

ASPEN CASEBOOK SERIES

*LEONARD
GOLD
WILLIAMS*

EVIDENCE
A Structured Approach

*Fourth
Edition*



Wolters Kluwer

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Wolters Kluwer

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Published by Wolters Kluwer in New York.

Wolters Kluwer Legal & Regulatory US serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.WKLegaledu.com)

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Wolters Kluwer
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-4548-6310-6

Library of Congress Cataloging-in-Publication Data

Names: Leonard, David P., author. | Gold, Victor J., 1950- author. | Williams, Gary C. (Lawyer), author.

Title: Evidence : a structured approach / David P. Leonard, Late Professor of Law and William M. Rains Fellow Loyola Law School, Los Angeles; Victor J. Gold, William H. Hannon Professor of Law and Dean Emeritus, Loyola Law School, Los Angeles; Gary C. Williams, Professor of Law and Johnnie L. Cochran, Jr. Chair in Civil Rights, Loyola Law School, Los Angeles.

Description: Fourth edition | New York : Wolters Kluwer, 2016. | Series: Aspen casebook series | Includes index.

Identifiers: LCCN 2016012937 | ISBN 9781454863106

Subjects: LCSH: Evidence (Law) — United States. | LCGFT: Casebooks.

Classification: LCC KF8935 .L458 2016 | DDC 347.73/6 — dc23

LC record available at <http://lcn.loc.gov/2016012937>

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PREFACE TO THE FOURTH EDITION

In this edition we have added a section at the end of each chapter entitled Assessments, consisting of five multiple-choice questions and an analysis of the answers. This new feature provides the student with an opportunity to assess the extent to which he or she has mastered the material in each chapter. Many questions also require that the student recall matters covered in preceding chapters, thus providing an opportunity to see the relationships between the different parts of evidence law. The analysis following the questions gives a detailed explanation of why each alternative answer is correct or incorrect. It also gives the student tips on how to analyze multiple-choice questions, an important skill to acquire before taking the Multistate Bar Examination.

We also have streamlined and clarified the materials contained in the Third Edition while maintaining our basic approach, which emphasizes the use of explanatory text and concise examples and deemphasizes cases. For more detail about our method, please refer to the Preface to the First Edition, which immediately follows.

This edition goes to press over five years after the passing of one of the original authors, Professor David P. Leonard. His name remains on this edition because it continues to reflect the clarity of his thought and writing, his gentle humor, and his love of teaching.

Victor J. Gold
Gary C. Williams

January 2016

PREFACE TO THE FIRST EDITION

The goal of *Evidence: A Structured Approach* is to make it easier both to teach and to learn evidence law, while keeping the subject intellectually challenging. The book facilitates teaching because its unique format complements the way most evidence professors already teach. The book facilitates learning because its format encourages preparation by focusing students' attention on the specific questions to be posed during class. As a result, basic doctrine can be covered quickly and efficiently, leaving more classroom time for analysis. The format employs what we call a "structured approach" to Socratic teaching.

A Structured Approach

Virtually every section of the book begins with one of the Federal Rules of Evidence or a part of one of the rules. The rule is followed by text that explains the rule's background, rationale, and content. This text provides numerous examples to ensure that students understand the law. Transcript exercises, diagrams, charts, and other materials supplement the explanatory text. We include an edited version of a case if it illustrates the rule effectively or provides important additional law. Working together, these features free the professor from the need to take extensive class time to describe the law and thus leave more time to focus on application and analysis.

Although we include many of the seminal cases in evidence law, these cases are provided only as supplements to the rules and explanatory text. Cases are intended to be neither the main source of information about the rules nor the principal focus of classroom discussion. Instead, the centerpiece of each section is a feature entitled Questions for Classroom Discussion. Most of these questions are short hypotheticals, each of which explores a limited aspect of the rule in question. The hypotheticals logically build upon preceding questions until the rule is fully explicated. As the title of this feature implies, these are the very questions the professor will pose during classroom discussion. The book thereby lends itself to Socratic teaching while providing a clear structure and direction for the classroom dialogue.

Because the format of the book encourages students to prepare for class, it makes teaching less frustrating and more fun. It also allows more class time to be devoted to issues of special interest to the professor. And because the Questions for Classroom Discussion are narrowly drawn and are preceded by an explanation of the law, students who prepare for class are in an excellent position to understand the questions and analyze them properly. In addition, students who use laptop computers in class may download the questions from our website before class, for a head start on class notes (<https://my.lls.edu/evidencestructuredapproach>). Students appreciate this approach because it saves time and allows them to focus on what is important.

Emphasis on the Federal Rules

Traditional casebooks often complicate teaching and learning evidence law. This is because judicial opinions usually include facts and issues that are not

pertinent to evidence law and sometimes even get that law wrong. Cases rarely facilitate the professor's systematic effort to build students' understanding of an evidence rule because judicial opinions simply are not written with that purpose in mind. As a result, students using a traditional casebook may have difficulty determining the meaning of a case and which aspects of a case will be the focus of the professor's attention. Students are often surprised by the professor's questions and discouraged from devoting significant effort to class preparation. Unprepared students are not ready to participate or think when they come to class. Because they are confused about the law when they arrive, they think the purpose of attending class is to transcribe what the professor says about the law.

Law students have to learn to teach themselves the law. But written rules, not cases, are the primary source of evidence law today. Students figure this out very early in the evidence course, which leads them to pay little attention to cases. As a result, classroom discussion of the details of the cases can be frustrating and unproductive. By focusing discussion on the rules, this book encourages preparation, making classroom discussion much more satisfying for students and teachers alike.

In focusing on the Federal Rules of Evidence, we seek not only to teach the particulars of each individual rule, but also to demonstrate that the Rules comprise a mostly coherent system of interrelated parts, many of which may be pertinent to the admissibility of just a single item of evidence. Again, our format is well adapted to conveying this message. As you review the Questions for Classroom Discussion in a given section, you will encounter questions that return to rules previously covered or anticipate issues developed in a subsequent chapter. The pedagogical intent is both to show the interrelationships among different rules and to reinforce earlier lessons.

Organization

Two aspects of our book's organization are important to note. First, Chapter 1 addresses rules governing the principal sources of evidence: witnesses and documents. Most evidence textbooks address these rules toward the end. As a consequence, many of the rules are covered in haste during the last days of the semester, or simply are not covered at all. We *begin* with these rules because they acquaint students with the basic nature of proof and the trial process, they are fairly simple and ease students into the subject of evidence law, and they provide an important foundation for understanding more complex doctrines to follow, such as hearsay.

Second, having established the basics of relevance analysis in Chapter 2, we immediately proceed to hearsay in Chapter 3. We address this subject as early as possible because it is the most difficult material in the course. In our experience, the more time students have to think about hearsay, the better they will come to understand it. We then immediately return in Chapter 4 to the relevance rules.

Teaching and Learning Hearsay

As the most difficult material in the course, the hearsay coverage is the most crucial chapter in any evidence textbook. We have found that the most effective way to teach and learn hearsay is through as many short practice hypotheticals as possible. Our format, centered around the Questions for Classroom Discussion feature, is well adapted to this approach. Accordingly, the hearsay chapter features a very large number of short hypotheticals that illustrate virtually every

angle of the definition of hearsay and the important hearsay exceptions and exemptions.

The Importance of Technology

Aside from providing students with some of the seminal cases in evidence law, we have chosen a number of cases that illustrate how courts are interpreting the rules to address problems posed by modern technological innovations. Special attention is given to authentication, hearsay, and best evidence problems raised by evidence in various digital formats. We also focus on the latest controversies concerning the admissibility of scientific and other expert evidence, including recent amendments to the opinion evidence rules.

Real Life

The gap between most textbooks and the real-life practice of law is immense. We aim to narrow that gap in several ways. For example, this book contains many transcripts illustrating how a given issue typically is presented in court. We also include cases selected to show how race and gender questions pose special issues under the Federal Rules of Evidence. It is important to show that, although those rules on their face appear race and gender neutral, in real life the application of the rules can implicate race and gender issues in surprising ways.

Thanks

Many people have helped in the creation of this book. We would like to thank the William M. Rains Foundation for its support, and our colleagues at Loyola Law School for their encouragement and advice. Professors Laurie Levenson and Gary Williams were especially helpful. Law students Joohan Song (Class of 2004) and Sabrina Cao-Garcia (Class of 2005) provided valuable assistance. Finally, special recognition goes to our evidence professor and mentor, Kenneth W. Graham, Jr., who—with wit and brilliance—taught us how to read. This book is dedicated to him.

David P. Leonard
Victor J. Gold

March 2004

ACKNOWLEDGMENTS

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