

WHAT'S NEW IN THE 2025 EDITION

In addition to updated statutory and case law, new features and recent developments in this edition include:

- Chapter 15 – Rule 404(a) – Character Evidence – Added *Diaz v. U.S.* which held that an expert could testify that most drug couriers know that they are transporting drugs, finding that did not violate Fed. R. Evid. 704(b) because he “did not state an opinion about whether the defendant herself had a particular mental state”;
- Chapter 17 – Rule 404(b) – Expanded discussion of what evidence is admissible to show intent and knowledge;
- Chapter 18 – Habit – Expanded discussion of what must be shown to establish a habit;
- Chapter 19 – Sexual Assault/Child Molestation – Added discussion of the standard of proof required to establish that the “other acts” occurred and the impact of a Fed. R. Evid. 403 analysis;
- Chapter 23 – Attorney-Client Privilege – Added discussion of issues involving attorney/client privilege on jail telephones;
- Chapter 24 – Work Product Doctrine – Added advice on how to protect “opinion” work product from disclosure;
- Chapter 25 – Marital Privilege – Warning to advise clients and their spouses that conversations on jail telephones are not privileged;
- Chapter 27 – Other Privilege Issues – Discussion of situations where defendant’s rights of confrontation, cross-examination, and due process may outweigh the psychotherapist privilege;
- Chapter 29 – Opinion Testimony – Added *Smith v. Arizona*, which held that when an expert testifies about a non-testifying expert’s notes and reports, that evidence is being offered for its truth and qualifies as hearsay; if the statements are testimonial, their admission would violate the Confrontation Clause; also added *Diaz v. U.S.*, interpreting Fed. R. Evid. 704(b) and the admissibility of drug experts testifying that most people in a group have a particular mental state

as long as they do not testify that a defendant possessed that particular mental state;

- Chapter 30 – Hearsay Issues – Rule 801(d)(2) – Added discussion of *U.S. v. Mirabal*, finding that the government’s factual proffer at a codefendant’s plea constituted a statement by a party-opponent; also added an example of a defense attorney’s opening statement and the defendant’s testimony from a first trial was properly admissible at a second trial as statements by a party-opponent;
- Chapter 31 – Hearsay Issues – Past Recollection Recorded/Refreshing Memory – Explaining in more detail the proper way to refresh memory;
- Chapter 32 – Hearsay Issues – Statements against penal interest – Updated to reflect amendment to Fed. R. Evid. 804(b)(3)(B) which became effective December 1, 2024 and a discussion of its purposes;
- Chapter 35 – Excluding “Course of Investigation” Evidence – Added to discussion of *res gestae*;
- Chapter 36 – Confrontation Clause – Added discussion of *Smith v. Arizona* where the U.S. Supreme Court again considered the question of whether permitting an expert witness to rely upon and testify about out-of-court statements forming the basis of their own expert opinion constituted a violation of the Confrontation Clause if the declarant who made the underlying statement does not testify;
- Chapter 38 – Summaries – Updated to reflect 2024 amendment to Fed. R. Evid. 1006 and discussed the impact of the changes including the requirement that the voluminous materials on which a summary is based must otherwise be admissible; added the new Fed. R. Evid. 107 also effective in 2024;
- Chapter 39 – Impeachment and Cross-Examination – Updated to reflect 2024 amendment to Fed. R. Evid. 613 which generally provides that extrinsic evidence of a witness’s prior inconsistent statement is not admissible until after the witness is given an opportunity to explain or deny it;
- Chapter 40 – Illustrative Aids and Demonstrations – Updated to reflect the new Fed. R. Evid. 107, which was adopted on December 1, 2024, addressing Illustrative Aids and describing its impact;
- Chapter 44 – Issues with Prosecution Witnesses – Added recent caselaw regarding protecting the identity of undercover witnesses;

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- Chapter 63 – Incompetency of Client – Adding description of process for determining if there is a substantial probability that a defendant will become competent in the foreseeable future; also added discussion about the proper factors to consider in deciding whether to order involuntary medication;
- Chapter 65 – Conflict between Client and Counsel – Requirement that counsel advise client when counsel plans to concede guilt and to give client an opportunity to object;
- Chapter 66 – Interference with Attorney/Client Relationship – Adding more examples of improper interference by the court which violated a defendant's Sixth Amendment right to counsel;
- Chapter 69 – Judicial Bias and Recusal – Adding discussion of presumptive bias when a judge fails to recuse;
- Chapter 73 – Representation of Multiple Defendants – Added to discussion of what conflicts cannot be waived; and
- Chapter 75 – Contempt Proceedings – Added discussion of the two categories of civil contempt – compensatory and coercive.