufficiently close in time</p> <p>✓ <i>Limiting Instructions & Prejudice:</i> Trial court's limiting instruction greatly minimized any risk of undue prejudice from admitting the other act evidence</p> <p>✓ <i>FRE 404(b) Foundation:</i> Other act evidence is admissible if it "[1] is relevant to an issue other than [defendant's] character and ...[2] its probative value is not substantially outweighed by the danger of unfair prejudice," (citing <i>United States v. Beechum</i>, 582 F.2d 898, 911 (5th Cir. 1978) (<i>en banc</i>))</p> <p>✓ <i>Assessing 403 Balance:</i> In assessing if the other act evidence's probative value is outweighed by its possible prejudice, the circuit considers "[1] the extent to which unlawful intent was established by other evidence, [2] the similarity between the extrinsic and charged offenses, and [3] the amount of time separating the other act and the charged offense"</p>	<p><i>United States v. Mendoza</i>, 587 F.3d 682 (5th Cir. Nov. 6, 2009) (No. 08-41052) (Jones, <u>Smith</u>, DeMoss)</p> <p>Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v._Mendoza.pdf</p> <p>Case Result: Affirming conviction</p> <p>Evidence Principle No.: 26</p> <p>Circuits At A Glance: p. 1131</p>



Evidence Case Docket

Rule	Evidence Principle	Cases
<p>FRE 404(b) Other Crimes, Wrongs or Acts</p>	<p>In conspiracy to possess with intent to distribute heroin resulting in serious bodily injury trial, admitting evidence of a prior heroin conviction, prior methamphetamine arrest and arrest after officers observed the defendant conducting cell phone heroin transaction while in police custody</p> <p>✓<i>Prior Conviction</i>: The defendant’s plea of not guilty raised the issue of his intent and the other crimes evidence was relevant to show intent since was it was similar to the charged crime; the prior conviction occurred seven years before the current charges, the prior crime evidence was not “heinous” in nature as would incite the jury to an irrational decision; the trial judge provided limiting instructions regarding the other act evidence which mitigated prejudice</p> <p>✓<i>Prior Arrest</i>: The arrest with the cell was admissible to show intent as the defendant’s plea of not guilty raised the issue of his intent; the arrest was contemporaneous with the charged heroin conspiracy and the prosecutor needed corroborative evidence of testimony by indicted and unindicted co-conspirators who purchased or received drugs from the defendant; the trial judge provided limiting instructions minimizing any prejudice</p> <p>✓<i>FRE 103(a) Harmless Error</i>: Even if admitting the cell phone arrest evidence was “duplicative and unnecessary,” under FRE 403, the defendant was “entitled to no relief because he has made absolutely no showing of prejudice”</p> <p>✓<i>FRE 404(b) Foundational Elements</i>: The Fifth Circuit “applies a two-pronged analysis.... First, the evidence of ‘other crimes, wrongs, or acts’ must be relevant to an issue other than the defendant’s character... [with] [t]he standard of relevancy under Rule 401 applie[d],” so that relevance “is a function of its similarity to the offense charged.”; “Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice” under FRE 403, examining the “extent to which the defendant’s unlawful intent is established by other evidence...” and by “[o]ther factors ... [which] include ‘the overall similarity of the extrinsic and charged offenses, and the amount of time that separates the extrinsic and charged offenses’ as well as any limiting instructions.” (citations omitted)</p>	<p><i>United States v. Cockrell</i>, 587 F.3d 674 (5th Cir. Nov. 6, 2009) (No. 08-41008) (King, <u>Garza</u>, Haynes)</p> <p>Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_Cockrell.pdf</p> <p>Case Result: Affirming conviction</p> <p>Cross-Reference: FRE 103(a), FRE 403</p> <p>Evidence Principle No.: 27</p> <p>Circuits At A Glance: p. 1132</p>



Evidence Case Docket

Rule	Evidence Principle	Cases
<p>FRE 404(b) Other Crimes, Wrongs or Acts</p>	<p>In conspiracy to manufacture, distribute and possess cocaine and crack cocaine trial, admitting evidence of the defendant's prior convictions six years earlier for the sale of cocaine, the sale and delivery of a controlled substance, and several counts of possession of cocaine under FRE 404(b)</p> <p>✓ <i>Prior Drug Convictions</i>: The prior convictions were probative of the defendant's intent to commit the charged offenses and the prior convictions began only six years prior to beginning of the charged conspiracy which was not too remote</p> <p>✓ <i>Prejudicial Assessment For FRE 404(b) Evidence</i>: In considering other act evidence under FRE 404(b) whether proffered "evidence is more probative than prejudicial" involves a "common sense assessment of all the circumstances surrounding the extrinsic offense," including prosecutorial need, overall similarity between the extrinsic act and the charged offense, as well as temporal remoteness" (citations omitted)</p>	<p><i>United States v. Brown</i>, 587 F.3d 1082 (11th Cir. Nov. 10, 2009) (No. 07-13007) (Carnes, Fay, <u>Alarcón</u> (9th))</p> <p>Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v._Brown.pdf</p> <p>Case Result: Affirming conviction</p> <p>Cross-Reference: FRE 901</p> <p>Evidence Principle No.: 28</p> <p>Circuits At A Glance: p. 1142</p>



Evidence Case Docket

Rule	Evidence Principle	Cases
<p>FRE 404(b) Other Crimes, Wrongs or Acts</p>	<p>In mortgage fraud scheme based on fraudulent documents concerning the appraised value and the straw purchaser's financial standing, admitting evidence of five uncharged fraudulent real estate transactions that were "materially indistinguishable" from the charged schemes to show "intent, knowledge, motive, and plan":</p> <p>✓ <i>Relevance Factor</i>: "In the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor"; the government was required only to show that the defendant knowingly was involved in the other similar fraudulent schemes, not that he personally tendered the fraudulent documents to lenders in the uncharged transactions</p> <p>✓ <i>Not Outweighed by Undue Prejudice Factor</i>: The other act evidence was probative of the defendant's role in the fraudulent scheme and his "intent, knowledge, motive, and plan"; any unfair prejudice was minimized by a detailed limiting instruction, prohibiting use of the evidence of the other five uncharged transactions "in deciding if defendant[s] ... committed the acts charged"</p> <p>✓ <i>Harmless Error</i>: Even if the trial court erred in admitting five uncharged fraudulent real estate transactions, it was harmless because the defendant failed to show that the evidence affected his substantial rights</p> <p>✓ <i>FRE 404(b) Foundational Elements</i>: Under FRE 404(b), other act evidence is admitted in the Fifth Circuit under "a two-step inquiry. First, the court must determine whether the extrinsic evidence is relevant to an issue other than the defendant's character, such as 'motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.' Second, the probative value must not be substantially outweighed by the potential for undue [unfair] prejudice." (citing <i>United States v. Beechum</i>, 582 F.2d 898, 911 (5th Cir. 1978) (<i>en banc</i>))</p>	<p><i>United States v. Cooks</i>, ___ F.3d ___ (5th Cir. Nov. 23, 2009) (No. 07-11151) (Higginbotham, Stewart, Englehardt (DJ))</p> <p>Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v._Cooks.pdf</p> <p>Case Result: Affirming convictions</p> <p>Cross-Reference: FRE 103(a), FRE 701, FRE 702</p> <p>Evidence Principle No.: 29</p> <p>Circuits At A Glance: p. 1135</p>



Evidence Case Docket

Rule	Evidence Principle	Cases
<p>FRE 404(b) Other Crimes, Wrongs or Acts</p>	<p>In SEC enforcement action seeking civil penalties for securities fraud in a scheme for investments by a state pension fund, evidence of prior bad acts by the manager of the victim state fund was admissible because it demonstrated the manager's knowledge or absence of mistake and that he knew how to illegally take advantage of his position for personal gain, and any error was harmless</p>	<p><i>S.E.C. v. DiBella</i>, 587 F.3d 553 (2d Cir. Nov. 25, 2009) (Nos. 08-1673-CV (L), 08-3797-CV (CON)) (Miner, <u>Wesley</u>, Stanceu (Ct of Int. Trade))</p> <p>Case Link: http://federalevidence.com/pdf/2009/11-Nov/SEC_v_DiBella.pdf</p> <p>Case Result: Civil penalties and disgorgement remedy</p> <p>Cross-Reference: FRE 103(a) Evidence Principle No.: 30</p> <p>Circuits At A Glance: p. 1130</p>
	<p>In possession of crack and illegal possession of a firearm case, admission of testimony by defendant's girlfriend about seeing defendant's previous drug sales was admitted as relevant to his intent to distribute crack cocaine as charged</p> <p>✓ <i>FRE 404(b) Foundation Satisfied:</i> Other Act evidence was [1] relevant as defendant claimed the seized drugs he was only holding for another person, [2] sufficiently similar as the prior drug sales involved a form of cocaine [3] close in time to the current charge against the defendant, as the prior sales occurred within two-years of his arrest; and [4] its probative value outweighed the danger of unfair prejudice, particularly in light of the court's limiting jury instruction</p> <p>✓ <i>Circuit Notes Standard Approach:</i> The circuit noted that "[w]e long ago rejected the proposition that a drug conviction is always admissible in a later, different drug prosecution" in order to prove defendant's intent, but that such prior act evidence is "most obvious[ly] justifiable" in drug prosecutions on the issue of intent when the defendant, "while admitting possession" of the drug, "denies the intent to distribute it" as in the defendant's case here</p>	<p><i>United States v. Harris</i>, 587 F.3d 861 (7th Cir. Nov. 25, 2009) (No. 07-4017) (Easterbrook, <u>Williams</u>, Sykes)</p> <p>Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_Harris_7th.pdf</p> <p>Case Result: Affirming conviction</p> <p>Cross-Reference: FRE 103(a); FRE 403</p> <p>Evidence Principle No.: 31</p> <p>Circuits At A Glance: p. 1139</p>



Evidence Case Docket

Rule	Evidence Principle	Cases
<p>FRE 408 Compromise and Offers to Compromise</p>	<p>In tax evasion trial concerning defendant doctor's embezzlement of payments due to his health clinic employer:</p> <p>✓ <i>Noting But Not Deciding Issue:</i> Although FRE 408 applied to criminal cases in the Fifth Circuit, declining to address whether the employment contract negotiations were admissible "because the evidence regarding settlement negotiations is excludable" under FRE 403</p> <p>✓ <i>Circuit Split Noted:</i> Noting that FRE 408 "applies in criminal cases" and a "split in authority in our sister circuits on this issue" (citing <i>United States v. Bailey</i>, 327 F.3d 1131, 1144-47 (10th Cir. 2003) (discussing circuit split); <i>United States v. Hays</i>, 872 F.2d 582, 588-89 (5th Cir. 1989) (Fifth Circuit position that FRE 408 applies in criminal cases))</p>	<p><i>United States v. Miller</i>, ___ F.3d ___ (5th Cir. Nov. 20, 2009) (No. 08-31168) (Jones, Garza, Stewart)</p> <p>Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_Miller.pdf</p> <p>Case Result: Affirming tax evasion conviction</p> <p>Cross-Reference: FRE 403, FRE 501</p> <p>Evidence Principle No.: 32</p> <p>Circuits At A Glance: p. 1134</p>



Evidence Case Docket

Rule	Evidence Principle	Cases
<p>FRE 413 Similar Crimes in Sexual Abuse Cases</p>	<p>In trial for attempt to entice a minor to engage in sexual activity and transferring obscene material to a minor, evidence of the defendant's 2001 conviction for soliciting a minor and of his 2005 conduct of attempting to have sexual contact with a minor was erroneously excluded</p> <p>✓<i>Prior Conviction Satisfied FRE 413</i>: Both requirements for FRE 413 were met: (1) “the government charged Rogers with an attempt to entice a minor to engage in sexual activity,” satisfying the element of a charge involving “an offense of sexual assault”; and (2) the prior act involved “an offense of sexual assault” based on the guilty plea “to knowingly soliciting a person he believed to be a minor to perform an act of sexual penetration.”</p> <p>✓<i>Prior Attempting To Have Sexual Contact With A Minor Satisfied FRE 413</i>: Trial court erred in considering whether minor consented to contact. “Minors lack the capacity to consent, and so sexual contact with a minor is always ‘without consent.’ Attempting to have sexual contact with the 14-year-old girl therefore qualifies as an ‘offense of sexual assault’ under Rule 413,” satisfying the second requirement. (citation omitted)</p> <p>✓<i>FRE 402 (Relevant Evidence Generally Admissible)</i>: Defendant's previous conviction for sexual solicitation of a minor as well as his prior conduct of engaging in sexually explicit Internet conversations with a 14-year-old girl were relevant to show the defendant intended to send the charged obscene picture that the minor received and intended to persuade the minor to engage in sexual acts; the prior crime or act evidence would establish a motive (to satisfy his desire for engaging in sexual activity with a minor or having done it before, was more likely to do so again)</p> <p>✓<i>Role Of FRE 403 Balancing</i>: A trial judge's decision to exclude FRE 413 evidence “based on the prejudicial effect of the propensity inference” is “problematic” as the court in conducting a FRE 403 balance must “acknowledge the probative value of the propensity inference” as well as “explain what about [defendant's] particular prior sexual offenses made them more prejudicial than probative”</p> <p><i>Case continued on next page</i></p>	<p><i>United States v. Rogers</i>, 587 F.3d 816 (7th Cir. Nov. 18, 2009) (No. 08-1516) (Cudahy, Flaum, Wood)</p> <p>Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_Rogers.pdf</p> <p>Case Result: In interlocutory appeal by government, reversing and remanding exclusion order</p> <p>Cross-Reference: FRE 402, FRE 403</p> <p>Evidence Principle No.: 33</p> <p>Circuits At A Glance: p. 1138</p>



Evidence Case Docket

Rule	Evidence Principle	Cases
	<p><i>Case continued from previous page</i></p> <p>✓ <i>Application Of FRE 403 To FRE 413 Evidence:</i> FRE 413 prior act evidence is not <i>per se</i> non-prejudicial under FRE 403; where FRE 413 evidence “risk[s] a decision on the basis of something like passion or bias—that is, an improper basis” and it is excludable under FRE 403 since all FRE 413 does is make a “propensity inference permissible” under FRE 403; thus where FRE 413 evidence risks a jury decision on the basis that “it is appalled by a prior crime the defendant committed rather than persuaded that he committed the crime charged,” it is properly excluded under FRE 403 as unfairly prejudicial</p> <p>✓ <i>FRE 403 Balance Required:</i> FRE 413 “affects the Rule 403 analysis of past sexual offenses introduced in sexual assault cases”; FRE 413 serves as “an exception” to FRE 404(b) which identifies propensity inferences as improper”; “Because Rule 413 identifies this propensity inference as proper, the chance that the jury will rely on that inference can no longer be labeled as ‘unfair’ for purposes of the Rule 403 analysis”</p> <p>✓ <i>Differential Analysis:</i> “[A] court’s Rule 403 analysis of prior conduct differs if the evidence falls under Rule 404(b) versus Rule 413; in the former analysis, the rule has decreed that the propensity inference is too dangerous, while in the latter, the propensity inference is permitted for what it is worth”</p> <p>✓ <i>Circuit Split: Rejecting List Of Standard FRE 413 Factors:</i> The Seventh Circuit rejects the Ninth Circuit’s approach to determining if FRE 413 evidence is unfairly prejudicial under FRE 403; “unlike our colleagues in the Ninth Circuit, we believe that lists [of factors] are unhelpful in the end for this inquiry” (citing <i>United States v. LeMay</i>, 260 F.3d 1018 (9th Cir. 2001) (requiring district courts to consider five enumerated factors), and noting that the Fourth Circuit has also rejected the Ninth Circuit approach</p>	<p><i>United States v. Rogers</i>, 587 F.3d 816 (7th Cir. Nov. 18, 2009)</p>



Evidence Case Docket

Rule	Evidence Principle	Cases
<p>FRE 501 Confidential Marital Commu- nications Privilege / Adverse Testimony Privilege</p>	<p>In tax evasion trial concerning defendant doctor’s embezzlement of payments due to his health clinic employer, notwithstanding the marital communications privilege, the defendant’s former wife could testify “regarding ongoing conversations with [defendant] Miller during their marriage in which they disagreed about Miller’s decision not to file income tax returns” and that “she ultimately consented to Miller’s decision, even though she believed that she was committing a crime by failing to file” and about how to process embezzled payments (even though only the defendant and not the former spouse witness was charged with that offense):</p> <p>✓ <i>Inapplicability Of Adverse Testimony Privilege:</i> Since the defendant and the former spouse witness were divorced, the spousal testimony privilege (right of a spousal witness to refuse to testify adversely against spouse) did not survive the end of the marriage</p> <p>✓ <i>An Act, Not A Communication:</i> Testimony about the defendant’s “practice of processing payments that were made to the medical clinic” was “not privileged because it refers to acts, not communications”</p> <p>✓ <i>Joint Crime Exception:</i> Testimony about conversations the former spouse had with the defendant “in which they discussed how to process checks and whether they should go into business or personal accounts” and that the defendant “decided not to file taxes after joining [anti-tax protest group] Save-a-Patriot because he believed that filing taxes was not necessary and unconstitutional” was not protected y the confidential marital privilege since the “testimony involved conversations about a joint criminal activity”</p> <p>✓ <i>Not A Confidential Communication:</i> The confidential marital communications privilege did not apply to the former wife’s “belief that she and her husband were involved in joint criminal activity” as no communications were involved by testimony concerning her beliefs; the testimony was not unfairly prejudicial as it was “both highly probative and important for determining whether the marital privilege applies”</p> <p>✓ <i>Joint Crime Exception Elements:</i> The joint crime exception to the confidential marital communications privilege applies to “[1] conversations [2] between husband and wife [3] about crimes [4] in which they are jointly participating” (citing <i>United States v. Ramirez</i>, 145 F.3d 345, 355 (5th Cir. 1998))</p>	<p><i>United States v. Miller</i>, __ F.3d __ (5th Cir. Nov. 20, 2009) (No. 08-31168) (Jones, Garza, Stewart)</p> <p>Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_Miller.pdf</p> <p>Case Result: Affirming tax evasion conviction</p> <p>Blog Post: http://federalevidence.com/node/575</p> <p>Cross-Reference: FRE 403, FRE 408</p> <p>Evidence Principle No.: 34</p> <p>Circuits At A Glance: p. 1134</p>



Evidence Case Docket

Rule	Evidence Principle	Cases
<p>FRE 501 State Secrets Privilege</p>	<p>In prosecution of defendant attorney for aiding her client (a seditious conspiracy convict) circumvent Special Administrative Measures designed to prevent the client's communications with terrorist organizations:</p> <p>✓ Defendant was not entitled to disclosure of classified information regarding whether she or other co-defendants were surveilled by the National Security Agency (NSA) based on the government's invocation of the state-secrets privilege since "details of the NSA's operations ... implicate national security and are among 'the nation's most guarded secrets'"</p> <p>✓ <i>State-Secrets Privilege In Criminal Cases</i>: The state-secrets privilege "applies to criminal cases" but trial court can assess if it "give[s] way under some circumstances to a criminal defendant's right to present a meaningful defense"</p> <p>✓ <i>Three-Part Test</i>: District court properly considers whether the criminal defendant's right to present a defense prevails over the government's privilege by (1) determining <i>in camera</i> and <i>ex parte</i> whether the information sought is relevant, and (2) if relevant, whether the assertion of the state-secrets privilege is colorable, and if colorable, (3) whether the information sought to be disclosed is material to the defense (citing <i>United States v. Aref</i>, 533 F.3d 72, 78 (2d Cir. 2008); <i>United States v. Yunis</i>, 867 F.2d 617, 622-25 (D.C.Cir. 1989))</p> <p>✓ <i>Claimant Of State-Secrets Privilege</i>: Circuit notes that generally the state-secrets privilege claim must be "lodged by the head of the department which has control over the matter, after actual personal consideration by that officer"; this requirement was dispensed with in the case because "[i]t would 'be of little or no benefit' for us to remand for the purpose of having the department head agree that disclosure of the classified information would pose a risk to national security here" (citing <i>United States v. Aref</i>, 533 F.3d 72, 80 (2d Cir. 2008))</p>	<p><i>United States v. Stewart</i>, ___ F.3d ___ (2d Cir. Nov. 17, 2009) (Nos. 06-5015-cr (L), 06-5031-cr (con), 06-5093-cr (con), 06-5131-cr (con), 06-5135-cr (con), 06-5143-cr (con)) (Walker (concurring and dissenting in part), Calabresi (concurring), <u>Sack</u>)</p> <p>Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v._Stewart.pdf</p> <p>Case Result: Affirming convictions, but remanding for resentencing</p> <p>Cross-Reference: FRE 403</p> <p>Evidence Principle No.: 35</p> <p>Circuits At A Glance: p. 1129</p>