EXAMPLES & EXPLANATIONS

Evidence

Fifth Edition

Arthur Best

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EVIDENCE

Examples and Explanations

Fifth Edition

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This edition is dedicated in honor of the University of Denver College of Law's inaugural year in its new University Park law center.

Preface

Evidence law is full of simple rules, complex rules, hard problems with satisfying answers, and hard problems that can never be resolved to everyone's agreement. This makes the subject difficult, but rewarding. For a student beginning the course, "Participation precedes interest" might be a helpful slogan. Once you get involved with the course, you will like it and you will master its various levels of complexity.

This text is designed to make participation easy. For every topic, it presents questions of different degrees of difficulty. It also provides clear explanations of how to analyze the questions. I hope you like this text, and I hope you like your Evidence course. Because it affects all of law practice, developing your skills in Evidence is a project that deserves your attention.

Arthur Best

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EVIDENCE

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1

The General Requirement of Relevance

Introduction

Learn a few simple rules and amaze your friends! There is much more than that to evidence law, but you do have to learn the basic structure to do well in an evidence course, the bar examination, or actual litigation. And it is only when you understand the explicit doctrines of evidence law that you can spot the sophisticated and complicated ambiguities that still remain even after the adoption of a code, the Federal Rules of Evidence.

The logical starting place in the study of evidence is the concept of relevance. In order to be admissible, information must be relevant to a disputed issue. This concept is the foundation of evidence law. If someone sued a police officer for alleged police brutality, could you imagine the defendant's lawyer asking the plaintiff, "Are you married?" That kind of question seems strange because the plaintiff's marital status has nothing to do with evaluating the police officer's conduct. Knowing whether the plaintiff is married cannot legitimately help the trier of fact decide whether the police officer used too much force against the plaintiff, so evidence law keeps that information out of the trial. The question is improper because it refers to something that has no reasonable connection to the substantive doctrines that govern a police brutality suit. Almost every issue in evidence law involves relevance—the idea that the party who seeks to have evidence admitted must specify what issue it relates to and show how it rationally advances the inquiry about that issue.

This chapter begins our consideration of evidence law by exploring the way it divides all the facts of the world into two categories in every case: relevant and irrelevant. Material must be relevant to be admitted into evidence at a trial. That highlights the importance of the relevance inquiry. But admissibility requires more than a showing of relevancy. There are important requirements for the form of testimony and the authentication of documents and about the degree of knowledge a witness must have concerning the topic of testimony, for example. Succeeding chapters discuss these rules as well as others that exclude relevant material for reasons based on social policies such as rules of privilege, which protect confidential communications, and the rule against hearsay, which avoids basing trial results on unreliable second-hand information. The Federal Rules of Evidence will be the main focus. They apply, of course, in federal courts. Additionally, more than 40 states have adopted evidence codes or rules modeled on the Federal Rules.

The Basic Standard and Its Application

The relevance rule restricts the trier of fact to considering only material that relates closely to facts that matter in the case. How close must the relationship be between an item of evidence and the proposition it is offered to support? The answer is necessarily vague: just close enough so the evidence could influence a rational fact finder in determining the truth or falsity of that proposition.

The Federal Rules have three main relevance provisions. Rule 402[1] requires that evidence be relevant to be admitted and that irrelevant evidence be excluded:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 401 provides the following definition of relevant evidence:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Another provision allows the trial judge to use discretion to avoid admitting evidence under certain circumstances even when its admission would seem to be required under Rules 401 and 402. That provision is Rule 403:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion

1. Throughout this book, Rule numbers will refer to provisions of the Federal Rules of Evidence.

> of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The relevancy concept saves time. It narrows the topics that parties have to develop in preparation for trial. Finally, it increases the perceived legitimacy of trials by ensuring that outcomes will be based on data most people would believe have something to do with the controversy.

Suppose a plaintiff sued the owner of an office building, claiming that he had fallen and hurt himself in the lobby and that inadequate maintenance of the lobby was the proximate cause of his injury. Should our trial system allow the plaintiff to show that the office building is one floor taller than the maximum height permitted by zoning regulations? The answer to this question depends on the substantive tort law that will govern the case. The evidence will be kept out because compliance with maximum height regulations has nothing to do with an owner's liability for injuries in a building's lobby. In technical terms it is immaterial since it does not involve one of the legal issues in the case. In the language of Rule 401, it does not deal with a fact that is "of consequence to the determination of the action." Could the plaintiff show that the lobby walls had once been painted pink but had been repainted yellow shortly before the injury? That evidence does relate to an issue at stake in the trial, the condition of the lobby, but it could not possibly influence a decision about the building owner's efforts to maintain a safe lobby. A court would keep it out, calling it irrelevant. How would a court treat evidence that the lobby was dimly lit? That information relates to an issue in dispute in a way that could help a fact finder decide rationally whether the owner had been adequately careful to provide a safe lobby. The evidence would be admitted.

For any relevance decision, the advocates and judge must have background information in mind, a context in which to evaluate whether the offered evidence has "any tendency," in the language of Rule 401, to affect the fact finder's resolution of a disputed issue. For example, in the lobby case, evidence that the lighting was dim seems relevant to us because we know (without its being proved or evidence about it being offered) that people trip and fall more often in dark places than in places that are brightly lit. This type of information about what the world is like is necessarily a part of every relevancy decision.

The judge decides questions of admissibility under common law and under the Federal Rules. Rule 104(a) provides:

> Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

Subdivision (b) of the Rule is discussed later in this chapter. Because relevancy is a condition for admissibility, it is one of the issues the judge is

intended to decide by himself or herself. Notice that evidence can clear the relevancy threshold with a very small showing: The judge must believe that a rational fact finder could be influenced by the material in deciding the existence of a fact. Strong influence is not required. The evidence only has to be capable of making determination of the fact more or less probable than it would be without the evidence. Thus, relevance is different from sufficiency. In McCormick's famous phrase, "A brick is not a wall."[2] Where the contribution an item of evidence could make is very slight, however, the possibility increases that a judge will exclude it under the authority of Rule 403 as wasteful of time or needlessly cumulative. In this field, judges have discretion and are rarely overruled because factual situations are so diverse and there can be a wide range of ideas about the rational relationships between various kinds of information and facts sought to be proved.

Unfair Prejudice

Evidence is subject to exclusion if the risk of unfair prejudice substantially outweighs its probative value. Rule 403 uses those terms to frame the judge's discretion. To understand this balancing, it is necessary to define both unfair prejudice and probative value. If evidence will help an opponent, parties try not to introduce it. In this sense, all evidence that a party introduces is intended to prejudice the opponent, since it is meant to help the proponent's side of the case and hurt the opponent. It is only when a factfinder might react to aspects of evidence *in a way that is not supposed to be part of the evaluative process* that the reaction is considered *unfair* prejudice.

For example, the victim in an assault case could introduce testimony that the defendant ran towards him shouting, "Get over here, I'm going to break your arm." Naturally, a juror might dislike a person who made such a statement and might therefore be prejudiced against him. This type of prejudice is proper because it comes from the juror's belief that the defendant committed the alleged aggression. On the other hand, if someone testified that the defendant said to the alleged victim, "I'm going to break your arm because I belong to a cult that worships violence," jurors might develop two kinds of ideas from learning about the defendant's worship of violence. They might relate the statement about religion specifically to the alleged crime and conclude that those words were part of the crime (in the sense that they reinforced the scary effect of the threat). Jurors might also develop negative impressions about the defendant based on their feelings of aversion to people who belong to weird cults. Those impressions would be an example of unfair prejudice since they are unrelated to the probative value the religion information has with respect to the charged crime. They flow from jurors' reactions

2. Charles T. McCormick, McCormick on Evidence 339 (John W. Strong, ed., 4th ed. 1992 (abridged ed.)).