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FEDERAL EVIDENCE REVIEW Coverage

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• Cases reviewed	248
• Cases cited	1036

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Evidence Case Docket

This table provides an overview of the recent cases reported and considered in this issue, beginning at page 955.

Rule	Evidence Principle	Cases	Page
Sixth Amendment Confrontation Clause	Co-Conspirator statement was not “testimonial” under <i>Crawford</i>	<i>United States v. Sanchez-Berrios</i> , 424 F.3d 65 (1st Cir. Sept. 20, 2005)	955
	No plain error in admitting foreign records under <i>Crawford</i> where the records satisfied the “particularized guarantees of trustworthiness” standard	<i>United States v. Dumeisi</i> , 424 F.3d 566 (7th Cir. Sept. 15, 2005)	956
Rule 103(a) Effect Of Erroneous Ruling	In a prisoner’s civil rights action against correctional officers, evidence that the plaintiff-prisoner was involved in a “convergence” on a correctional officer seven years earlier in state prison was properly excluded as inadmissible propensity evidence; evidence that other prisoners were beaten after the incident was relevant to show pattern and modus operandi on the excessive force claims; any error was harmless	<i>Surprenant v. Rivas</i> , 424 F.3d 5 (1st Cir. Sept. 9, 2005)	958
	Uncharged bank robbery seven years earlier of the same bank the defendant was being prosecuted for was inadmissible under FRE 404(b) and alternatively as “intricately related” evidence; the error was not harmless and the conviction was reversed	<i>United States v. Owens</i> , 424 F.3d 649 (7th Cir. Sept. 21, 2005)	958
	Trial court erred in disallowing impeachment of three agents with rulings of other judges who had disbelieved prior testimony; the error was harmless since the plea agreements required the witnesses to provide truthful information	<i>United States v. Dawson</i> , 425 F.3d 389 (7th Cir. Sept. 28, 2005)	958

Lead Story: Pending FRE 609(a)(2) Amendment: Seeking To Clarify Mandatory Impeachment Of Convictions Involving “Dishonesty Or False Statement”

FRE 609 allows certain prior convictions to be admitted for impeachment of a witness or defendant. FRE 609(a)(2) is an important provision that includes a mandatory class of crimes that must be admitted for impeachment purposes. A pending amendment seeks to address a long-standing ambiguity concerning impeachment of a witness by evidence of a prior conviction involving “dishonesty or false statement, regardless of the punishment” under FRE 609(a)(2). The amendment also replaces the terms “character for truthfulness” for the term “credibility” in the introductory clause of FRE 609(a). (Compare current rule with proposed amendment in box on page 941).



Background: The “Dishonesty And False Statement” Phrase

Before discussing the pending amendment to FRE 609(a), it is useful to consider the context and background of the language to be affected by the pending amendment, and the types of convictions that have been admitted and excluded under the rule. The primary amendment change concerns the phrase “dishonesty and false statement.” The types of impeachable convictions qualifying under this phrase have been the subject of discussion since the terms were first used in FRE 609. In Congress, the Conference Committee Report provided the following explanation:

By the phrase “dishonesty and false statement” the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused’s propensity to testify truthfully.

The admission of prior convictions involving dishonesty and false statement is not within the discretion of the court. Such convictions are peculiarly probative of credibility and, under this rule, are always to be admitted. Thus, judicial discretion granted with respect to the

Recent Amendment Action

In April 2004, the Advisory Committee on Evidence unanimously approved the proposed amendment to FRE 609. In June 2005, the Committee on Rules of Practice and Procedure (“Standing Committee”) approved the proposed amendment to FRE 609. The Judicial Conference considered this amendment at its September 2005 meeting and transmitted the amendment to the U.S. Supreme Court [See <http://www.uscourts.gov/rules/nrerule6.html> (reporting that the amended rule was now awaiting final action by the Supreme Court)]. The Supreme Court will act on the recommendation by May 2006. Congress will then have the final opportunity to accept, modify or reject the proposed amendment.

Federal Rule Making Process

The Rules Enabling Act, 28 U.S.C. §§ 2071-2077, establishes the process for the promulgation of rules and amendments for the Federal Rules of Evidence.

For a summary of the rulemaking process, *see*: “The Rulemaking Process: A Summary for the Bench and Bar (October 2004)” available at:

<http://www.uscourts.gov/rules/proceduresum.htm>

Rule 501 (General Rule – Privileges – Attorney-Client Privilege)



In insurance coverage dispute, attorney’s testimony about status of claim was not a protected “confidential” communication based on communications between attorney and agents of the insured and the attorney’s independent inference and conclusion about the communications

International Ins. Co. v. RSR Corp. (5th Cir.)



The Case

In this case, a question about the availability of the attorney-client privilege arose in an insurance dispute concerning coverage over environmental costs. The dispute concerned who was responsible for the remediation costs required under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601, *et seq.*, based on a claim under an Environmental Impairment Liability insurance policy. International Insurance sought a declaratory judgment that it was not obligated to indemnify or reimburse its insureds (RSR) for these costs after the Environmental Protection Agency placed a particular cite on the Superfund List. After the jury answered two interrogatories, the district court concluded International Insurance was obligated to indemnify the insureds.

At trial the former counsel of the North River Insurance Company, which originally issued the insurance policy, testified that he told the insured that the inclusion of the site on the Superfund List constituted a claim against the insured under the policy. International Insurance was the successor-in-interest of North River Insurance Company. International Insurance claimed this testimony was admitted in violation of its attorney-client privilege.

The circuit affirmed the admission of the testimony. The circuit concluded that the testimony did not involve a “confidential communication” that would be protected by the privilege. As the circuit summarized, “His testimony described the communications between himself and the attorneys and agents of RSR [the insured] and his independent inference and conclusion based upon them, viz., that he as North River’s representative and his counterparts representing RSR treated the [National Priorities List]’s inclusion of the Harbor Island site as

a claim by EPA against RSR.” [299 (citing *Huie v. De-Shazo*, 922 S.W.2d 923 (Tex. 1986) (noting the attorney-client privilege protects confidential communications between an attorney and client “made for the purpose of facilitating the rendition of professional legal services to the client”) (quoting TEX. R. CIV. EVID. 503(b))].



Commentary

Comment – Privilege Protects “Confidential” Communications: Several other cases have noted that a communication qualifies for application of the attorney-client privilege only if it is a confidential communication. *Fisher v. United States*, 425 U.S. 391, 403 (1976) (must be confidential communication from client to attorney); *United States v. Robinson*, 121 F.3d 971, 976 (5th Cir. 1997) (“The assertor of the privilege must have a reasonable expectation of confidentiality, either that the information disclosed is intrinsically confidential, or by showing that he had a subjective intent of confidentiality.”); *Kevlik v. Goldstein*, 724 F.2d 844, 849 (1st Cir. 1984) (“key question is whether...the client reasonably understood the conference to be confidential”).

Comment – Determining Intent To Be A “Confidential” Communication: The determination whether a communication was intended to be confidential is often a fact-specific issue concerning the intent of the communicators and who else may have been present. *See, e.g., United States v. Blasco*, 702 F.2d 1315, 1329 (11th Cir. 1983) (attorney-client consultation taking place outside courtroom in voices loud enough to be overheard by passers-by was not privileged); *United States v. Landof*, 591 F.2d 36, 39 (9th Cir. 1978) (privilege destroyed when a second attorney present at the meeting was not acting in capacity of attorney to provide legal advice at time of client’s meeting with attorney); *United States*

v. *Hatcher*, 323 F.3d 666, 674 (8th Cir. 2003) (where attorney and clients “could not reasonably expect that their conversations would remain private” it was not confidential).

Practice Point – Which Privilege Law Applies In Diversity Cases: The circuit noted that the “availability of a privilege in a diversity case is governed by the law of the forum state.” [299 n.26 (citing FED. R. EVID. 501; *Miller v. Transamerica Press*, 621 F.2d 721, 724 (5th Cir. 1980))].



Case Reference

Citation: *International Ins. Co. v. RSR Corp.*, 426 F.3d 281 (5th Cir. Sept. 19, 2005) (No. 04-10311) (Wiener, Barksdale, Dennis).

Type Of Action/Claim Or Charge: Civil; 28 U.S.C. § 1332(a) (diversity jurisdiction) (declaratory judgment concerning insurance coverage claim).



United States v. Burke - continued from p. 973

the Government to prove to the court *by clear and convincing evidence* that the defendant committed the similar act.” *Huddleston*, 485 U.S. at 685 & n.2 (citations omitted; emphasis added).

Practice Point – FRE 404(b) Elements: The Seventh Circuit applies four elements to admit evidence under FRE 404(b): “(1) the evidence is directed toward establishing a matter in issue other than the defendant’s propensity to commit the crime charged, (2) the evidence shows that the other act is similar enough and close enough in time to be relevant to the matter in issue, (3) the evidence is sufficient to support a jury’s finding that the defendant committed the similar act, and (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.” [410 (quoting *United States v. Bursey*, 85 F.3d 293, 296 (7th Cir. 1996))].



Case Reference

Citation: *United States v. Burke*, 425 F.3d 400 (7th Cir. Sept. 28, 2005) (No. 03-3483) (Bauer, Easterbrook, Rovner).

Type Of Action/Claim Or Charge: Criminal; 18 U.S.C. § 1623 (perjury before a grand jury).



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