RUTTER GROUP PRACTICE GUIDE
FEDERAL CIVIL TRIALS AND EVIDENCE
2026 UPDATE

This 2026 softbound Update completely replaces the 2025 Update.

These Highlights summarize the most significant developments over the past year. References are to chapters and paragraph numbers of the 2026 edition of the Practice Guide where the material is discussed in greater detail.

Check for Case/Statutory/Rules Developments: This Update went to press in April 2026. Some of the new cases may not have been final at that time and may be affected by later developments. In addition, unless specifically noted, this Update does not include case, legislative or rules developments taking effect after our press date. Counsel should check subsequent case histories and independently verify the current state of the law, including any developments that may affect the analysis in this Practice Guide.

Thank You! We encourage your comments and suggestions regarding this Practice Guide. *Please keep them coming!*

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2026 UPDATE HIGHLIGHTS

CHAPTER 2

RIGHT TO JURY TRIAL

Constitutional Standard—"Suits at Common Law"

Jury right determined by issues being tried

- [2:61.1] **Questions of fact vs. questions of law:** When a factual dispute regarding a nonjury triable claim is *intertwined* with the merits of a counterclaim that falls under the Seventh Amendment, *both claims* may be decided by a jury. [*In re Google Play Store Antitrust Litig.* (9th Cir. 2025) 147 F4th 917, 939-941—single jury trial for nonjury antitrust claims and jury triable counterclaims proper where disputed factual issues for both were closely intertwined (finding no abuse of discretion in denying bifurcation)]

Right to Jury Trial on Statutory Claims

Statutory claims *not* jury triable

- [2:169] **Religious Land Use and Institutionalized Persons Act (RLUIPA):** Whether land use regulation imposes a substantial burden on a party's exercise of religion under the RLUIPA is a question of law for a court to decide. [*Spirit of Aloha Temple v. County of Maui* (9th Cir. 2025) 132 F4th 1148, 1155-1156 (finding submission to jury harmless error where jury's verdict was consistent with required legal outcome)]

CHAPTER 4

FINAL PRETRIAL CONFERENCE AND MOTIONS IN LIMINE

Preliminary Matters Discussed in Final Pretrial Conference

Review of pleadings and contested issues

- [4:76.1] **Includes merging claims:** The court's power under FRCP 16(c)(2)(A) includes the ability to merge claims to simplify the issues. [*Thelen v. Somatics, LLC* (11th Cir. 2025) 156 F4th 1115, 1127-1128—in action against manufacturer of electroconvulsive therapy device, court properly merged P's negligence and strict liability claims sua sponte]

CHAPTER 5

JURY SELECTION

Challenging Prospective Jurors—Peremptory Challenges

Constitutional limitation—cannot exclude certain cognizable groups

- [5:337.1] **Caution—professional responsibility considerations:** A lawyer may not follow a client's directive or accept a jury consultant's advice or AI software's guidance to exercise peremptory challenges if the lawyer *knows or rea-*

sonably should know that the conduct will constitute unlawful juror discrimination. Doing so violates ABA Model Rule 8.4(g). However, a lawyer does not violate ABA Rule 8.4(g) by exercising peremptory challenges on a discriminatory basis where not forbidden by other law (e.g., age, marital status). [See ABA Form.Opn. 517 (eff. 7/9/25)]

- [5:370.1] **Race-neutral/gender-neutral/ethnic-neutral explanation:** In products liability claim against manufacturer of recreational power boat, peremptory challenge against black juror was reasonable because a similarly situated white juror (both worked in medical fields) who was not stricken had work experience indicating he might attribute explosion to a lack of maintenance rather than a design flaw. [*Carroll v. Brunswick Corp.* (8th Cir. 2025) 148 F4th 583, 588]

CHAPTER 8A

EVIDENCE: INTRODUCTION AND APPROACH

Recent Amendments to FRE

[8:6] **Amended FRE 801(d)(1)(A) (declarant-witness's prior statement as nonhearsay):** Effective December 1, 2026 (absent contrary Congressional action), FRE 801(d)(1)(A) is amended. Amended FRE 801(d)(1)(A) allows all prior inconsistent statements by a testifying witness to be admissible as substantive evidence, removing the requirement that such statements be made under penalty of perjury at a formal proceeding. *See further discussion at ¶8:1901 ff. of the Highlight Summaries.*

CHAPTER 8B

RELEVANCE

Particular Relevance Issues

Consciousness of guilt

- [8:144.4] **Attempted flight:** Evidence that D fled from a subsequent traffic stop was admissible in prosecution for possession with intent to distribute drugs because D raised the "mere presence" defense (that D's passenger possessed drugs thrown from D's vehicle without D's knowledge) which made D's mental state a material issue and increased the probative value of any evidence tending to show D's knowledge of the drugs, motive to flee police, or D's intent to aid and abet passenger's efforts to discard the drugs. [*United States v. Kitchen* (8th Cir. 2025) 149 F4th 1019, 1025-1026]

Prior/subsequent accidents to show negligence

- [8:147.4] **Other similar incidents (OSI) evidence:** In product liability action following boat explosion, district court did not abuse its discretion in finding that evidence concerning explosion of first boat and related litigation was not admissible as OSI evidence where Plaintiffs failed to show that the boats were in similar condition when the explosions occurred and they

offered no proof concerning mileage, maintenance, or condition of the first boat when it exploded. [*Carroll v. Brunswick Corp.* (8th Cir. 2025) 148 F4th 583, 589]

Value of property or services—condemnation cases

- [8:191.3] **Precondemnation appraisals:** Landowner's reliance on appraisal of *conservation* easement as basis for opinion as to the value of a *pipeline* access easement was speculative, and thus inadmissible, where Landowner failed to explain why the easements, one of which covered the entire 590-acre parcel (conservation easement) while the other covered only 0.32 acres (pipeline easement), would devalue the property at the same rate. [*Mountain Valley Pipeline, LLC v. 0.32 Acres of Land* (4th Cir. 2025) 127 F4th 427, 434]

Workplace discrimination and harassment

- [8:196.3c] **Proof of hostile environment:** Supervisor's prior sexualized conduct against P while they worked at another law firm could not be used by P to establish her claim against law firm where the two subsequently worked. [*Bruce v. Adams & Reese, LLP* (6th Cir. 2026) 168 F4th 367, 377-378; see also *Martinez-Medina v. Rollins* (8th Cir. 2025) 144 F4th 1091, 1097-1098—conduct that occurred prior to P's settlement agreement with employer could not be used as continuing evidence of hostile work environment where the agreement expressly discontinued liability for conduct predating the settlement]

CHAPTER 8C

TYPES OF EVIDENCE AND FOUNDATION

Testimony

State law governs in diversity cases

- [8:238.2] **Compare:** FRE 601, not Illinois' Dead Man's Act, governed witnesses' competency in case involving mixed federal and state claims. Thus, testimony regarding now-deceased passenger's conduct and conversations leading up to collision resulting from pursuit by officers after robbery was admissible in estate's suit under 42 USC §1983 asserting excessive force and state law claims because testimony about decedent's actions and statements were relevant to defendants' contributory negligence defense under both state and federal claims. [*Arrington v. City of Chicago* (7th Cir. 2025) 147 F4th 691, 701-703]

Personal knowledge requirement—lay witness with expert knowledge

- [8:306.3a] Police officer was allowed to testify as lay witness regarding the meaning of words or acronyms used by gang members where the testimony was based on her experience in gang investigations, her investigation in the case, and her review of defendants' voluminous social media activity.

I.e., the lay opinion of a law enforcement official does not automatically become an expert opinion simply because it involves knowledge that preexisted the present case. [*United States v. Graham* (11th Cir. 2024) 123 F4th 1197, 1259-1262]

- [8:306.6b] In prosecution for wire and commodities fraud relating to alleged "spoofing" by Traders (placing deceptive orders they intended to cancel to push the market price a certain direction), Mercantile Exchange Group Investigator was permitted to testify as a lay witness about his investigative role and provide impressions of the case without crossing into expert territory, even though testimony was informed by Investigator's background experience. Moreover, district court did not abuse its discretion admitting Investigator's lay opinion testimony and that of three cooperating Witnesses who used the word "spoofing" to describe Traders' activity. Despite Traders' claim that Witnesses improperly characterized spoofing as fraud and price manipulation and inappropriately opined on Traders' intent, Witnesses' use of "spoofing" was consistent with colloquial vernacular of the trading industry. And testimony about Traders' mental states was properly framed as opinion drawn from trading data based on Witnesses' own experience. [*United States v. Smith* (7th Cir. 2025) 150 F4th 832, 847-848]
- [8:306.6c] In negligence and failure-to-warn products liability action, Neuropsychologist could not offer lay opinion testimony on medical causation, because the cause of plaintiff's cognitive decline required a complex diagnostic process, requiring scientific and technical reasoning, and Neuropsychologist did not begin treating Plaintiff until nearly three years after he formed his medical causation opinion, at which time he was only consulting with Plaintiff's treating physicians rather than treating Plaintiff himself. [*Thelen v. Somatics, LLC* (11th Cir. 2025) 156 F4th 1115, 1132-1133]
- [8:306.6d] In prosecution for conspiracy to commit mail fraud, conspiracy to commit money laundering and money laundering, testimony of IRS Agent about tracing fraud proceeds and use of charts to diagram and aggregate allegedly fraudulent transactions was not improper expert testimony. It did not transcend elementary mathematical operations or require technical or specialized knowledge to execute, and was based on Agent's *particularized* knowledge derived from his role in the investigation, rather than his *specialized* knowledge derived from his accounting expertise, IRS experience, and training in money laundering. Although Agent's tracing methodology—the equivalent of balancing the ledgers of a 55-account checkbook—was undoubtedly laborious and involved volume-based complexity, summaries of voluminous evidence are precisely the kind of testimony FRE 1006 contemplates, and such complexity does not convert otherwise lay testimony into expert testimony. [*United States v. Dermen* (10th Cir. 2025) 143 F4th 1148, 1206, 1209-1215]

Material Objects ("Real Evidence")

Authentication by evidence—testimony

- [8:384.2] In prosecution for drug trafficking conspiracy crimes, cooperating Witness' testimony was sufficient to authenticate drugs and other items depicted in officers' video of house search. Although Witness did not record video and was not present during all parts of filming, he was physically present when officers seized drugs during the search, had worked at the house weekly for two years, and confirmed that the video accurately portrayed the state of the house and the officers' actions during the search. He established extensive personal knowledge of the conspiracy and its operations and testified about specific identifying characteristics of the seized evidence. Because Witness' testimony provided supportable basis to conclude the video and items seized were reasonably likely to be what the Government said they were, Government was not required to call the officers involved in the search as authentication witnesses. [*United States v. Reyes-Rosario* (1st Cir. 2025) 142 F4th 3, 12-14]
- [8:390.4] District court did not abuse discretion by admitting drugs into evidence despite the fact they weighed different amounts at different times before trial and their packaging changed while in police custody because Defendant was permitted to cross-examine witnesses about those discrepancies. Similarly, chain-of-custody concerns regarding Government's failure to provide list of all police officers who handled the drugs and inconsistent testimony about bags used to hold them might indicate police department didn't use best practices when storing evidence, but did not create a "reasonable probability" someone with access to the evidence tampered with it. Such concerns are for a jury to assess because chain-of-custody issues go to the *weight* of evidence, not its *admissibility*. [*United States v. Fellmy* (6th Cir. 2026) 165 F4th 501, 509]

Documentary Evidence

Authentication by evidence

- [8:451.7a] **Data from Defendant's cell phone:** Analyst's testimony was sufficient to authenticate reports of data extracted from Defendants' cell phones even though Analyst was not present when data was extracted and could not testify as to its chain of custody. Government introduced evidence proving phones were owned by Defendants, and messages involving Defendants included associated profile photographs, account usernames and phone numbers. Analyst also testified that international mobile equipment identity (IMEI) numbers—unique numeric identifier found on cell phones—linked to Defendants' phones and matched IMEI numbers found on the extraction report. Finally, Analyst testified that forensic images of the physical cell phones matched the size of data contained in the extraction reports, further confirming that data

in reports came from Defendants' phones. [*United States v. Gonzalez* (2nd Cir. 2025) 144 F4th 396, 405-406]

- [8:451.8] **Employment termination report:** Employer failed to properly authenticate report purporting to explain reasons for employee's termination where the supposed author of the report (human resource specialist) had no independent recollection of authoring the document or of the facts underlying it. Senior Manager could also not authenticate report as "someone with knowledge of the evidence offered" because she did not author the document, did not witness its creation, and did not discuss its creation with others. [*Kean v. Brinker Int'l, Inc.* (6th Cir. 2025) 140 F4th 759, 764, 770-771]

- [8:451.9] **Photographs of premises search:** Federal agent's testimony re participation in search of apartment, personal knowledge that items depicted in photographs were seen in apartment, and testimony that photos accurately depicted the items was sufficient to circumstantially authenticate items in trial for conspiracy to distribute controlled substances, even though another agent had found the items. [*United States v. Driscoll* (8th Cir. 2024) 122 F4th 1067, 1070-1071]

[8:478a] **Self-authenticating documents—foreign public documents:** FRE 902(3) imposes two conditions on treating a foreign public document as self-authenticating:

— there must be some indication the document is what it purports to be (i.e., executed by a proper official in an official capacity or attested to by a proper official in official capacity); and

— "there must be some indication that the *official* vouching for the document is who he purports to be." [*United States v. Fuchs* (7th Cir. 2024) 118 F4th 911, 917—copy of Philippine birth certificate was properly authenticated and admissible despite digital signature on attestation where supporting documents satisfied both conditions of FRE 902(3)]

Self-authenticating documents—certified copies of business records

- [8:486.6e] District court did not abuse discretion by admitting Google-certified emails between Defendant and co-conspirators as self-authenticating documents under FRE 902(11) where Google kept records of the addresses, accounts, timing, and contents of emails sent using its server in the regular course of its business. The government also presented a certification from Google that the recorded account sent the recorded message, along with its attachments, to the recipient account on a specific day, at a specific time. [*United States v. Spila* (11th Cir. 2025) 136 F4th 1296, 1307-1308]

  Defendant also argued that court's authentication of emails also authenticated their *content*. However, authentication under FRE 902(11) did not relieve the government from proving the admissibility of the emails' content. (Even so, Defendant did not argue that the content of the emails violated any evidentiary rule.) [*United States v. Spila* (11th Cir. 2025) 136 F4th 1296, 1307-1308]

- [8:486.17] District court properly admitted Facebook records consisting of incriminating screenshots of Defendant's social media profile and account activity at trial for distribution of methamphetamine where Government demonstrated the records were self-authenticating under FRE 902(11) and FRE 803(6) as records maintained by Facebook in the regular course of business. Government separately authenticated the underlying substantive content under FRE 901(a) by introducing evidence showing that a profile photograph in Facebook records matched Defendant's appearance, the user had the same birthday as Defendant, and the account messages referred to Defendant's drug dealer moniker "Ghost" and cell phone number. [*United States v. Allen* (9th Cir. 2025) 159 F4th 625, 633-634]

Best Evidence Rule Exceptions

Original unobtainable by proponent—secondary evidence

- [8:538] **Translated transcript of foreign language recording as substantive evidence:** English language recordings do not provide independent evidentiary content and cannot make facts of consequence more or less likely, they simply serve as illustrative aids. However, the result is otherwise with respect to foreign language recordings; jurors are prohibited from relying on their own knowledge of foreign languages to interpret foreign language recordings. [*United States v. Marchan* (7th Cir. 2019) 935 F3d 540, 548]

  Thus, translated transcripts of foreign language recordings *can* make facts of consequence more or less likely by imparting information the jury may not garner from any other source. FRE 1002 requires that underlying recordings be admitted into evidence before English-translation transcripts may be offered. However, once admitted, translated transcripts are substantive evidence, not simply illustrative aids. [*United States v. Farias* (7th Cir. 2025) 147 F4th 764, 772]

Summary of voluminous materials (FRE 1006)

- [8:550.5] Defendants were prosecuted for conspiracy to commit money laundering and possession of drugs with intent to distribute them by using drivers who transported marijuana from states where it is legal to states where it is illegal. District court erred admitting government Investigator's summary chart purporting to allocate drug quantities amongst Defendants through the number of driver trips. Investigator's calculations were "questionable at best" (even incorrect) and Investigator acknowledged that in calculating unknown trips, he simply made "a guesstimate" of the drug quantities involved. Moreover, Investigator's unreliable chart would likely lead jurors to find Defendants each responsible for over 1,000 kg of marijuana. [*United States v. McGuire* (5th Cir. 2025) 163 F4th 882, 898-902]
- [8:583] **Compare—secondary-evidence summaries:** Secondary-evidence summaries are a hybrid of FRE 1006 sum-

maries (admitted in place of evidence itself because underlying evidence is voluminous) and FRE 107 illustrative aids (e.g., drawings, graphs) that simplify already-admitted material but are not admitted into evidence. Secondary-evidence summaries are admitted into evidence not in lieu of the evidence they summarize, but in addition thereto, where the court concludes they accurately summarize complex/difficult evidence and will assist jurors in better understanding the evidence and the court provides a limiting instruction reminding the jury the summary is not independent evidence, but is only as valid and reliable as the material it summarizes. [*United States v. Baskerville* (6th Cir. 2026) 164 F4th 459, 490-491 & fn. 8 (collecting cases)]

- [8:583.1] **Limitation—discretionary exclusion under FRE 403:** Secondary-evidence summaries may be excluded under FRE 403 if their probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. [FRE 403 (*discussed at ¶8:4503 ff.*); *United States v. Baskerville* (6th Cir. 2026) 164 F4th 459, 491-492—district court properly admitted phone charts after considering FRE 403 elements where Defendant did not dispute that charts accurately conveyed underlying phone data, were highly probative and confirmed that Defendant communicated with gang members who carried out the six shootings on the night in question. Combining Defendant's contacts with shooters into visual timelines provided powerful evidence of government's theory that Defendant directed and kept tabs on the charged shootings, and district court issued limiting instruction re charts' being only as valid and reliable as underlying material they summarized]

Demonstrative Evidence

[8:691.1] **Demonstration by witness testimony:** In robbery prosecution, district court did not abuse discretion by denying Defendant's request to try on Jordan sneakers recovered from his bedroom (the same brand worn by robber) in front of the jury, because Defendant could easily mislead the jury by pretending the shoes did not fit. The minimal probative value of demonstration was substantially outweighed by the danger of misleading the jury: At most, the demonstration could have shown the shoes did not fit, a "far cry" from conclusively proving Defendant was not the robber. [*United States v. Louis* (11th Cir. 2025) 146 F4th 1328, 1341]

CHAPTER 8D

ALTERNATIVE METHODS OF ESTABLISHING PROOF

Matters Subject to Judicial Notice

Facts on internet

- [8:904.16a] In a false-advertising class action alleging the cloud-storage provider offered a 205 GB plan rather than a

200 GB plan, district court properly took judicial notice of screenshots showing three successive versions of Apple's iCloud webpage describing plan details and pricing. The accuracy of the screenshots was undisputed. [*Bodenburg v. Apple Inc.* (9th Cir. 2025) 146 F4th 761, 768, fn. 2]

Matters *Not* Subject to Judicial Notice

Matters generally not known or readily determined

- [8:915.5] Diversity of citizenship may not be established purely by judicial notice. Plaintiffs must plead and prove diversity jurisdiction and may not avoid pleading jurisdiction by relying on judicial notice. [*Rosenwald v. Kimberly-Clark Corp.* (9th Cir. 2025) 152 F4th 1167, 1174-1175 (noting circuit split and siding with 10th Circuit)]

Disputed matters—disputed government actions or policies

- [8:919.2] In action alleging officers used excessive force, trial judge properly denied request to take judicial notice of officers' dash and body cam footage of shooting. Unlike official public records containing indisputable facts (i.e., birth or death certificates), the video's contents were subject to reasonable dispute requiring the court to weigh evidence and make factual findings (whether the officers saw the subject drop his BB gun). [*Fuqua v. Santa Fe County Sheriff's Office* (10th Cir. 2025) 157 F4th 1288, 1298-1299]

CHAPTER 8E

CHARACTER AND HABIT EVIDENCE

Other Crimes, Wrongs or Acts Inadmissible (FRE 404(b))

Not applicable to intrinsic misconduct

- [8:1159.16] **View that conduct must be "inextricably intertwined" with or "intrinsic" to charged offense:** In prosecution for knowingly prescribing controlled substance without legitimate medical purpose resulting in patient's death, court erred admitting testimony of D's former assistant that D used profanity while firing her, testimony that D had used a colleague's prescription pad, and testimony of D's former office manager that she quit over D's use of colleague's prescription pad and that she had warned D he was going to kill someone. These other acts had nothing to do with D's treatment of patient who died, D's outbursts occurred four months after patient's death, and D's use of colleague's pad and manager's resignation occurred over a year before events charged in the indictment. Such evidence was patently character evidence admitted in violation of FRE 404(b). [*United States v. Sadrinia* (6th Cir. 2025) 134 F4th 887, 893-895]
- [8:1159.18] In prosecution for RICO violations involving sex trafficking offenses, evidence of D's uncharged sexual misconduct, including exposing other women to his genital herpes and

of his videotaping of sexual encounters, was inextricably intertwined with evidence of RICO conspiracy and charged conduct. [*United States v. Kelly* (2nd Cir. 2025) 128 F4th 387, 424-427]

- [8:1159.20] In prosecution of pharmacist for conspiracy to commit health-care fraud, evidence of D's uncharged theft from pharmacy was necessary to complete story of crime where D argued at trial that he received none of the profits from the conspiracy and lacked motive to participate in it. Evidence that D was skimming cash from pharmacy explained D's financial motive to participate in conspiracy, and when confronted about theft, D told pharmacy owner he felt undervalued (which could show D viewed money he took as his fair share of conspiracy's profits). [*United States v. Beasley* (11th Cir. 2025) 160 F4th 1199, 1206-1207]

Discretionary exclusion (FRE 403)

- [8:1172.1] Evidence of witness's past violent acts was substantially more prejudicial than probative and properly excluded under FRE 403. The evidence went to the witness's propensity for violence, was not particularly relevant, and the jury was already aware of his violent character through other testimony, including witness's own testimony that he had a reputation for violence. [*United States v. Dencklau* (9th Cir. 2025) 160 F4th 1046, 1055-1056]
- [8:1172.6] In wrongful death action against decedent's former Employer (offshore oil platform operator) evidence of Employer's prior felony conviction for failing to issue "hot work" permits was relevant to establish knowledge, lack of accident, and absence of mistake, particularly where the parties disputed whether Employer had issued the required permit and Plaintiffs presented evidence that the failure to do so contributed to decedent's death. Also, because the conviction did not constitute a critical part of Plaintiffs' case, and Plaintiffs introduced evidence showing that Employer failed to mitigate multiple hazards (not solely those related to "hot work") the probative value of admitting the prior conviction was not substantially outweighed by the risk of undue prejudice. [*Warner v. Talos ERT, LLC* (5th Cir. 2025) 133 F4th 412, 432]
- [8:1179.5] **Effectiveness of limiting instruction:** In sex trafficking prosecution, testimony of woman whose prostitution for D was not part of charged conduct was admissible under FRE 403: (i) testimony that D forced her to have sex with other men for money was relevant to rebut defense that victims voluntarily worked for D; (ii) woman's experiences were similar in kind and close in time to crimes charged testimony was supported by sufficient evidence; and (iii) district court gave appropriate limiting instruction ensuring potential unfair prejudice did not substantially outweigh probative value of testimony. [*United States v. Womack* (8th Cir. 2025) 154 F4th 584, 587-589]
- [8:1179.6] In prosecution for transporting aliens, D's prior conviction for same offense that occurred less than two years

before was admissible to prove intent, knowledge, and lack of accident or mistake, where prior conviction was not too remote in time and was sufficiently similar to the instant offense. Prior conviction was not unfairly prejudicial because parties agreed to redact prejudicial facts and court gave repeated limiting instructions about proper purpose of prior conviction each time government raised it. [*United States v. Ruiz* (9th Cir. 2026) 167 F4th 1024, 1031-1034]

"Other bad acts" evidence admissible to show motive

- [8:1189.5] Testimony about Defendant's uncharged sexual misconduct with a minor was relevant to show Defendant's motive to bribe local officials to obtain false identification for that minor. [*United States v. Kelly* (2nd Cir. 2025) 128 F4th 387, 426]
- [8:1189.6] Evidence that Defendant participated in uncharged shooting on same day as carjacking was admissible to show potential motive for carjacking. [*United States v. Dukes* (7th Cir. 2025) 147 F4th 711, 718]

"Other bad acts" evidence admissible to show knowledge or notice

- [8:1194.1] Evidence that defendant exposed other women to his genital herpes was relevant to establish defendant's knowledge of his herpes diagnosis. [*United States v. Kelly* (2nd Cir. 2025) 128 F4th 387, 425]
- [8:1194.2] In a 42 USC §1983 excessive force/wrongful death action by administrator of Suspect's estate, intra-police department alerts notifying officers Suspect was wanted in connection with a shooting and domestic battery incident were relevant to objective reasonableness of officer's use of deadly force, explained why officer wanted to make vehicle stop in which Suspect was passenger, established officer's state of mind at time of shooting, and countered argument that officer did not need to chase Suspect. [*Hernandez v. City of Peoria, Ill.* (7th Cir. 2025) 135 F4th 517, 521, 524-525]
- [8:1194.5] Uncharged videos depicting child pornography recovered from D's laptop admissible in child pornography prosecution where it was relevant to D's knowledge of possession. [*United States v. Shaughnessy* (5th Cir. 2025) 157 F4th 378, 389-390 & fn. 8]
- [8:1194.6] In prosecution for aiding and abetting murder of person assisting federal officer, Defendant's anti-government social media posts and comments advocating for violence against law enforcement did not constitute improper character evidence but instead established Defendant's growing animosity towards the federal government and desire to commit violence against government actors. Evidence was admitted to demonstrate Defendant's state of mind at the time of the attack, a non-propensity purpose. [*United States v. Justus* (9th Cir. 2025) 162 F4th 962, 968-969]

[8:1195.4] **"Other bad acts" evidence admissible to show "modus operandi":** In prosecution for robbery using a firearm during violent crime and unlawful possession of firearm as a felon, evidence of two uncharged robberies was admissible to establish identity where uncharged evidence shared unique set of signature facts. E.g., Suspect used distinctive black handgun with gold ejection port in all but one robbery; drove a silver car with black top in all but two robberies; wore a black glove with a white band at bottom in all but two robberies; and all robberies took place within one month and 50 miles from each other. [*United States v. Spratt* (8th Cir. 2025) 141 F4th 931, 937-938]

Victim's Sexual Behavior Admissible Under FRE 412

[8:1253.1] **Includes sexual harassment cases:** FRE 412, which explicitly includes civil cases involving "sexual misconduct," encompasses sexual harassment lawsuits. [FRE 412(a), Adv. Comm. Notes; *Graf v. Morristown-Hamblen Hosp. Ass'n* (6th Cir. 2025) 155 F4th 578, 593-595—in Title VII retaliation suit, evidence of P's sexual communications with security guard and P's sexual preferences with him admissible under FRE 412 to demonstrate consent to sexual encounter with guard because probative of whether P reasonably believed encounter with guard was sexual harassment; *Wilson v. City of Des Moines* (8th Cir. 2006) 442 F3d 637, 642-645—in discrimination action based on gender, sexual harassment and retaliation, evidence of P's own sexual comments and behavior admissible under FRE 412; *Wolak v. Spucci* (2nd Cir. 2000) 217 F3d 157, 159-160—in action based on gender discrimination based on hostile work environment, evidence of plaintiff/officer's history of viewing pornography outside workplace inadmissible under FRE 412]

CHAPTER 8F

OPINION EVIDENCE

Lay Opinion Testimony

[8:1435.5] Statement by supervisor of police department's towing program that towing company's conduct was "fraudulent" was not an impermissible legal conclusion but a statement of fact or lay opinion based on supervisor's experience. [*Nationwide Recovery, Inc. v. City of Detroit, Mich.* (6th Cir. 2026) 163 F4th 977, 989]

Expert Opinion Testimony

Opinion must be substantiated

- [8:1530] Plaintiff's expert on cause of water intrusion into commercial building chose to eliminate causes but failed to test portions of the building's roof to support his opinion. In doing so, critical information was overlooked. While another judge may have attributed this to the testimony's weight—not its admissibility—the judge's conclusion the testimony lacked sufficient support to assist the trier of fact was not manifestly erroneous. [*Bliv, Inc. v. Charter Oak Fire Ins. Co.* (8th Cir. 2025) 159 F4th 539, 543-544]

Expert must be qualified

- [8:1541a] In female students' action against university for violating Title IX, court properly excluded testimony of Expert challenging methodology of university's Title IX survey of its student body where Expert acknowledged that Title IX survey design fell outside her expertise. [*Niblock v. University of Ky.* (6th Cir. 2026) 165 F4th 460, 469]

Testimony must be based on facts or data

- [8:1575] **Secondhand information (reports, books, studies, etc.):** [*In re EPD Investment Co., LLC* (9th Cir. 2024) 114 F4th 1148, 1163-1164—expert witness properly based opinion that business was operated as Ponzi scheme on charts created from financial records admitted as business records]

Expert's methodology must be reliable

- [8:1618.1d] In action against chemical plant alleging exposure to cancer-causing gas, trial court abused discretion by excluding plaintiff/doctor's expert opinion because court did not truly critique doctor's methodology but instead made a veiled credibility determination. (Such an assessment goes to weight, not admissibility.) The court also improperly deemed expert's opinion unreliable because expert did not "validate" the data on which the opinion was based. (Validation is not required to satisfy the reliability threshold for admissibility.) [*Sommerville v. United Carbide Corp.* (4th Cir. 2025) 149 F4th 408, 423-424]

- [8:1619.6] In patent infringement action, testimony from plaintiff's damages Expert should have been excluded. Expert's calculation of the amount Defendant should pay for infringing, based on a framework estimating the royalty amount the parties would have agreed upon had they negotiated an agreement before infringement began, was unreliable. Royalty amounts for existing licenses (on which Expert relied) were insufficient to support his conclusion that prior licensees agreed to the specific royalty rate. Nor did Expert access evidence of relevant sales figures to verify whether the estimated amount to be paid (a lump sum) corresponded to a particular unit-based rate. [*EcoFactor, Inc. v. Google LLC* (Fed. Cir. 2025) 137 F4th 1333, 1340]

- [8:1619.7] Purchaser of business sued seller for violating the Defend Trade Secrets Act, unfair competition and breach of contract claims. Purchaser's CPA expert calculated Purchaser's lost past and future profits by determining Purchaser's average profit margins based on past performance. Defendant argued that CPA's testimony was unreliable because CPA made too many assumptions about the predictive behavior of Purchaser and whether Purchaser had the ability to produce product but did not challenge the factual accuracy of any of CPA's underlying data or calculations. The fact that CPA relied on assumptions is insufficient to mandate exclusion because every model relies on assumptions and no model can account for every conceivably relevant factor. [*Crabar/GBF, Inc. v. Wright* (8th Cir. 2025) 142 F4th 576, 588]

- [8:1620.5b] In negligence action against mining company for flooding that destroyed landowners' homes and properties, testimony from landowners' Expert was properly excluded as unreliable because it lacked site-specific data and failed to include any quantifiable or objectively testable model accepted by the engineering community. Moreover, Expert's reliance on studies that included models demonstrated his belief that a modeling method is the industry standard. [*Baker v. Blackhawk Mining, LLC* (6th Cir. 2025) 141 F4th 760, 770-771]

- [8:1621.4e] In toxic tort case against oil company for worker's chronic pansinusitis allegedly due to exposure to chemicals in oil spill cleanup, testimony by worker's Expert was properly excluded where expert did not reliably apply differential etiology approach (¶*8:1702a ff.*) and Expert reached his conclusion on causation after three sentences and zero analysis. [*Williams v. BP Exploration & Production, Inc.* (5th Cir. 2025) 143 F4th 593, 599-600]

[8:1624.3] **Expert's testimony must apply to facts in case:** In toxic tort action against oil rig, Worker alleged he was diagnosed with prostate cancer from exposure to crude oil during clean-up of oil spill. But Worker's expert's testimony failed to demonstrate causation; i.e., an adequate link between the specific chemical Worker was exposed to and Worker's prostate cancer. Instead, expert's testimony linked a specific chemical to cancer but did not establish that chemical causes prostate cancer; thus, expert's testimony was properly excluded. [*Ruffin v. BP Exploration & Production, Inc.* (5th Cir. 2025) 137 F4th 276, 284-285]

When expert opinion testimony prohibited

- [8:1657.1] **Questions of law:** In customer's breach of contract action alleging defendant overcharged customer, court correctly excluded testimony of plaintiff's expert because expert offered legal conclusions that defendant "overcharged" customer and opined on the meaning of a contract's provisions, effectively interpreting the agreement. [*Brainchild Surgical Devices, LLC v. CPA Global Ltd.* (4th Cir. 2025) 144 F4th 238, 252-254]

When expert opinion permissible—differential diagnosis methodology

- [8:1702.2c] In Consumer's action against Monsanto alleging exposure to weedkiller Roundup likely caused Consumer's blood cancer, judge properly excluded Consumer's Expert's report for failure to follow the differential etiology methodology and failure to reliably rule out obesity as the potential cause of Consumer's cancer. [*Engilis v. Monsanto Co.* (9th Cir. 2025) 151 F4th 1040, 1050-1052]

- [8:1702.2d] In products liability action by Patient that ECT treatments caused memory loss and brain damage, trial court did not abuse discretion in excluding Expert's opinion on causation which was unreliable because Expert failed to evaluate alternative explanations for Patient's cognitive decline, specifically Patient's serious substance abuse of alcohol, opioids and cocaine or

prior suicide attempts. Reliable differential analysis requires consideration of other factors that could have been the sole cause of injury. [*Thelen v. Somatics, LLC* (11th Cir. 2025) 156 F4th 1115, 1132]

CHAPTER 8G

HEARSAY EVIDENCE

Prior Statements by Testifying Witness Not Hearsay

[8:1901; 8:1901.1] **Alert—prior inconsistent statements need not be under oath effective 12/1/26:** Effective 12/1/26, FRE 801(d)(1)(A) is amended to allow all prior inconsistent statements by a testifying witness to be admissible as substantive evidence, removing the requirement that such statements be made under penalty of perjury at a formal proceeding. [See FRE 801(d)(1)(A) (subd. amended eff. 12/1/26)]

Such prior inconsistent statements are admissible not just as impeachment but as substantive proof (i.e., for their truth). [See FRE 801(d)(1)(A), Adv. Comm. Notes, 2026 Amend. (amendment avoids needing to give confusing jury instructions distinguishing between substantive and impeachment uses for prior inconsistent statements)] (Impeachment evidence proves only that the declarant lacks credibility; substantive evidence proves the facts in dispute.)

Rationale: Under Amended FRE 801(d)(1)(A), a prior inconsistent statement by a witness is admissible without needing to have been made under penalty of perjury at a trial, hearing, or deposition. It is not hearsay because cross-examination under oath at the current trial sufficiently addresses reliability concerns (i.e., truthfulness and accuracy) through live questioning and the factfinder's ability to observe the witness' demeanor. [FRE 801(d)(1)(A), Adv. Comm. Notes, 2026 Amend.]

FRE 803 Hearsay Exceptions (Availability of Declarant Immaterial)

Statements of present mental or emotional condition ("state of mind" exception)

- [8:2389] **Requirements for admissibility—statement of person whose state of mind is at issue:** Plaintiff sued defendant for violating bailment agreement involving a Liberace piano. Defendant claimed the piano was a gift. In response to defendant's offer to promote the piano, one of plaintiff's employees emailed a coworker that he "wish[ed] they take a long term loan out" and the coworker responded that he would ask defendant. Emails were properly admitted because they showed plaintiff giving direction to a plan for a long-term loan and the jury could infer that plaintiff followed through on that plan. [*Gibson Found., Inc. v. Norris* (1st Cir. 2025) 159 F4th 147, 151-152 (brackets in original)]

Statements for purpose of medical diagnosis or treatment (FRE 803(4))

- [8:2486] **Statements made with dual motives?** The Eleventh Circuit upheld a trial court's determination to exclude as inadmissible hearsay statements made by defendant to her psychologist, who diagnosed defendant with a dissociative disorder, where such statements were made in anticipation of litigation, not for diagnosis or treatment. [*United States v. Keegan* (11th Cir. 2025) 161 F4th 1334, 1341-1343]

"Business records" exception (FRE 803(6) and 803(7))

- [8:2685.3] **"Regular practice" to make record requirement:** In age discrimination action, defendant introduced Supervisor's desk notes indicating plaintiff failed to meet Company's performance expectations. Notes were improperly admitted under business records exception because there was *no evidence* that: (i) Supervisor regularly took notes on other employees; (ii) the notes were systematically checked for accuracy; (iii) Supervisor had special duties or habits of precision; or (iv) anyone else within Company relied on Supervisor's notes to make decisions. Nor was there any other internal mechanism that would ensure the notes were accurate. [*Murphy v. Caterpillar Inc.* (7th Cir. 2025) 140 F4th 900, 909-910]

CHAPTER 8H

PRIVILEGES

Attorney-Client Privilege—Advice Sought from Legal Advisor

[8:3410] **Alert—client's AI use may not be subject to attorney-client privilege:** Courts are beginning to address whether a client's communications with generative AI platforms (such as ChatGPT or Claude) are protected by the attorney-client privilege or the work product doctrine (¶*8:3700 ff.*). This is a new and unsettled area of law which is evolving rapidly. Some lower court decisions have not been favorable to clients who use these tools without attorney direction. Until courts and legislatures provide clearer guidance, practitioners should treat client use of AI in connection with litigation as a significant privilege risk. The safest course remains the most traditional one: clients should discuss their legal matters only with their attorneys, not with AI platforms.

Legal vs. business advice

- [8:3415.3] **Differing "primary purpose" standards:** Courts are divided on whether the test for determining a communication's primary purpose is whether legal advice was *the* primary purpose or *one of the* primary purposes. [*Greer v. County of San Diego* (9th Cir. 2025) 127 F4th 1216, 1224—dual-purpose communication can only have single primary purpose; *Epic Games, Inc. v. Apple Inc.* (9th Cir. 2025) 161 F4th 1162, 1179-1180—communications at issue contained classic business advice re business risks and fact injunction prompted or caused such communications insufficient to invoke

privilege; compare *FTC v. Boehringer Ingelheim Pharmaceuticals, Inc.* (DC Cir. 2018) 892 F3d 1264, 1267-1268—courts applying primary purpose test should determine whether obtaining or providing legal advice was "*one* of the significant purposes of the attorney-client communication" (emphasis in original; internal quotes omitted)]

- [8:3417] Attorney-client privilege did not protect internal slideshow presentation where its primary purpose was business, rather than legal advice. Although presentation contained slides related to a court-ordered injunction and included redacted privileged communications, those slides were merely an introduction to the bulk of presentation and failed to show receiving legal advice was even *a* primary purpose, much less *the* primary purpose of the communications. Because unredacted portions of slides that followed analyzed how various compliance options would affect the company's revenue, not the strength of its legal positions, the communication consisted of classic business advice regarding business risks. [*Epic Games, Inc. v. Apple Inc.* (9th Cir. 2025) 161 F4th 1162, 1179-1180]

Investigations

- [8:3427.2] Attorney-client privilege protected internal documents relating to public utility Company's investigation of its alleged involvement in bribery scheme from disclosure in shareholders' securities fraud class actions where Company and its board hired law firms to secure legal advice through internal investigations into Company's potential liability. The fact that Company made business decisions based on the legal advice did not preclude application of the attorney-client privilege to protect investigative documents. [*In re FirstEnergy Corp.* (6th Cir. 2025) 154 F4th 431, 436-438]

Attorney-Client Privilege—Confidential Communications

No protection for facts underlying communication

- [8:3457.6] **Compare—privilege applied to documents from internal investigation:** A public utility company, facing legal challenges following allegations of its involvement in a bribery scheme, employed outside legal firms to conduct internal investigations and advise on responding to subpoenas. In a subsequent securities class action suit by shareholders, the class action plaintiffs sought access to documents from the internal investigations. The attorney-client privilege, however, applied where investigatory counsel did not simply recite facts learned from third-parties, but instead determined what happened, whether it was lawful and what civil and criminal liability could result. [*In re FirstEnergy Corp*. (6th Cir. 2025) 154 F4th 431, 442]

"Common interest" doctrine

- [8:3509] **Application—joint defense rejected (privilege not applicable):** Because Defendant's communications with counsel in the presence of a confidential informant (CI) re

reclaiming seized drug money from the government did not satisfy the common interest exception, Defendant was not entitled to the protections of the attorney-client privilege. CI had no prior knowledge of the true purpose of the meeting, Defendant lured CI to the meeting under false pretenses, CI promptly reported to and cooperated with the FBI, and there was no palpable threat of litigation at the time that would make Defendant and CI potential codefendants. [*United States v. Brown* (5th Cir. 2025) 151 F4th 647, 657-658]

Exceptions to Attorney-Client Privilege

Joint client exception

- [8:3552.2] **Parent-subsidiary relationships:** In litigation between a parent and a subsidiary formerly represented by same attorney, the common interest doctrine does not apply. Rather, neither party may exercise the attorney-client privilege in subsequent litigation between themselves. [*In re Teleglobe Communications Corp.* (3rd Cir. 2007) 493 F3d 345, 365-366]

Fiduciary exception inapplicable (attorney-client privilege applies)

- [8:3586.11] **Executive deferred-compensation plans ("top-hat plans"):** The fiduciary exception does not apply to an executive severance plan under ERISA if it is an executive deferred-compensation plan (i.e., "top-hat plan"). [*Kramer v. American Elec. Power Executive Severance Plan* (6th Cir. 2025) 128 F4th 739, 746-748—where employer's executive severance plan qualified as "top-hat plan," fiduciary exception to attorney-client privilege did not apply (employer and Plan not compelled to produce privileged documents to Plan beneficiary)]

Waiver of Attorney-Client Privilege

Advice of counsel defense creates implied waiver

- [8:3659.6] **Compare—involvement of counsel defense:** The involvement of counsel defense is a narrower variation of the advice of counsel defense (¶*8:3659*), in which the client does not claim to have relied on counsel's specific legal advice, but instead on the fact that an attorney participated in the relevant transaction or decision. The attorney's involvement is offered as circumstantial evidence that the client acted in good faith and without fraudulent intent. Unlike the traditional advice of counsel defense, which is a "paradigmatic example of an implied waiver," the involvement of counsel defense does not automatically trigger a waiver of the attorney-client privilege. [*United States v. SpineFrontier, Inc.* (1st Cir. 2025) 160 F4th 212, 223-225 (vacating waiver order and remanding case to trial court for further analysis re whether jury was being requested to draw inference attorney approved of conduct or only made it less likely of intent to violate law and whether alternative measures (limiting instructions) would address potential prejudice to Government in lieu of waiver)]

Procedure for Claiming Attorney-Client Privilege

[8:3674] **Claiming attorney-client privilege (FRCP 26(b)(5)):** A person seeking to withhold information otherwise discoverable by asserting an attorney-client privilege must expressly make such claim and describe the nature of the documents, communications, or tangible things not disclosed in sufficient detail to enable other parties to assess the claim. [FRCP 26(b)(5)(A); see *In re Renco Group Inc.* (11th Cir. 2026) 164 F4th 1336, 1344—claim of attorney-client privilege is not self-executing; *and* ¶*8:3668*]

[8:3674.1] **Alert—new disclosure requirements for compliance with FRCP 26(b)(5)(A):** FRCP 26(f)(3)(D) is amended effective 12/1/26 to require parties to address as part of their discovery plan the timing and method for complying with FRCP 26(b)(5)(A). Because there is no one-size-fits-all approach, the amendment is aimed at providing parties maximum flexibility in designing an appropriate method for identifying the grounds for withholding materials and requiring early discussion of these issues with the court at the outset of the litigation to minimize problems later on. [FRCP 26(f)(3)(D) (amended eff. 12/1/26) & Adv. Comm. Notes, 2026 Amend.]

Work Product Doctrine—Waiver

Common interest exception

- [8:3708.1] **Effect of government agency FOIA exemptions:** The Freedom of Information Act (FOIA) requires the government to disclose requested agency records unless a statutory exemption applies. At least one court has held that FOIA's Exemption 5, allowing a government agency to withhold from a requesting party intra-agency documents not otherwise available by law (see 5 USC §552(b)(5), *discussed further at* ¶*8:4131.3*), is applicable where the government agency enters into a common-interest arrangement with nongovernment aligned parties in litigation. When the government discloses privileged materials to other aligned parties pursuant to a common-interest agreement, the government bears the burden to show the common interest doctrine applies. Upon meeting such burden, disclosure of protected documents does not constitute a waiver of the work product protection. [*Georgia v. United States Dept. of Justice* (DC Cir. 2025) 148 F4th 724, 735, 739-740]

Privilege Against Self-Incrimination

Duration of privilege

- [8:4037] **Effect of pending appeal:** A conviction is not "final" while a defendant's appeal of his conviction is pending. [*United States v. Oliver* (4th Cir. 2025) 133 F4th 329, 337—codefendant allowed to invoke privilege where testimony might have opened him up to adverse consequences if his pending appeal was remanded for resentencing]

Other sanctions for invocation of Fifth Amendment

- [8:4055.1] Witness in criminal case, who was granted statutory

immunity under 18 USC §§6002 and 6003 by Government in exchange for her testimony, continued to invoke her Fifth Amendment privilege at trial. The court found Witness in criminal contempt. Witness argued that the immunity granted was not coextensive with her Fifth Amendment privilege because it did not protect her from being prosecuted for perjury based on her testimony under immunity. Affirming the contempt order, the appellate court found there is no Fifth Amendment right to refuse immunized testimony based on fear of perjury prosecution. [*United States v. McBreairty* (1st Cir. 2026) 167 F4th 552, 554-555]

Journalists' Privilege

[8:4071] **Public interest not weighed:** In determining whether to apply the qualified reporter's privilege, courts are not required to balance the public's interest in the social importance of the news story against plaintiffs' personal interests in vindicating their claims. [*Chen v. FBI* (DC Cir. 2025) 153 F4th 1289, 1294-1295]

Deliberative Process Privilege

[8:4130.1] **Separation and disclosure of nonprivileged information:** The deliberative process privilege does not protect documents in their entirety. Where possible, the government must segregate and disclose non-privileged factual information within a document.

If the government shows a record includes exempt information, it is entitled to a presumption that it complied with its obligation to disclose reasonably segregable material. An FOIA requester may rebut the presumption by demonstrating that a reasonable person would find the government failed to comply. [*Rudometkin v. United States* (DC Cir. 2025) 140 F4th 480, 494—segregability analysis insufficient where, notwithstanding line-by-line document review, government failed to address in its affidavit whether record's exempt portions could be disclosed without causing foreseeable harm]

Invocation of privilege in Freedom of Information Act (FOIA) cases

- [8:4131.4] **Government's burden to show "chilling effect":** To meet this burden, the government must concretely demonstrate the link between the specified harm and specific information within the material withheld. Boilerplate and generic assertions of foreseeable harm (i.e., chilling future internal agency discussions) is insufficient except in the "rare situations" where the "foreseeability of harm is manifest from the very context and purpose of the documents." [*Rudometkin v. United States* (DC Cir. 2025) 140 F4th 480, 492-493 (internal quotes omitted)—Government's withholding of records re selection of high-ranking military position was proper where manifest nature of foreseeable harm was evident from records' context (confidentiality of internal discussions about candidates and selection process)]

Legislative Privilege

[8:4159] **Limitation—government entities and legislative bodies:** Because the privilege is personal to the legislator, a government entity or legislative body cannot invoke the legislative privilege on an individual legislator's behalf. [*Arnold v. Barbers Hill Independent School Dist.* (5th Cir. 2025) 157 F4th 749, 756-757—school district and its board of trustees lacked appellate standing to challenge protective order on basis of legislative privilege because they could not assert privilege on behalf of their superintendent or former president and superintendent and former president failed to individually assert privilege themselves]

Informant's Identity Privilege

[8:4199] Despite defendant's argument that informant's identity could have aided his defense by casting doubt on the search warrant and helping suppress evidence from search, district court did not abuse its discretion in denying motion for disclosure of informant's identity where informant's identity was not needed to assess the validity of the warrant and informant acted as mere tipster unlikely to testify at trial. [*United States v. Maxwell* (7th Cir. 2025) 143 F4th 844, 856-857]

Grand Jury Privileges

[8:4215] **Grand jury secrecy rule:** The long-established rule of grand jury secrecy is governed by FRCrP 6(e), which provides that government attorneys, grand jurors, interpreters, court reporters, recording device operators, transcribers and others "must not disclose a matter occurring before the grand jury." [FRCrP 6(e)]

The common law grand jury privileges (¶*8:4210 ff.*) protect only *grand jurors and witnesses* from being compelled to disclose the proceedings and/or testimony, but permits them to waive the privileges and voluntarily disclose information. The grand jury secrecy rule, by comparison, creates an affirmative duty for parties involved in or present at grand jury proceedings not to disclose matters occurring before the grand jury (not merely a protection against compulsion), which privilege cannot be waived. [*Kalbers v. United States Dept. of Justice* (9th Cir. 2026) 166 F4th 783, 791-795 (discussing scope of grand jury secrecy rule and determining FRCrP 6(e) bars disclosure of documents obtained through grand jury subpoena); *In re United States for an Order Pursuant to 18 USC 2705(b)* (DC Cir. 2026) 166 F4th 173, 178-180 (same)]

CHAPTER 8I

OTHER EXCLUSIONS

Subsequent Remedial Measures (FRE 407)

Admissible to prove disputed issue

- [8:4324.4] **Application—inadmissible where feasibility not in dispute:** In action for violations of California Labor Code requiring employer to indemnify employee for all necessary expenditures incurred in discharge of job duties,

employer's post-litigation change to its cell phone reimbursement policy was inadmissible as a subsequent remedial measure. Plaintiffs offered remedial measure as evidence of employer's culpability (requiring employees to use personal cell phones at work) but never challenged whether it was *feasible* for employer to allow employees to use their personal cellphones or to reimburse them for such use. [*Williams v. J.B. Hunt Transport, Inc.* (9th Cir. 2025) 151 F4th 1020, 1037-1038]

Discretionary exclusion under FRE 403

- [8:4326.2] Testimony that defendant voided patient tests run on its blood testing device was not precluded under FRE 407 as a subsequent remedial measure. Sufficient evidence supported finding that the decision to void tests was not voluntary. District court also reasonably concluded under FRE 403 that such evidence was highly probative of defendant's knowledge and state of mind because decision to void tests demonstrated blood testing devices were unreliable despite defendant's contrary representations to investors. [*United States v. Holmes* (9th Cir. 2025) 163 F4th 547, 568-569]

Plea and Plea Discussions in Criminal Cases (FRE 410)

[8:4400.1] **"Against defendant":** Courts are split regarding whether and to what extent a defendant in a civil suit may use a nolo plea *against a plaintiff* who entered the nolo plea as a *defendant in a prior criminal action*. [*Rose v. Uniroyal Goodrich Tire Co.* (10th Cir. 2000) 219 F3d 1216, 1219-1221—in wrongful discharge action, plaintiff employee's prior nolo plea to drug charge admissible to show basis for employer's decision to discharge; but see *King v. R. Villegas* (9th Cir. 2025) 156 F4th 979, 984-985—neither plaintiff's nolo plea to resisting executive officer or statements during plea hearing were admissible in 42 USC §1983 excessive force action against correctional officers arising out of same incident]

[8:4403.3] **Enforcement of express waivers in plea agreements:** Plea agreements commonly contain provisions waiving all of defendant's evidentiary objections to facts underlying the plea agreement, including objections based on FRE 410. Such waivers are effective only where (i) the court finds the plea agreement was breached; and (ii) the government chooses to pursue charges not filed previously as a result of entering into the plea agreement. [See *United States v. Puig Valdes* (9th Cir. 2025) 138 F4th 1231, 1239-1241—plea agreement waiving FRE 410 protections was expressly contingent on court approval that never occurred, thus agreement was not enforceable and waiver did not apply; *United States v. Wilson* (10th Cir. 2025) 137 F4th 1127, 1135-1136—trial court erred in allowing guilty plea and related documents into evidence without holding hearing and making express findings defendant breached plea agreement]

Discretionary Exclusion (FRE 403)

"Substantially outweighed"—balancing required

- [8:4519.12] **Application—remoteness in time factor:** In

trial for drug possession, district court reasonably excluded defendant's cross-examination of DEA's forensic chemist regarding a performance improvement plan issued 3 1/2 years after chemist's initial analysis. The 2023 performance improvement plan concerned work performance generally and was not tied to the 2019 testing on the defendant's samples. Given the significant lapse of time and absence of any demonstrated connection between the plan and testing of defendant's samples, any marginal relevance for impeachment purposes was outweighed by the risk of confusion of the issues and unfair prejudice. [*United States v. Yumang* (7th Cir. 2026) 164 F4th 601, 611]

Effect of limiting instruction

- [8:4521.8] District court did not abuse its discretion in admitting inmate's testimony about his experience smuggling contraband into prison, the reasons inmates sought cell phones, and the high value placed on smuggled phones. Evidence was probative of defendant's motive, its relevance was not outweighed by the danger of unfair prejudice, and the court's careful and clear jury instructions regarding the limited purpose of the testimony protected against any unfair prejudice. [*United States v. Armenteros-Chervoni* (1st Cir. 2025) 133 F4th 8, 27-30]

Grounds for exclusion—"unfair prejudice"

- [8:4531.1] **Application—emotionally discomforting not sufficient:** Although evidence presented at trial (two videos recorded during murders, photos of the excavation of victims' graves, and autopsy photos of victim's remains) was "undoubtedly gruesome" and caused jury to ask for warning prior to showing graphic videos, the evidence's highly probative value was not outweighed by the risk of unfair prejudice. Although jurors may have been disturbed by the evidence, unfair prejudice requires a showing of a *genuine risk* the jury's emotions will be excited to irrational behavior, and that such risk is disproportionate to the probative value of the offered evidence. [*United States v. Contreras* (4th Cir. 2025) 149 F4th 349, 364-366 (no abuse of discretion in admitting video and photos)]
- [8:4534.2] **Application—effect of opportunity to cross-examine:** Admitting evidence of three gang-related murders in which defendants had no involvement was not an abuse of discretion where the evidence had "significant probative value" in establishing a racketeering enterprise. Although the evidence "was most certainly prejudicial" (to show defendants were gang members committing murder), any prejudice was mitigated by defense counsel's cross-examination of relevant witnesses. Court's jury instruction that defendants were not on trial for conduct not specifically charged in the indictments further mitigated prejudice. [*United States v. Contreras* (4th Cir. 2025) 149 F4th 349, 364]
- [8:4535.5] **Application—effect of "opening the door":** Notwithstanding court's pretrial ruling excluding ev-

idence of defendant's Nazi memorabilia as unfairly prejudicial, during direct examination in a federal hate crimes case, defendant "opened the door" to admission of such evidence. The court's "change of heart" in admitting the evidence was not an abuse of discretion. Defendant was on notice of the consequences of raising this evidence, but did so anyway by framing himself as a military collector. Jury could consider his ownership of Nazi memorabilia when deciding whether he committed a hate crime. [*United States v. Hudak* (4th Cir. 2025) 156 F4th 405, 411-412]

- [8:4544] **Application—gory photographs:** In racketeering case involving murder and kidnapping, evidence (videos recorded during victim's murders, photos of the excavation of victims' graves, and autopsy photos), albeit gruesome, was nonetheless properly admitted. Its probative value was not outweighed by the risk of unfair prejudice because the evidence was not duplicative of other evidence, not introduced solely for its shock value, placed several defendants at the scene of the crime, corroborated witness testimony, helped establish the victims' identities, and depicted parts of the events that were the subject of the charges. While the photos may have been upsetting for the jury to view, "such was the nature of the crime." [*United States v. Contreras* (4th Cir. 2025) 149 F4th 349, 364-367]

Grounds for exclusion—"confusing" or "misleading" evidence

- [8:4556.4a] In prosecution of child-exploitation related charges, the district court did not abuse its discretion in excluding evidence of sexually explicit photos another minor took that were different than the defendant's. The evidence was likely to confuse the jury by prompting a mini-trial on the photos, which had no bearing on whether *defendant* solicited or received sexually explicit photographs from different minors. [*United States v. Jakits* (6th Cir. 2025) 129 F4th 314, 330]
- [8:4559] Evidence of the age of consent under Minnesota law was inadmissible at trial because its probative value was substantially outweighed by the risk of confusing the issues in a federal prosecution for sex trafficking of a minor. The defendant argued it was relevant to his good faith belief that his conduct complied with state law, but the federal statute sets the relevant age at 18, making state law irrelevant and potentially misleading. [*United States v. Lazzaro* (8th Cir. 2025) 129 F4th 514, 529-530]
- [8:4562] Plaintiff who received 95 electroconvulsive therapy (ECT) treatments brought negligence and products liability claims against manufacturer of ECT device, alleging that ECT treatments caused permanent memory loss and brain damage. District court did not abuse its discretion in determining that marginal probative value of a patient consent video featuring patient's treating physician was substantially outweighed by risk of creating jury confusion about the legal standard. Video

was cumulative of other evidence presented and focused on disclosures from the doctor as opposed to disclosures from the manufacturer. [*Thelen v. Somatics, LLC* (11th Cir. 2025) 156 F4th 1115, 1130-1131]

CHAPTER 10

CROSS-EXAMINATION

Objectives of Cross-Examination

Other grounds for impeachment

- [10:271.5] **Application—prior felony conviction admitted:** In civil rights excessive force case arising out of prison riot, Plaintiff's convictions for aggravated assault and armed robbery were properly admitted under FRE 403's balancing test. Plaintiff's credibility was a central issue in the case, there was a direct conflict between Plaintiff's and Officers' testimonies, and video evidence was ambiguous. [*Jackson v. Catanzariti* (11th Cir. 2025) 159 F4th 874, 884-885]

CHAPTER 12

IMPEACHMENT AND REHABILITATION

Impeachment

Character for truthfulness—impeachment with prior felony conviction

- [12:53.7] **Application—FRE 403 balancing test applied:** In excessive force case, plaintiff's impeachment by prior convictions was proper where plaintiff's credibility was a critical issue and video evidence was ambiguous. Danger of unfair prejudice was reduced because it was a civil case and jury already knew plaintiff was an inmate at state prison. [*Jackson v. Catanzariti* (11th Cir. 2025) 159 F4th 874, 884-885]

CHAPTER 18

VERDICTS AND JUDGMENTS

Verdicts in Jury Trials

Special verdict—effect of conflicting special verdict answers

- [18:52.3] **Resubmission not mandatory:** Although the Ninth Circuit recognizes a trial court's discretion to resubmit inconsistent special verdict answers to the jury before dismissing the jury, it also has expressly found that a trial court has discretion *not* to do so while the jury is still available. [*Lister v. City of Las Vegas* (9th Cir. 2025) 148 F4th 690, 697-698 (no abuse of discretion in refusing to resubmit inconsistent special verdict answers on liability and damages where, having polled jury, court had sufficient legal grounds to discharge jury and reconcile special verdict on its own)]

Final judgments and amended judgments—separate document requirement

- [18:140.4a] **Effect of separate judgment entered after 150-day deadline:** Where a final judgment is deemed entered by operation of law after 150 days (¶*18:140.2*), all subsequent final judgments entered by the court thereafter are superfluous and ineffective for purposes of a timely appeal. The statutory filing deadline for an appeal is jurisdictional and cannot be altered by subsequent waiver, forfeiture or the parties' agreement. [*DRE Health Corp. v. BRM Trades, LLC* (8th Cir. 2025) 151 F4th 957, 959-960—appeal dismissed as untimely where order was "entered" by operation of law 150 days after its entry on docket, and subsequent final judgment entered by court after such deadline expired did not restart time to file appeal]

[18:160] **Time to appeal postjudgment orders not specified in FRCP 58(a) and appealable interlocutory orders?** Because FRCP 58 does not specify the requirements for entry of postjudgment orders not mentioned in FRCP 58(a) or appealable interlocutory orders, it is unclear when the time to appeal such orders starts to run:

- [18:160.1] **Plain language interpretation—time to appeal may be subject to 150-day period:** FRCP 58 requires every "judgment" (except the orders specified in FRCP 58(a), ¶*18:156*) to be set forth on a separate document (FRCP 58(a), ¶*18:125*), and FRCP 54(a) defines a "judgment" to include any "order" from which an appeal lies. This definition arguably encompasses any postjudgment order not specified in FRCP 58(a) and any appealable interlocutory order, making the date of entry of such orders arguably determined by FRCP 58(c)(2) (*see* ¶*18:150*).

  This plain language interpretation, however, has been criticized by the Ninth Circuit in *McNeil v. Gittere* (¶*18:160.2*).

- [18:160.2] **Time to appeal subject to 30-day period:** The Advisory Committee Notes to the 2002 Amendments to FRCP 58(c)(2) (formerly (b)(2)) state that the time to appeal an interlocutory order that is appealable under the collateral order doctrine should start to run the date it is entered "without regard to creation of a separate document and without awaiting expiration of the 150 days" provided by FRCP 58(c)(2).

  Likewise, distinguishing between appealable collateral "orders" and final "judgments," the Ninth Circuit found an order denying summary judgment on qualified immunity grounds (i.e., immediately appealable under the collateral order doctrine) was deemed "entered" under 28 USC §2107 when it was filed on the civil docket. The court rejected Defendants' isolated, plain language interpretation of the FRCP, reasoning the timely appeal jurisdictional requirement in federal civil cases also must be considered: The FRCP cannot expand or diminish the jurisdiction conferred by Congress, and where a federal statute

unambiguously circumscribes jurisdiction, the statute (i.e., 30-day period in 28 USC §2107) must be followed. [*McNeil v. Gittere* (9th Cir. 2025) 150 F4th 1205, 1207-1210 (noting collateral orders do not raise same concern re risk of losing appellate rights that final judgments do)]

CHAPTER 19

COSTS, ATTORNEY FEES AND OTHER EXPENSES

Costs (Other Than Attorney Fees)

Statutes providing for costs not contrary to FRCP 54(d)(1)

- [19:4.3a] **Clayton Act:** The Clayton Act (15 USC §12 et seq.) provides that where a plaintiff "substantially prevails" in an action for injunctive relief under the Clayton Act is entitled to the cost of suit (including reasonable attorney fees). [See 15 USC §26; *Garavanian v. JetBlue Airways Corp.* (1st Cir. 2025) 149 F4th 95, 98-102 (costs/attorney fees under Clayton Act not warranted because plaintiffs failed to qualify as prevailing parties under statute)]

Statutory Fee Awards

Determining "reasonableness" fee rate

- [19:321.2] **Effect of small law firm size:** It is improper for a court to deem it unreasonable to award "big law" rates to a small law firm. [*LA Int'l Corp. v. Prestige Brands Holdings, Inc.* (9th Cir. 2026) 168 F4th 608, 626]
- [19:325.20] **Determination must be specifically explained:** In 42 USC §1988 suit alleging county took P's property without just compensation, district court insufficiently explained its decision to reduce attorney hours by 35%. While court gave some examples of relevant factors that might weigh in favor of fee reduction, it failed to explain why those factors made the hours spent unnecessary. [*Freed v. Thomas* (6th Cir. 2025) 137 F4th 552, 561]

Equal Access to Justice Act (EAJA)

- [19:346] **Recovery against U.S. in adversary adjudication conducted by administrative agency:** Prevailing parties may also recover "fees and other expenses" from the United States in an "adversary adjudication" conducted by an *administrative agency* unless the adjudicative officer finds that the agency's position "was substantially justified or that special circumstances make an award unjust." [5 USC §504(a)(1); *Richlin Security Service Co. v. Chertoff* (2008) 553 US 571, 574-577, 590, 128 S.Ct. 2007, 2010-2012, 2019—prevailing party may recover paralegal fees at prevailing market rate; *Contractor's Sand & Gravel, Inc. v. Federal Mine Safety & Health Review Comm'n* (DC Cir. 2000) 199 F3d 1335, 1338; *Benally v. United States of Navajo & Hopi Indian Relocation* (9th Cir. 2025) 154 F4th 630, 632, 638 (awarding prevailing party attorney fees despite fact Indian tribe paid fees through legal services program)]

Fair Labor Standards Act (FLSA)

- [19:484.35] **Results obtained considered; not an exact science:** Analyzing the degree of success obtained is not an exact science. In assessing fees, a court's goal "is to do rough justice, not to achieve auditing perfection." [*Garcia v. State Ins. Fund Corp.* (1st Cir. 2026) 169 F4th 13, 29 (internal quotes omitted); *De Paredes v. Zen Nails Studio LLC* (4th Cir. 2025) 134 F4th 750, 754—court improperly relied on court-produced fee matrices as presumptive baseline for determining reasonable fees in FLSA action]

CHAPTER 20

POST-TRIAL MOTIONS

Renewed Motion for Judgment as a Matter of Law (Postverdict JMOL)

Appellate review

- [20:57] **Abuse of discretion standard for FRCP 50(a) preservation:** While appellate courts review the *substance* of a trial court's decision granting or denying a JMOL de novo, the trial court's determination of whether grounds for a *renewed* JMOL under FRCP 50(b) are properly preserved is reviewed under the *abuse of discretion* standard. [*Ziccarelli v. Dart* (7th Cir. 2025) 142 F4th 477, 483-484]

Motion for New Trial

[20:135] **Appellate review:** Appellate courts generally accord trial courts wide discretion in conducting trials. An abuse of discretion will be found only where there was an absolute *absence of evidence* supporting the jury's verdict. [*Lewis v. Board of Supervisors of Louisiana State Univ. & Agricultural & Mechanical College* (5th Cir. 2025) 134 F4th 286, 296-297]

[20:151.2] **Based on violation if in limine order:** Counsel's single question on cross-examination in violation of in limine order did not warrant a new trial. The jury's mixed verdict demonstrated that the jury was not influenced by counsel's conduct but carefully considered the evidence and reached a well-reasoned decision. [*Selective Ins. Co. of America v. Heritage Const. Companies, LLC* (8th Cir. 2026) 165 F4th 1132, 1141]

Motion to Alter or Amend Judgment (FRCP 59(e))

[20:276.1] **Timing:** A FRCP 59(e) motion to "alter or amend" a judgment *must be filed no later than 28 days* after entry of the judgment (¶*20:321 ff.*). [FRCP 59(e)]

The 28 days begins to run from the date the "final judgement" is entered; i.e., a decision that conclusively determines the pending claims of the parties to the litigation. [*Alessi Equip., Inc. v. American Piledriving Equip., Inc.* (2nd Cir. 2025) 160 F4th 38, 43-44, 48—where two documents titled "judgment" were issued by court, document that resolved all issues of liability, damages and prejudgment interest triggered time to file FRCP 59(e) motion (the other document left party's prejudgment interest issue unresolved)]

Motion for Relief from Judgment Based on Clerical Error (FRCP 60(a))

[20:333] **Cannot alter judgment's substantive reasoning:** FRCP 60(a) may not be used to reconsider a substantive issue that has already been decided, or to revisit the court's decisions already made. [*Chavez-Deremer v. Medical Staffing of America, LLC* (4th Cir. 2025) 147 F4th 371, 415-416 (denying FRCP 60(a) motion brought to relitigate substance of and bases for court's damages calculation, not to correct a "clerical error")]

Motion for Relief from Judgment Based on Mistake, Newly-Discovered Evidence, Fraud, Etc. (FRCP 60(b))

"Final" judgment or order required

- [20:365.1] **Includes dismissal without prejudice:** A dismissal without prejudice of a civil action is a final judgment, order or proceeding that may be reopened under FRCP 60(b). [*Waetzig v. Halliburton Energy Services, Inc.* (2025) 604 US 305, 311-312, 145 S.Ct. 690, 696]

Based on "catchall" grounds (FRCP 60(b)(6))

- [20:402] **Exceptional circumstances required:** This provision is used sparingly as an equitable remedy to prevent manifest injustice where *extraordinary circumstances* prevented a party from taking action in a timely manner to avert or correct an erroneous judgment. [*BLOM Bank SAL v. Honickman* (2025) 605 US 204, 211-212, 145 S.Ct. 1612, 1619-1620]

Procedural considerations—time limits for bringing motion

- [20:430] **Motions under FRCP 60(b)(4), (b)(5) or (b)(6)—"reasonable time":** There is no outside time limit for moving for relief under FRCP 60(b)(4) (judgment void), 60(b)(5) (judgment discharged or satisfied) or 60(b)(6) ("any other reason that justifies relief"). The only requirement is that the motion be made within a "reasonable time." [FRCP 60(c)(1); see *Coney Island Auto Parts Unlimited, Inc. v. Burton Trustee for Vista-Pro Automotive, LLC* (2026) 607 US ___, ___, 146 S.Ct. 579, 582-585—FRCP 60(c)(1) "reasonable time limit" applies to FRCP 60(b)(4) motions (abrogating prior authorities holding no time limit applied); *Molloy v. Wilson* (9th Cir. 1989) 878 F2d 313, 316 ("reasonable time limit" applied)]