

*This is your new*

# Trial Handbook

*Fall 2016*

by Kent Sinclair

This new *Trial Handbook (Fall 2016)* replaces the Spring 2016 *Trial Handbook*. Simply discard the two grass-green volumes of *Trial Handbook (Spring 2015)*, as well as the USB flash drive, and replace them with this completely updated set.

This edition of *Trial Handbook* updates **Volume 2's** extensive **Case Authority** with scores of the most recent leading decisions construing the evidence rules. Here's just a small sample:

**New discussions of the Patent Agent Privilege.** The unique roles of patent agents, the congressional recognition of their authority to act, the Supreme Court's characterization of their activities as the practice of law, and the current realities of patent litigation counsel in favor of recognizing an independent patent agent privilege. *See* page CA-502 *et seq.*

**New discussions of Authentication and Identification of Digital Files.** Where a "mirror image" of a mass digital data storage device, such as a hard disk drive, containing responsive data has been lawfully seized from a third-party custodian, authentication concerns arising under Rule 901 cannot be avoided simply by returning the original medium to the party from whom it was seized. This is so because a third-party custodian may need to utilize a hard drive in ways that will alter the data, and will likely have no incentive to retain a mirrored copy of a drive as it once existed. *United States v. Ganius*, 2016 U.S. App. LEXIS 9706 (**2d Cir.** 2016). *See* page CA-1287 *et seq.*

A district court's refusal to play a white noise while plaintiff's attorney was making objections about the admissibility of evidence, thus **permitting the jury (potentially) to hear inadmissible evidence in violation of Rule 103(d)**, was not reversible error, where the plaintiff failed to indicate specifically what inadmissible evidence was suggested to the jury and the jury was instructed that lawyers' statements, arguments, questions, and comments are not evidence. *Smiley v. Gary Crossley Ford, Inc.*, 2016 U.S. Dist. LEXIS 54664 (W.D. Mo. 2016). *See* page CA-19.

In a case charging the defendant and others with several crimes, including conspiracy to distribute controlled drugs with the intent to commit rape, nightclub video security footage purporting to show one defendant slipping drugs into the victim's drink would not be **excluded under Rule 106** on the ground that it fails to show several hours of the victim's alcohol consumption prior to her interactions with the defendant. *United States v. Licciardi*, 2016 U.S. Dist. LEXIS 47745 (E.D. La. 2016). *See* page CA-62.

**Use of profanity** in a recorded conversation generally does not create a **risk of unfair prejudice**, where the content of the conversation is otherwise relevant to the charges **under Rule 401**. This is particularly so where, in order to minimize the potential focus on profanity, the court prevents the jury from seeing a transcript of recorded voicemails and instructs the

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jury to focus on the content of the messages, as opposed to the language used. *United States v. Morris*, 817 F.3d 1116 (8th Cir. 2016). *See* pages CA-162, -192.

In a prosecution for production, receipt, and possession of child pornography, transfer of obscene material to a minor, and coercion and enticement of a minor, where an Internet chat log detailed what the defendant did with another minor victim, and those acts were deemed to be **“strikingly similar”** to what he did with the alleged victim in the instant case, the Internet chat log was **admissible under Rule 404(b), and not excludable under Rule 403**, because it spoke to defendant’s modus operandi: finding a vulnerable, underage girl on the Internet and exploiting her for sexual pleasure—and showed the means by which defendant induced the victim in the instant prosecution to engage in the conduct at issue. *United States v. DeHate*, 2016 U.S. Dist. LEXIS 2818 (E.D. Mich. 2016). *See* pages CA-189, -269, -289, -296.

A police officer’s decision to draw his gun, use handcuffs, or search a car during a traffic stop can hardly be characterized as “habitual” or “semi-automatic” so as to be **admissible as evidence of habit or routine practice under Rule 406**. *Nelson v. City of Chicago*, 810 F.3d 1061 (7th Cir. 2016). *See* page CA-321.

Confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from **compelled disclosure under Rule 501**. Conversations and notes taken during counseling sessions with licensed social workers constitute **“confidential communications”** within this privilege. *Jiang v. Porter*, 2016 U.S. Dist. LEXIS 68934 (E.D. Mo. 2016). *See* page CA-467.

A party seeking the protections afforded under the **clergy-communicant privilege** must show that the communications were made (1) to a clergy member, (2) in the clergy member’s spiritual and professional capacity, and (3) with a reasonable expectation of confidentiality. *Sampson v. Sisters of Mercy of Williard*, 2016 U.S. Dist. LEXIS 10828 (N.D. Ohio 2016). *See* page CA-482.

**Prostitution** is not a crime involving dishonesty or deceit, such that a prior prostitution conviction might suggest that the victim has a history of lying and that his or her testimony may therefore be false. A prior prostitution conviction thus has relatively little impeachment value, for purposes of Rule 609(a). *United States v. Thompson*, 2016 U.S. Dist. LEXIS 55385 (W.D.N.Y. 2016). *See* page CA-661.

**“Historical cell-site analysis”** uses cell phone records and cell tower locations to determine, within some range of error, a phone’s location at a particular point in time. Some circuits have treated historical cell-site analysis as **lay testimony falling within the purview of Rule 701**. *United States v. Hill*, 818 F.3d 289 (7th Cir. 2016). *See* page CA-761.

**Website “screenshots” are not hearsay under Rule 801 because they are not “statements”** as defined in Rule 801(a). Photographs are not statements unless they are intended as assertions of some kind, and likewise, website screenshots are not assertions when they are offered to show what content is found on the website. *Summit Auto Sales, Inc. v. Draco, Inc.*, 2016 U.S. Dist. LEXIS 21643 (N.D. Ala. 2016). *See* pages CA-958, -1055.

A **domestic abuse victim’s statement** to a social worker during an emergency room visit indicating her fear of returning home falls under the **Rule 803(3) exception** as a statement of her then-existing state of mind. *United States v. Eaves*, 2016 U.S. Dist. LEXIS 47644 (N.D. Okla. 2016). *See* page CA-1088.

In addition, you will find the entire contents of both volumes of *Trial Handbook (Fall 2016)* on the companion **USB flash drive**—a searchable, electronic version of the book that provides instant access to all of Professor Sinclair’s materials, in a convenient, portable format.