

MUELLER  
KIRKPATRICK

EVIDENCE UNDER  
THE RULES

*Fourth  
Edition*



ASPEN LAW & BUSINESS

# **EVIDENCE UNDER THE RULES**

## **Text, Cases, and Problems**

**FOURTH EDITION**

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*To Martha, Gretchen, and David*

CBM

*To Carole, Ryan, and Morgan*

LCK

## PREFACE

As we have had occasion to observe in earlier editions, this book takes as its focus the Federal Rules of Evidence. American evidence law underwent a sea change in 1975 when the Rules were adopted, and they are now the law in 41 states (listed in footnote 2 of Chapter One). A great body of interpretive tradition has gathered around these Rules, and today few decisions on evidence issues can be made without taking the Rules into account. Hence the Rules are provide a natural core for the study of evidence. Most of the Problems set out in this book, and most of the cases, notes and essays too, examine the Rules and how they work.

The enthusiasm of professors and students using this book has reinforced the ideas we had in mind in writing it: To study evidence law effectively, we need more than cases. We refer to the present work as a *coursebook* that combines the best features of the more standard materials (casebook, problems, hornbook). Here the basics are set forth in narrative form, with live issues presented in modern cases and problems that we put together, trying to be sure to include enough facts to make the evidence issue concrete and vivid. We hope these materials are largely self-contained—we think a conscientious student can grasp what is most important from this book alone, without constantly going elsewhere to fill in the gaps.

The subject of evidence law—what evidence law is *about*—is one that carries great intrinsic interest. That subject is something akin to epistemology: In an adversary system, how do we go about finding the facts? The challenge for the Rules of Evidence is to regulate the process of inquiry in this setting in which lawyers, witnesses, courts and jurors are the important players. Not surprisingly, and we hope we may be



forgiven as teachers for making the following claim, we think the course in Evidence is the most absorbing course in law school.

Evidence law continues to raise larger issues of policy, principle, and philosophy, often with constitutional dimensions. And because we have the Rules, evidence law brings narrower issues of application and construction. This book aims to raise both the larger and the narrower issues, to be philosophical and policy-oriented as well as practical and concrete.

The coming of the Rules did not, of course, put a stop to growth or change in the law of evidence. In 1997, for example, a new hearsay exception was added: Under FRE 804(b)(6), a party who has “engaged or acquiesced in wrongdoing” that makes another unavailable forfeits the right to exclude the latter’s statements, and the implications of this exception are only beginning to unfold. And in the same year FRE 407 was amended to make it applicable in product liability cases. In the year 2000, changes are expected in FRE 103, 404, and 701-703: In anticipation of ultimate approval of the pending language, this book notes and deals with these developments. This edition brings other changes. As authors, we decided it was time for a fresh look at some old problems, so this book includes cases like the Maryland decision in the *Tuer* case to illustrate subsequent remedial measures in the setting of medical malpractice (page 507), the Iowa decision in *Weaver* to illustrate the catchall exception in the setting of evidence that helped win a new trial, and ultimately an acquittal, for a woman charged with killing a child in her care (page 407), and the *Norcon* case to illustrate the business records exception in the distinctly modern context of an internal investigation into sexual harassment on the job (page 326).

Not surprisingly, this edition also includes important modern pronouncements by the Supreme Court in cases such as *Old Chief* on relevance and stipulations (pages 62 and 86), *Lilly* on the against-interest exception (pages 392-396), *Kumho Tire* on scientific evidence (page 735), and *Jaffee* on psychotherapist-patient privilege (page 925). And Supreme Court pronouncements touching narrower points are also noted in these pages, like the *Gray* decision on the efficacy of redaction in dealing with *Bruton* problems (pages 229-230) and the decision in *Joiner* on the standard for review of decisions rejecting expert testimony under the *Daubert* doctrine (page 735).

In offering what we have called a coursebook, and claiming for it a kind of completeness that cannot be found in casebooks, we don’t mean at all to steer students away from other sources. Excellent studies of evidence law abound, and even students using this coursebook may find value in consulting some of these. Here are some of the books we recommend:

Michael Graham, *Handbook of Federal Evidence* (4th ed. 1996)  
(compact single-volume source)

- Graham Lilly, *Introduction to Evidence* (3d ed. 1996) (very compact single-volume summary of evidence law).
- McCormick on *Evidence* (5th ed. 1999) (compact single-volume source; updated revision of classic work)
- Christopher Mueller and Laird Kirkpatrick, *Evidence* (2d ed. 1999) (compact single-volume source)
- Christopher Mueller and Laird Kirkpatrick, *Federal Evidence* (2d ed. 1994) (5-volume set with supplementation)
- Roger Park, David Leonard, Steven Goldberg, *Evidence Law: A Student's Guide* (1998) (compact single-volume source)
- Charles Wright and Kenneth Graham, *Federal Practice and Procedure*, volumes 21-26A (FRE 101 through Rejected Rule 513); 27-29 (C. Wright and V. Gold) (FRE 601-706); 30 (K. Graham) (Hearsay Policy); 31 (FRE 801-1103) (M. Graham).

Among our friends whose comments have helped us in revising this book we want to acknowledge the following: David Bernstein, Chris Blair, Mark Bonner, David Crump, James Duane, Edward Kimball, Paul Janicke, John Junker, Ronald Lansing, Lash LaRue, Graham Lilly, Peter Lushing, Kevin McMunigal, David McCord, Jean Montoya, the Honorable Gerald Rosen, Alex Stein, George Strickler, Eleanor Swift, the Honorable Richard Unis, Robert Weninger, Mimi Wesson and Wayne Westling. All of these colleagues in evidence have from time to time commented on these pages and helped us to improve them, and the book is much the better for their suggestions.

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Finally some words about our families. Spouses and children are always in the wings, and often in the thoughts of authors working on long projects. They are expected to understand when we get tired or can't quite leave the work at school, and in thousands of ways, both large and small, they support what we do. It is to our families that we dedicate this work. On Laird Kirkpatrick's side, we wish to acknowledge

his wife Carole and their sons Ryan and Morgan. On Christopher Mueller's side, we wish to acknowledge his wife Martha and their children Gretchen and David. We trust that our families know how much they mean to us.

*Laird C. Kirkpatrick*  
*Eugene*

*Christopher B. Mueller*  
*Boulder*

*January 2000*

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## SPECIAL NOTICE

The problems and examples in this book are drawn, for the most part, from actual cases. But facts have been changed for predictable reasons—to add human interest, to adapt the situation to classroom use, to combine in a single example the conflicts that have arisen in several decided cases, to present particular issues or sharpen the presentation of issues, and to achieve other educational purposes. Names used in the problems and examples are inventions of the authors. None of the examples or problems should be read as referring to an actual person, and none is intended to make any comment about any person.

*CBM*  
*LCK*

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