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EVIDENCE
Practice, Problems, and Rules



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EVIDENCE

Practice, Problems, and Rules

Arthur Best

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Law & Business

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To A. Leo Levin, the inspiring professor who introduced me to the field of Evidence, and to the many hundreds of students with whom I've had the honor of continuing that study.

This book offers basic coverage of the most important Evidence rules and doctrines. Its goal is to clear things up without dumbing them down. To that end, it provides a narrative introduction to each section, introduces each case with a brief description of the main problem that case analyzes, and uses charts and tables where that kind of exposition may be helpful. Many of the cases have interesting factual settings.

In addition, the book exposes students to rival approaches for many topics. This highlights the choices inherent in many of the Federal Rules of Evidence and some traditional doctrines. Along with providing a basic understanding of the main topics, the book covers intriguing frontier issues. Some of these are allowing extrinsic evidence of past false accusations for impeachment, the “near-miss” interpretation of the residual hearsay exception, treatment of innocent loss of memory for impeachment with prior inconsistent statements, and allowing character evidence about a defendant who introduces character evidence about a victim.

Why cases? The problem method has been very successful in many Evidence courses. But sometimes students can feel swamped by a full diet of hypothetical situations. In this book, cases are the new problems. By that, I mean they offer detailed factual settings for considering how evidence problems might be solved. Because the cases involve real people and real trials, they have inherent interest.

Any problems with that? Along with cases, this book presents about 80 problems. Each of them reinforces aspects of evidence that are clear-cut. And many require consideration of ambiguity in rules, or in the art of applying rules to diverse factual situations.

What’s an interesting case? People are interested in different things. Where possible, this book’s cases are recent and involve circumstances that current students may find engaging. For example, the multiple murders of a defendant’s husbands provide the context for a case involving forfeiture of hearsay and Confrontation Clause claims. Authentication is presented in a case with many quotations from social media postings. An impeachment case involves a prosecutor using a defendant’s photograph of himself holding a bag of drugs. Statements by an opposing party are introduced with a case in which a prosecutor sought to introduce a draft e-mail from a defendant’s computer, which confessed a crime to a talk show host.

Why cover minority views? For some topics where treatment varies significantly among states, this book gives students examples of the range of choices. This allows students to compare, for example, the standard treatment of impeachment by proof of past convictions with choices that either allow that technique, essentially, always or never. Seeing the range can help students understand the majority choice better, can help them understand the values at stake in making a choice, and can prepare them to evaluate changes and developments during their future careers. Students may find it provocative to know that one state always treats evidence of subsequent remedial measures as relevant to negligence or product defect. Comparing the inclusion and exclusion of social interests in the hearsay exception for

statements against interest can provoke a discussion of the common sense rationale for the majority rule.

Students who have used draft editions of this book have given it very favorable ratings in anonymous evaluations. Their enthusiasm, and their many suggestions, have shaped this edition. They have particularly appreciated the clear organization of the materials and the small introductions that help them dig into the cases.

The opinions have been edited with the goal of facilitating readability and understanding. Typographic choices used here may vary from those of the courts, and many citations have been omitted.

Evidence law is a great context for learning and reinforcing the skill of reading rules as a professional must read them, and of analyzing social problems and the judicial opinions that grapple with them. Teaching and learning from these materials has been lots of fun for my students and me, and I hope others will have the same experience.

Arthur Best
Denver, Colorado
May 2013

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I deeply appreciate the care and effort given by many students and colleagues who have helped in the production of this book. In particular, a large number of anonymous reviewers made many extremely helpful suggestions about various drafts of the work. Colleagues at Wolters Kluwer have been highly perceptive and thoughtful in helping the book's development — great thanks are due to Carol McGeehan and John Devins.

The video segments that accompany this book are based on scripts originally written by Prof. H. Patrick Furman of the University of Colorado School of Law and used by Continuing Legal Education in Colorado, Inc. in its programs. Permission to use these scripts as a basis for the video segments is gratefully acknowledged.

USING THE VIDEOS

By integrating portions of the text with accompanying video, this book uses an innovative approach to demonstrate how Evidence law is applied in various trial scenarios. Videos that show parts of a hypothetical trial of a domestic violence case are visually keyed to specific parts of this text by this icon:



You will find these icons in various locations in the left-hand margin of the text. It is important to note that the particular short excerpts often include more than one aspect of Evidence law. This is because the videos represent how things work at a real trial, and testimony at a trial may not fit neatly into the various categories of Evidence law. To better understand the individual videos, therefore, it's a good idea to watch them all as a group at the start of the course. This will help you understand the context of each specific short section.

The background of the page is a light gray with a subtle, abstract pattern of curved lines and a large, faint circular shape on the right side, creating a sense of depth and movement.

EVIDENCE

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