

SKLANSKY

EVIDENCE  
Cases, Commentary,  
and Problems

ASPEN  
PUBLISHERS

---

# **EVIDENCE**

## **CASES, COMMENTARY, AND PROBLEMS**

**David A. Sklansky**

*University of California, Los Angeles, School of Law*



1185 Avenue of the Americas, New York, NY 10036

[www.aspenpublishers.com](http://www.aspenpublishers.com)

© 2003 Aspen Publishers, Inc.

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or any information storage and retrieval system, without permission in writing from the publisher. Requests for permission to make copies of any part of this publication should be mailed to:

Permissions  
Aspen Publishers  
1185 Avenue of the Americas  
New York, NY 10036

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 0-7355-2756-3

**Library of Congress Cataloging-in-Publication Data**

Sklansky, David A.

Evidence : cases, commentary, and problems / David A. Sklansky  
p. cm.

Includes index.

ISBN 0-7355-2756-3 (alk. paper)

1. Evidence (Law)—United States. I. Title.

KF8934.S56 2003

347.73'6—dc21

2002043892

---

# EVIDENCE

## **EDITORIAL ADVISORS**

### **Erwin Chemerinsky**

Sydney M. Irmas Professor of Public Interest Law, Legal Ethics,  
and Political Science

University of Southern California

### **Richard A. Epstein**

James Parker Hall Distinguished Service Professor of Law

University of Chicago

### **Ronald J. Gilson**

Charles J. Meyers Professor of Law and Business

Stanford University

Marc and Eva Stern Professor of Law and Business

Columbia University

### **James E. Krier**

Earl Warren DeLano Professor of Law

University of Michigan

### **Richard K. Neumann, Jr.**

Professor of Law

Hofstra University School of Law

### **Kent D. Syverud**

Dean and Garner Anthony Professor

Vanderbilt University Law School

### **Elizabeth Warren**

Leo Gottlieb Professor of Law

Harvard University

## **EMERITUS EDITORIAL ADVISORS**

### **E. Allan Farnsworth**

Alfred McCormack Professor of Law

Columbia University

### **Geoffrey C. Hazard, Jr.**

Trustee Professor of Law

University of Pennsylvania

### **Bernard Wolfman**

Fessenden Professor of Law

Harvard University

---

## About Aspen Publishers

Aspen Publishers, headquartered in New York City, is a leading information provider for attorneys, business professionals, and law students. Written by preeminent authorities, our products consist of analytical and practical information covering both U.S. and international topics. We publish in the full range of formats, including updated manuals, books, periodicals, CDs, and online products.

Our proprietary content is complemented by 2,500 legal databases, containing over 11 million documents, available through our Loislaw division. Aspen Publishers also offers a wide range of topical legal and business databases linked to Loislaw's primary material. Our mission is to provide accurate, timely, and authoritative content in easily accessible formats, supported by unmatched customer care.

To order any Aspen Publishers title, go to [www.aspenpublishers.com](http://www.aspenpublishers.com) or call 1-800-638-8437.

To reinstate your manual update service, call 1-800-638-8437.

For more information on Loislaw products, go to [www.loislaw.com](http://www.loislaw.com) or call 1-800-364-2512.

For Customer Care issues, e-mail [CustomerCare@aspenpublishers.com](mailto:CustomerCare@aspenpublishers.com); call 1-800-234-1660; or fax 1-800-901-9075.

**Aspen Publishers**  
**A Wolters Kluwer Company**

---

***To Deborah, for everything***

---

## PREFACE

Evidence law is steeped in the drama of trials. It is critically important for any lawyer who might ever step foot in a courtroom. And it is just plain fascinating. For all these reasons, I love teaching the subject, and most students seem to enjoy learning it.

But students also tend to find evidence law difficult. The rules of evidence are notoriously complicated and confusing. Much of evidence law makes sense only against the backdrop of Anglo-American trial procedure, with which law students typically have only limited familiarity. And students—like lawyers and judges—often are puzzled by the very nature of evidence law: Is it statutory, judge-made, or a matter of applied logic?

I have tried in this book to capitalize on the inherent attractions of evidence law and to minimize its difficulty. Because actual cases are more interesting and more memorable than made-up problems, the book has more cases than problems. The cases have been selected to illustrate the central concepts and controversies of evidence law, not to provide encyclopedic coverage of the subject, and they have been edited tightly. Problems have been used selectively, sometimes to allow students to test their understanding of particularly confusing rules, and sometimes to highlight and to spark reflection about ambiguities in the rules. Many of the problems are themselves drawn from real cases. Because the Federal Rules of Evidence provide a convenient and now pervasive framework for thinking about evidence law, the structure of the book tracks, wherever possible, the structure of the federal rules. The major exceptions to the ban on hearsay, for example, are addressed in the same order here as in the Federal Rules of Evidence. Because the legislative history of the federal rules, particularly the Advisory Committee's Notes, have proved so highly influential, the cases are accompanied by edited excerpts from the Advisory Committee Notes and, where relevant, congressional reports and floor debates. Because academic commentary has played such a large role in the development of evidence law—and because much of that commentary is so interesting—I have added excerpts from the writings of a wide range of scholars. Wigmore and Morgan are here, but so are Mirjan Damaška and Jennifer Mnookin. These excerpts, too, have been edited tightly, in part to allow room for multiple perspectives.

The first chapter of this book gives students the basic background information they need about the nature and sources of evidence law and the conventions of Anglo-American trial practice. I have tried to spell these matters out as explicitly as possible. After the first chapter, though, I have kept my-



self in the background. This is not a treatise. Nor is it a series of lectures. It is a set of materials designed to illustrate the chief features of evidence law and to facilitate lecture and class discussion. I have proceeded on the assumption that my own students get quite enough of my own views in class, and that other students probably are more interested in their instructors' views than in mine.

The book is designed so that it can be assigned cover-to-cover in a four-unit course. The topics are arranged in the order that I cover them when I teach evidence, but other instructors may choose to vary the sequence. In view of the steadily increasing importance of scientific evidence, probabilistic proof, expert testimony, and demonstrative exhibits, I have included more materials on these topics than evidence casebooks typically contain. I also have included readings on certain other topics traditionally slighted in evidence courses, such as questioning by the judge and by the jury. I have found that students enjoy studying all of these issues, and I think they are sufficiently important to warrant the space I have given them. But instructors who disagree can easily skip those portions of the book or assign readings from them selectively.

My greatest debt by far is recorded in the dedication. But I also owe some other thanks. Paul Bergman, Ken Graham, and John Wiley taught me much of what I know about teaching evidence. My parents, Jack and Gloria Sklansky, taught me much of what I know, period. Several hundred UCLA law students sharpened my understanding of evidence law and made teaching the subject a joy. Several students gave countless hours of their time to help me improve this book and its supporting materials: Carolyn Hoff, '97; Christina Johnson, '03; Hien Nguyn, '03; Meghan Habersack, '04; Robert Horton, '04; and Jonathan Phillips, '04. My editors at Aspen—Lynn Churchill, Anne Brunell, Barbara Roth, and the incomparable Carol McGeehan—were a dream to work with. Steven Clymer, Daniel Richman, and several anonymous reviewers criticized earlier drafts of the book perceptively and constructively. Dr. Michael Beach graciously helped me with the "probability primer" in Chapter 9. As always, the librarians and staff of the Hugh & Hazel Darling Law Library provided superb research assistance, and Tal Grietzer gave me splendid secretarial support. My colleagues have made UCLA a wonderful place to teach and to write about law. And Joseph Edward Lambe Sklansky kept his parents smiling throughout the work on this book.

David A. Sklansky

February 2003

---

## ACKNOWLEDGMENTS

Excerpts from the following, copyrighted materials are reprinted with permission. Except where noted, the publication date is also the copyright date.

Mirko Bagaric & Kumar Amarasekara, *The Prejudice Against Similar Fact Evidence*, 5 Int'l J. Evid. & Proof 71 (2001). Reprinted with permission.

Vaughn C. Ball, *The Myth of Conditional Relevance*, 14 Ga. L. Rev. 435 (1980). Reprinted with permission.

Robert D. Brain & Daniel J. Broderick, *The Derivative Use of Demonstrative Evidence: Charting Its Proper Evidentiary Status*, copyright © 1992 by Robert D. Brain & Daniel J. Broderick; published in 25 U.C. Davis L. Rev. 957 (1992), copyright © 1992 by the Regents of the University of California. Reprinted with permission.

Simon A Cole, *Suspect Identities: A History of Fingerprinting and Criminal Identification* (2001), published by Harvard University Press, Cambridge, Mass. Copyright © 2001 by the President and Fellows of Harvard College. Reprinted by permission of the publisher.

Mirjan Damaška, *Evidence Law Adrift* (1997), published by Yale University Press. Copyright © 1997 by Yale University. Reprinted with permission.

James J. Duane, *The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders*, published by West Publishing Co. in 157 F.R.D. 95 (1994). Reprinted with permission.

David L. Faigman, David H. Kaye, Michael J. Saks & Joseph Sanders, *How Good Is Good Enough? Expert Evidence Under Daubert and Kumho*, 50 Case W. Res. L. Rev. 645 (2000). Reprinted with permission.

G. Michael Fenner, *The Residual Exception to the Hearsay Rule*, 33 Creighton Law Review 265 (2000). Reprinted with permission.

Richard D. Friedman, *Character Impeachment Evidence: The Asymmetrical Interaction Between Personality and Situation*, 43 Duke L.J. 826 (1994). Reprinted with permission.

Richard D. Friedman, *The Conundrum of Children, Confrontation, and Hearsay*, 65 Law & Contemp. Probs. 243 (2002). Reprinted with permission.

Richard D. Friedman, "E" Is for Eclectic: Multiple Perspectives on Evidence, 87 Va. L. Rev. 2029 (2001). Reprinted with permission.

Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. Pa. L. Rev. 1171 (2002). Reprinted with permission.

Victor Gold, *Do the Federal Rules of Evidence Matter?*, 25 Loyola L.A. L. Rev. 909 (1992). Reprinted with permission.

Robert H. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence*. This article originally appeared at 28 Colum. L. Rev. 432 (1928). Reprinted with permission.

Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea*. Originally published in 51 Ohio St. L.J. 575 (1990). Reprinted with permission.

Jonathan J. Koehler, *DNA Matches and Statistics: Important Questions, Surprising Answers*, 76 *Judicature* 222 (1993). Reprinted with permission.

Jonathan J. Koehler, *On Conveying the Probative Value of DNA Evidence: Frequencies, Likelihood Ratios, and Error Rates*, 67 *U. Colorado L. Rev.* 859 (1996). Reprinted with permission.

John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*. This article originally appeared at 96 Colum. L. Rev. 1168 (1996). Reprinted with permission.

Joseph H. Levie, *Hearsay and Conspiracy*, 52 *Mich. L. Rev.* 1159 (1954). Reprinted with permission.

Graham C. Lilly, *An Introduction to the Law of Evidence* (3d ed. 1996), published by West Publishing Co. Copyright © 1996 by West Publishing Co. Reprinted with permission.

Brooks W. MacCracken, *The Case of the Anonymous Corpse*, published in *American Heritage* (1968). Copyright © 1968 by American Heritage, Inc. Reprinted by permission of American Heritage, Inc.

Kevin C. McMunigal & Calvin William Sharpe, *Reforming Extrinsic Impeachment*, 33 *Conn. L. Rev.* 363 (2001). Reprinted with permission.

Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 *Iowa L. Rev.* 413 (1989). Reprinted with permission.

Jennifer Mnookin, *The Image of Truth: Photographic Evidence and the Power of Analogy*, 10 *Yale J.L. & Human.* 1 (1998). Reprinted with permission.

Edmund M. Morgan, *Admissions*, 1 *UCLA L. Rev.* 18 (1953). Reprinted with permission.

Edmund M. Morgan, *Basic Problems of Evidence* (1961), published by the Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association. Copyright © 1954, 1957, 1961 by the American Law Institute. Reprinted with the permission of the American Law Institute-American Bar Association Committee on Continuing Professional Education.

Andrew J. Morris, *Federal Rule of Evidence 404(B): The Fictitious Ban on Character Reasoning from Other Crime Evidence*. Published originally in 17 *Rev. Litig.* 181 (1998). Copyright © 1998 by the University of Texas Law School Publications, Inc. Reprinted with permission.

Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence* (1995), published by Little, Brown & Co. Copyright © 1995 by Christopher B. Mueller & Laird D. Kirkpatrick. Reprinted with permission.

Dale A. Nance, *The Best Evidence Principle*, 73 *Iowa L. Rev.* 227 (1998). Reprinted with permission.

Aviva Orenstein, *No Bad Men: A Feminist Analysis of Character Evidence in Rape Trials*, 49 *Hastings L.J.* 663 (1998). Copyright © 1998 by the University of California, Hastings College of the Law. Reprinted with permission.

Roger C. Park, *The Crime Bill of 1994 and the Law of Character Evidence: Congress Was Right About Consent Defense Cases*. This excerpt was originally published in the *Fordham Urban Law Journal* as Roger C. Park, *The Crime Bill of 1994 and the Law of Character Evidence: Congress Was Right About Consent Defense Cases*, 22 *Fordham Urban L.J.* 271 (1995). Reprinted with permission.

Roger C. Park, *Evidence Scholarship, Old and New*, 75 *Minn. L. Rev.* 849 (1991). Reprinted with permission.

Roger C. Park, David P. Leonard & Steven H. Goldberg, *Evidence Law* (1998), published by West Group. Copyright © 1998 by West Group. Reprinted with permission.

Merrill D. Peterson, *Lincoln in American Memory* (1994), published by Oxford University Press. Copyright © 1994 by Merrill Peterson. Used by permission of Oxford University Press, Inc.

Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 *Va. L. Rev.* 939 (1997). Reprinted with permission.

D. Michael Riseinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 *Albany L. Rev.* 99 (2000). Reprinted with permission.

Paul F. Rothstein, *Intellectual Coherence in an Evidence Code*, 28 *Loyola L.A. L. Rev.* 1295 (1995). Reprinted with permission.

Michael J. Saks, *Banishing Ipse Dixit: The Impact of Kumho Tire on Forensic Identification Science*, 57 *Wash. & Lee L. Rev.* 879 (2000). Reprinted with permission.

Michael J. Saks & Jonathan J. Koehler, *What DNA "Fingerprinting" Can Teach the Law About the Rest of Forensic Science*, 13 *Cardozo L. Rev.* 361 (1991). Reprinted with permission.

Steven A. Saltzberg, Michael M. Martin & Daniel J. Capra, *Federal Rules of Evidence Manual* (7th ed. 1998), published by Lexis Law Publishing. Copyright © 1998 by Matthew Bender & Company, Inc., a member of the Lexis-Nexis Group. Reprinted with permission.

William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 *Law & Soc. Inquiry* 243 (1998) by the University of Chicago Press. Copyright © 1998 by the American Bar Foundation. Reprinted with permission.

Christopher Slobogin, *Doubts About Daubert: Psychiatric Anecdotes as a Case Study*, 57 *Wash. & Lee L. Rev.* 919 (2000). Reprinted with permission.

State Bar of California, *California Bar Examination* (1998). Reprinted with permission.

John W. Strong, *Consensual Modifications of the Rules of Evidence: The Limits of Party Autonomy in an Adversary System*, 80 *Neb. L. Rev.* 159 (2001). Reprinted with permission.

John W. Strong ed., *McCormick on Evidence* (5th ed. 1999), published by West Group. Copyright © 1954, 1972, 1984, 1987 by West Publishing Co.; copyright © 1999 by West Group.

Eleanor Swift, *One Hundred Years of Evidence Law Reform: Thayer's Triumph*, 88 *Cal. L. Rev.* 2437 (2000). Copyright © 2000 by the California Law Review. Reprinted by permission of the University of California, Berkeley.

Laurence H. Tribe, *Triangulating Hearsay*, 84 Harv. L. Rev. 957 (1974). Copyright © 1974 by the Harvard Law Review Association. Reprinted with permission.

Jon R. Walz, *The Present-Sense Impression Exception to the Rule Against Hearsay: Origins and Attributes*, 66 Iowa L. Rev. 869 (1981). Reprinted with permission.

Glen Weissenberger, *The Former Testimony Exception: A Study in Rule-making, Judicial Revisionism, and the Separation of Powers*, 67 N.C. L. Rev. 295 (1989). Reprinted with permission.

Glen Weissenberger & James Duane, *Federal Rules of Evidence* (4th ed. 2001), published by Anderson Publishing Co. Copyright © 2001, Anderson Publishing Co., Cincinnati, Ohio, [www.andersonpublishing.com](http://www.andersonpublishing.com). Reprinted with permission.

John Shepard Wiley Jr., *Taming Patent Cases* (2002). Reprinted with permission.

Charles Alan Wright & Kenneth C. Graham Jr., *Federal Practice and Procedure: Evidence* (1980), published by West Publishing Co. Copyright © 1980 by West Publishing Co. Reprinted with permission.

---

# SUMMARY OF CONTENTS

<i>Contents</i>	<i>xi</i>
<i>Preface</i>	<i>xxvii</i>
<i>Acknowledgments</i>	<i>xxix</i>
1 Introduction to Evidence Law	1
2 Relevance	15
3 Hearsay	41
4 Character Evidence	245
5 Other Forbidden Inferences	303
6 Trial Mechanics	323
7 Impeachment and Rehabilitation	343
8 Competence	401
9 Opinions, Experts, and Scientific Evidence	439
10 Privileges	547
11 Physical Evidence	619
12 Burdens, Presumptions, and Judicial Notice	649
<i>Table of Cases</i>	<i>685</i>
<i>Table of Rules, Statutes, and Constitutional Provisions</i>	<i>693</i>
<i>Index</i>	<i>699</i>

# CONTENTS

*Preface* xxvii

*Acknowledgments* xxix

## **1 INTRODUCTION TO EVIDENCE LAW 1**

- A. Good News and Bad News 1
- B. The Nature and Development of Evidence Law 4
- C. The Anglo-American Trial 7
- D. The Role of the Trial Judge 11
  - 1. The Trial Judge's Authority 11
    - Advisory Committee Note to F.R.E. 104(a) 11
  - 2. The Trial Judge's Discretion 12
    - Roger C. Park, David P. Leonard, & Steven H. Goldberg,  
Evidence Law 12
    - Stephen A. Saltzburg, Michael M. Martin & Daniel J. Capra,  
Federal Rules of Evidence Manual 12
    - United States v. Walton* 13

## **2 RELEVANCE 15**

- A. Relevance and Irrelevance 15
  - Advisory Committee Note to F.R.E. 401 16
  - Advisory Committee Note to F.R.E. 402 17
  - Knapp v. State* 19
  - United States v. Dominguez* 18
  - State v. Larson* 19
  - Edmund M. Morgan, Basic Problems of Evidence 20
  - Graham C. Lilly, An Introduction to the Law of Evidence 21
- B. Probative Value and Prejudice 22
  - Advisory Committee Note to F.R.E. 403 22

Eleanor Swift, One Hundred Years of Evidence Law Reform: Thayer's Triumph	23
<i>United States v. Noriega</i>	23
<i>United States v. Flitcraft</i>	25
<i>Abernathy v. Superior Hardwoods, Inc.</i>	26
<i>United States v. McRae</i>	27
<i>Old Chief v. United States</i>	28
Daniel C. Richman, <i>Old Chief v. United States</i> : Stipulating away Prosecutorial Accountability?	35
C. Conditional Relevance	35
Edmund M. Morgan, Basic Problems of Evidence	36
Advisory Committee Note to F.R.E. 104(b)	36
<i>State v. McNeely</i>	37
Vaughn C. Ball, The Myth of Conditional Relevance	38
Problem	39

3

## HEARSAY 41

A. The Basic Rule and Its Rationale	41
1. Introduction	41
<i>Trial of Sir Walter Raleigh, Knight</i>	42
<i>Leake v. Hagert</i>	44
McCormick on Evidence	45
Laurence H. Tribe, Triangulating Hearsay Problem	46 48
2. Nonhearsay Uses of Out-of-Court Statements	49
Advisory Committee Note to F.R.E. 801(c)	49
<i>Lyons Partnership v. Morris Costumes, Inc.</i>	50
<i>United States v. Parry</i>	51
<i>Subramaniam v. Public Prosecutor</i>	52
<i>United States v. Johnson</i>	53
<i>United States v. Jefferson</i>	54
<i>United States v. Saavedra</i>	54
<i>Hanson v. Johnson</i>	55
<i>Creaghe v. Iowa Home Mutual Casualty Co.</i>	56
<i>United States v. Montana</i>	57
Problems	57
3. Implied Assertions	58
<i>United States v. Zenni</i>	59
Laurence H. Tribe, Triangulating Hearsay Problems	62 63



B. Exceptions to the Hearsay Rule	64
Laurence H. Tribe, <i>Triangulating Hearsay</i>	64
Advisory Committee Note to Article VIII of the F.R.E.	64
1. Prior Statements by Witnesses	65
<i>Albert v. McKay &amp; Co.</i>	65
Advisory Committee Note to F.R.E. 801(d)(1)	66
Report of the Senate Judiciary Committee	68
Report of the Conference Committee	68
Report of the Senate Judiciary Committee	69
<i>United States v. Owens</i>	69
Problems	71
2. Admissions by Party-Opponents	71
a. Direct Admissions	72
i. Generally	72
<i>Salvitti v. Throppe</i>	72
Advisory Committee Note to F.R.E. 801(d)(2)	72
Edmund Morgan, Admissions	73
<i>United States v. McGee</i>	73
McCormick on Evidence	74
<i>United States v. Phelps</i>	74
ii. Admissions and Multiple Hearsay	75
<i>Reed v. McCord</i>	75
<i>Foster v. Commissioner of Internal Revenue</i>	76
Stephen A. Saltzburg, Michael M. Martin & Daniel J. Capra, Federal Rules of Evidence Manual	76
iii. Admissions and Completeness	77
<i>Beech Aircraft Corp. v. Rainey</i>	77
Problems	79
b. Adoptive Admissions	80
Advisory Committee Note to F.R.E. 801(d)(2)(B)	80
<i>United States v. Fortes</i>	80
<i>Southern Stone Co. v. Singer</i>	81
c. Authorized Admissions	83
<i>Hanson v. Waller</i>	83
Advisory Committee Note to F.R.E. 801(d)(2)(C)	84
Problem	84
d. Agent and Employee Admissions	85
Advisory Committee Note to F.R.E. 801(d)(2)(D)	85
<i>Mablandt v. Wild Canid Survival &amp; Research Center, Inc.</i>	85
<i>Sea-Land Service, Inc. v. Lozen International, LLC</i>	88
Problems	89
e. Co-Conspirator Admissions	90