



FEDERAL EVIDENCE REVIEW

HIGHLIGHTING RECENT FEDERAL EVIDENCE CASES & DEVELOPMENTS

Volume 2, Number 6

www.FederalEvidence.com

June 2005

About THE FEDERAL EVIDENCE REVIEW

The FEDERAL EVIDENCE REVIEW highlights recent federal evidence cases and developments. The REVIEW is a monthly legal journal distributed online in a PDF format with links to many of the cases covered. The REVIEW is available online at:

www.FederalEvidence.com

The FEDERAL EVIDENCE REVIEW:

- Monitors current federal evidence developments, cases and trends
- Serves as a key litigation aid and reference source for practitioners at all litigation stages
- Provides a forum for federal litigators, jurists, academia, and other practitioners and students of evidence
- Promotes ideas and stimulates discussion of key evidence issues

FEDERAL EVIDENCE REVIEW Coverage

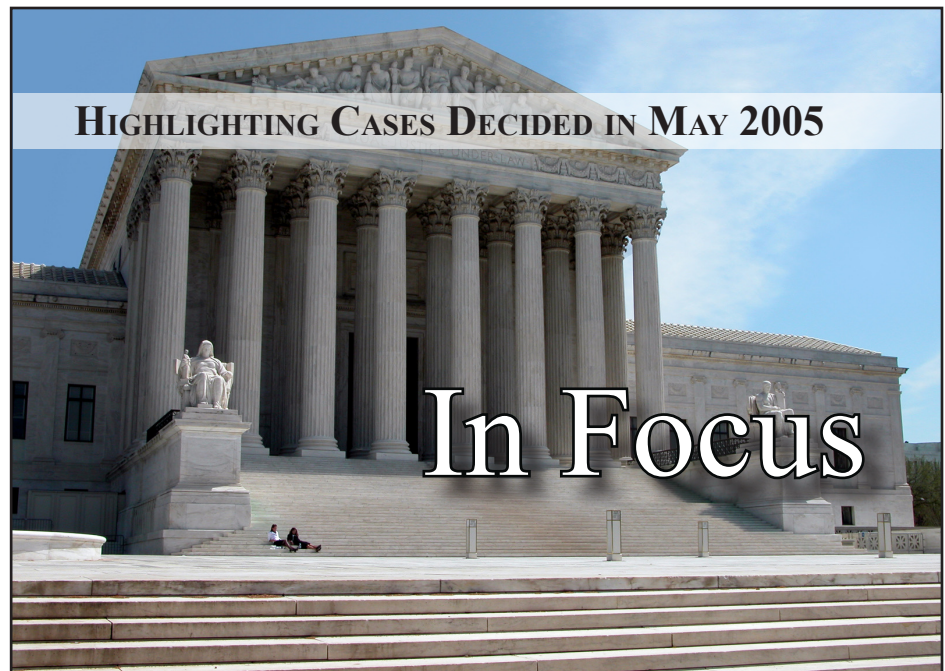
Cases Covered This Issue:

• Reviewed	27
• Cited	289
• Case Comments	72
• Practice Points	17

Covered Since Vol. 1, No. 1:

• Cases reviewed	279
• Cases cited	1700

Subscription information available on page 433 and at: www.FederalEvidence.com



HIGHLIGHTING CASES DECIDED IN MAY 2005

In Focus

Party Opponent Admission By Government Employee: The circuits split on whether a government agent or employee can make a statement that binds the government as an admission under FRE 801(d)(2) – 7th Cir. (p. 525)

Lead Story – Expert Eyewitness Identification: Common Grounds For Assessing Admissibility of Experts on Eyewitness Identification – (p. 448)

Trial Time Limits: Limits on plaintiff’s direct testimony permitted when flexibly and reasonably applied – 11th Cir. (p. 507)

Spousal Testimonial Privilege: Privilege may be asserted only by the witness-spouse and there is no “child abuse” exception to the witness-spouse’s privilege to decline to testify against his or her spouse during marriage – 10th Cir. (p. 491)

Hobson’s Choice: Defendant failed to preserve for appeal his claim that he was improperly impeached because he failed to take the stand to testify and suffer impeachment – 8th Cir. (p. 504)

Polygraph Evidence: When proffered for corroboration or impeachment, polygraph evidence proponent must show it (1) provided adequate notice to opposing party of its proffer; (2) that the opposing party had a reasonable opportunity to have its own polygraph test covering the same questions; and (3) the rules of evidence governing corroboration or impeachment testimony are applicable to the proffer – 11th Cir. (p. 518)

Contents (p. 434)

Evidence Case Docket (p. 437)

Table of Cases (p. 543)

Subscriptions
Available online at: www.FederalEvidence.com/subscribe
Comments / Suggestions/ Contact
If you have ideas for future features or columns, or any other suggestions or comments on the FEDERAL EVIDENCE REVIEW, your views and ideas are welcome and encouraged at: www.FederalEvidence.com/contact
Disclaimer
The FEDERAL EVIDENCE REVIEW presents information and opinions as an informational and educational service to subscribers. The content should not be relied upon as legal advice and is not intended to create an attorney-client relationship. For more information, please review the disclaimer at: www.FederalEvidence.com/terms_of_use.html
How to Cite the REVIEW
Material from the FEDERAL EVIDENCE REVIEW should be cited: [Volume] FED. EVID. REV. [page number] (Month Year) Thus, 2 FED. EVID. REV. 40 (Jan. 2005) indicates volume two of the FEDERAL EVIDENCE REVIEW at page 40. Page numbers in any volume of the REVIEW are consecutive from the first issue of that volume.
FEDERAL EVIDENCE REVIEW (ISSN: 1556-5645) Volume 2, Number 6 (June 2005) Published monthly by FederalEvidence.com P.O. Box 54037, San Jose, CA 95124-4037 Fax: (408) 559-0900 Web: www.FederalEvidence.com/contact Copyright © 2005 FederalEvidence.com All Rights Reserved.

Subscribe Now To The FEDERAL EVIDENCE REVIEW To:

❖ Receive a monthly journal delivered via the Internet in PDF format providing summaries, insight, and analysis on the evidence cases of the previous month

❖ Utilize the REVIEW's special features, including *Lead Story*, *Practice Tip*, *Circuit Splits*, *Amendment Updates*, and more, which provide up-to-date tracking of recent evidence developments and trends

❖ Maintain your advantage on evidence law by making it easier to use recent evidence cases in your practice.

All of this and more is available to individual subscribers for \$1195 a year (12 issues). Special rates for multiple subscribers or organizational subscribers are available by contacting the REVIEW at: www.FederalEvidence.com/contact

To subscribe, complete this form and return to:

FEDERAL EVIDENCE REVIEW Subscriptions
P.O. Box 54037
San Jose, CA 95124-4037
or Fax this page to: (408) 559-0900

First Name: _____

Last Name: _____

Email (required): _____

Organization: _____

Address: _____

City, State, Zip: _____

Telephone: _____

Check for \$1195 payable to *FederalEvidence.com*

Or bill me by sending invoice (Subscription starts upon payment)

Money-back Guarantee: As part of our unconditional guarantee, if you are dissatisfied with the REVIEW (for any reason), cancel the subscription in writing within 30 days of your purchase and we will provide a full refund upon receipt of your written refund request.



Contents

Subscribe	433
Evidence Case Docket	435
Lead Story: Expert Eyewitness Identification: Common Grounds For Assessing Admissibility	448
Practice Tip: Forfeiting The Right To Object To Hearsay Under FRE 804(b)(6)	457
Circuit Split: Rule 801(d)(2) – Admission by Party Opponent	459
Emerging Circuit Consensus: Rule 1101(d)(3) (Applicability of Rules -- Miscellaneous Proceedings)	462
Proposed Amendments To The Federal Rules Of Evidence	464
Evidence Cases Reviewed	465
Introductory Note	465
Sixth Amendment (Compulsory Process)	466
<i>United States v. Walker</i> (5th Cir.).....	466
Sixth Amendment (Confrontation Clause)	467
<i>United States v. Magallanez</i> (10th Cir.).....	467
<i>United States v. Iskander</i> (4th Cir.).....	468
Rule 103 (a) and (d) Table (Harmless and Plain Error)	469
Rule 103(a) (Effect Of Erroneous Ruling)	471
<i>Larson v. Kempker</i> (8th Cir.).....	471
<i>United States v. Iskander</i> (4th Cir.).....	472
Rule 103(d) (Plain Error)	474
<i>United States v. Agnew</i> (3d Cir.)	474
Rule 201 (Judicial Notice of Adjudicative Facts)	476
<i>Group One, Ltd. v. Hallmark Cards, Inc.</i> (Fed. Cir.).....	476
Rule 401 (Definition of “Relevant Evidence”)	478
<i>United States v. Magallanez</i> (10th Cir.).....	478
<i>Neilson v. D’Angelis</i> (2d Cir.).....	480
Rule 402 (Irrelevant Evidence Inadmissible)	481
<i>United States v. Iskander</i> (4th Cir.).....	481
Rule 403 (Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time)	482
<i>United States v. Duran</i> (7th Cir.).....	482
<i>United States v. Head</i> (8th Cir. 2005)	484
<i>United States v. Henderson</i> (11th Cir.).....	485
<i>United States v. Magallanez</i> (10th Cir.).....	486
<i>United States v. Roy</i> (8th Cir.).....	487



Contents

Rule 404(b) (Other Crimes, Wrongs or Acts)	488
<i>United States v. Frederick</i> (6th Cir.)	488
<i>United States v. Henderson</i> (11th Cir.).....	489
<i>United States v. Walker</i> (5th Cir.).....	490
Rule 501 General Rule (Privileges – Spousal Testimonial Privilege)	491
<i>United States v. Jarvison</i> (10th Cir.)	491
Rule 602 (Lack of Personal Knowledge)	493
<i>Castleberry v. Goldome Credit Corp.</i> (11th Cir.).....	493
Rule 603 (Oath or Affirmation)	494
<i>United States v. Weatherspoon</i> (9th Cir.)	494
Rule 607 (Who May Impeach)	495
<i>United States v. Douglas</i> (7th Cir.)	495
Rule 608(a) (Opinion and Reputation Evidence of Character)	498
<i>United States v. Henderson</i> (11th Cir.).....	498
Rule 608(b) (Evidence of Character and Conduct of Witness – Specific Instances)	499
<i>United States v. Magallanez</i> (10th Cir.).....	499
Rule 609 (Impeachment by Evidence of Conviction of Crime)	501
<i>United States v. Agnew</i> (3d Cir.)	501
<i>United States v. Douglas</i> (7th Cir.)	503
<i>United States v. Head</i> (8th Cir.)	505
Rule 611(a) (Mode and Order of Interrogation and Presentation)	507
<i>Akouri v. State of Florida Dept. of Transp.</i> (11th Cir.)	507
Rule 701 (Opinion Testimony by Lay Witnesses)	509
<i>United States v. Ayala-Pizarro</i> (1st Cir.).....	509
Rule 702 (Testimony by Experts)	512
<i>Anderson v. Westinghouse Savannah River Co.</i> (4th Cir.)	512
<i>Larson v. Kempker</i> (8th Cir.).....	514
<i>United States v. Henderson</i> (11th Cir.).....	516
<i>United States v. Henderson</i> (11th Cir.).....	518
Rule 703 (Bases of Opinion Testimony by Experts)	520
<i>Ramirez v. Elias</i> (1st Cir.)	520



Contents

Rule 801(c) (Definition of “Hearsay”)	522
<i>Cody v. Harris</i> (7th Cir.)	522
<i>United States v. Vazquez-Rivera</i> (1st Cir.).....	524
Rule 801(d)(2) (Admission by Party Opponent)	525
<i>Westfed Holdings, Inc. v. United States</i> (Fed. Cir.).....	525
Rule 801(d)(2)(D) (Admission by Agent)	525
<i>United States v. Arroyo</i> (7th Cir.).....	525
Rule 803(1) (Present Sense Impressions)	527
<i>Cody v. Harris</i> (7th Cir.)	527
Rule 803(6) (Records of Regularly Conducted Activity)	528
<i>Kikalos v. United States</i> (7th Cir.).....	528
Rule 803(8) (Hearsay Exception – Public Records)	530
<i>Anderson v. Westinghouse Savannah River Co.</i> (4th Cir.).....	530
Rule 803(21) (Hearsay Exception – Reputation as to Character)	532
<i>United States v. Arroyo</i> (7th Cir.).....	532
Rule 807 (Residual Exception)	535
<i>Cody v. Harris</i> (7th Cir.)	535
<i>United States v. Walker</i> (5th Cir.).....	536
Rule 1101(d)(3) (General Applicability)	537
<i>United States v. SLW</i> (8th Cir.).....	537
<i>United States v. Walker</i> (5th Cir.).....	537
Other Significant Evidence Issues (Handling Of Evidence)	538
<i>United States v. Arroyo</i> (7th Cir.).....	538
Other Significant Evidence Issues (Vouching For Witness)	540
<i>United States v. Magallanez</i> (10th Cir.).....	540
<i>United States v. Vazquez-Rivera</i> (1st Cir.).....	541
Table of Cases	543