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AN ANALYTICAL APPROACH TO EVIDENCE

Text, Problems, and Cases

Sixth Edition

Wolters Kluwer

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RONALD J. ALLEN
John Henry Wigmore Professor of Law
Northwestern University School of Law

ELEANOR SWIFT
Professor of Law Emerita
University of California at Berkeley School of Law

DAVID S. SCHWARTZ
Foley & Lardner-Bascom Professor of Law
University of Wisconsin Law School

MICHAEL S. PARDO
Henry Upson Sims Professor of Law
University of Alabama School of Law

ALEX STEIN
Professor of Law
Benjamin N. Cardozo School of Law

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PREFACE

In this sixth edition of our book, we maintain our focus on the study of evidence law through the text of the Federal Rules of Evidence and the ideas and principles that underlie those rules. The book presents the rules in a systematic format that is used consistently throughout. This format provides students with the text of the rules, interpretations and illustrations of the rules' terms, an elaboration of principles and policies used to explain and interpret the rules, illustrations from recent case law, and problems that call for the application of each significant rule in its most basic as well as its most challenging contexts.

We have returned to the book's former name, *An Analytical Approach to Evidence*, because we believe it captures one of the unique contributions of this book. This is a problem-based casebook designed to elicit a critical examination of the Federal Rules of Evidence in context and to illuminate the Rules' underlying theories and perspectives. Analysis is encouraged through explanatory text, excerpted materials, case summaries, and problems. Lively discussion and interesting problems engage students in discovering the principles, policies, and debates that surround evidence law. In every instance, although we begin with the basics, we deepen the analysis to the conceptual foundations of the particular aspects of evidence under consideration, and indeed to the conceptual foundations of the entire field.

Although the casebook text has been edited throughout, adding new excerpts from judicial opinions and scholarly work, updating the case citations that illustrate application of the rules, and adding new problems, much remains familiar. As always, we have sought throughout to present each set of problems in ascending order of difficulty—easy, medium, and difficult. This edition still includes ongoing "saga" problems that build, in successive chapters, on each developing "saga" fact pattern. These unique problems demonstrate how the rules of evidence actually apply to individual items of evidence in "layers" as students' knowledge of those rules increases.

New to this edition are:

- probing discussions of fundamental moral questions (e.g., sexual politics rules);
- enhanced focus on the way in which evidence law serves not just an epistemological function but also involves critically important allocations of authority between trial and appellate courts, between the trial judges and the parties, and others;

- emphasis on another increasingly important aspect of the law of evidence in its effects on both non-litigation ("primary") and litigation behavior;
- economic justifications for different rules of evidence;
- self-assessment questions, accompanied with answers and explanations, in each chapter;
- additional pedagogical elements, redesigned formatting, and softened notes/questions to make the discussion less austere (without sacrificing intellectual sophistication).

As in previous editions, we have not been content to present a mass of doctrines and cases. We have endeavored instead to show, through discursive text and problems, the relationship between the theories underlying the rules and the rules themselves. This emphasis on the underlying theories reflects our view that the study of any field of law should not consist primarily of ingesting enormous amounts of doctrinal "stew." Rather, the pursuit should be gaining an understanding of the conditions that give rise to the forms of regulation of decision making that are contained in the rules of evidence.

From its inception, another factor has heavily influenced this book. We believe that the field of evidence is in large measure a coherent whole rather than an amalgam of virtually unrelated parts. Unlike traditional works on evidence, we present an analytic theme in our text that attempts to show the underlying relationships between the various common law categories of evidence. This theme is relevancy and the assumptions about decision making that inhere in a system of proof based on relevancy. With this theme in mind, we explore all of the major federal rules of evidence, requiring students to develop a systematic approach to the admission of evidence that begins with the relationship of evidentiary facts to the essential elements of the case. Only with such a beginning can one properly understand the principles governing the selection of evidence and their judicial interpretation.

We also emphasize the process by which facts are established in court, and the roles played by each of the participants in the courtroom. Chapter One begins with the study of a transcript from a real case. This introduces students to the process of analyzing evidence in terms of the essential elements of a legal dispute, as well as experiencing what is at stake in run-of-the-mill trials. We believe that the transcript serves as an effective introduction to much of the course to follow. Although accurate fact finding is the dominant goal of trial, the rules of evidence also regulate with other goals in mind, such as efficiency, fairness and incentives to out-of-court behavior. The transcript usefully illustrates these matters, and we return to it at relevant points throughout the text. We have also generated a series of problems on the transcript so that student investment in reading it pays off with a deeper understanding of the context within which isolated evidence issues arise and are resolved.

Chapter Two provides additional background information on trial process and strategy that brings the evidence course alive. After a brief introduction advising students on how to incorporate the book into their study of evidence, the chapter describes how trials are structured, how witnesses are examined, and it begins our exploration of the relationship between inferential reasoning as used by the factfinder and the process of presenting proof at trial.

Chapter Three examines the single most important concept in the study of evidence—relevance—and introduces students to the trial judge's discretion to exclude even relevant, and probative, evidence. Some judicial opinions, including the U.S.

Supreme Court's majority opinion in Old Chief v. United States, give students a more concrete understanding of how the context of the whole "case" can influence the judge's exercise of discretion.

Chapter Four discusses the foundation principle underlying evidence law: that no evidence is admissible until it is first shown to be what its proponent claims that it is. The chapter analyzes and elaborates the complex of rules from which this principle is derived, and applies the principle specifically to testimony and exhibits in various forms. Because of its close connection to documentary evidence, Chapter Four also covers the Best Evidence Rule.

Chapter Five focuses on the character and propensity rules. We start by introducing the primary rule of exclusion, the policies that justify exclusion, and the policing of the borderline between forbidden "character" and permitted "non-character" uses of specific acts. We then turn to instances in which character is a permissible topic of proof.

Chapter Six contains other relevancy rules. These rules determine the admissibility of subsequent remedial measures evidence, settlement and plea bargain discussions, availability of insurance and offers to pay an opponent's medical expenses. Our analysis of these rules separates between permissible and impermissible uses of the evidence and explains how it affects the parties' litigation conduct and primary behavior.

Chapter Seven presents the doctrines of impeaching and rehabilitating witnesses, prior to the study of the hearsay rule. The attention paid to examining witnesses, we believe, helps students better understand the hearsay rules, which we discuss in Chapter Eight.

Chapter Eight unfolds a comprehensive analysis of hearsay dangers and the hearsay doctrine. This chapter contains revised text on the problem of "implied assertions" that we think streamlines presentation without sacrificing accuracy. It also provides an up-to-date discussion of the U.S. Supreme Court's recent jurisprudence on the Confrontation Clause.

Chapter Nine, focuses on the rules governing lay and expert witness opinion testimony, and includes principal Supreme Court cases on rule 702 and the 2000 amendments to the Federal Rules. The chapter proceeds to elaborate on both practical and theoretical issues arising out of expert testimony, concluding with a substantial reflection section that features excerpts from the National Academy of Science Report in 2009 largely critiquing the current state of the forensic sciences.

Chapter Ten has reorganized the presentation of the burdens of proof and presumptions by focusing separately on civil and criminal law.

Chapter Eleven has streamlined the study of judicial notice.

The book concludes, as before, with an examination of rules of privilege in Chapter Twelve, which we thoroughly updated. This discussion includes material on the recent Federal Rule 502 concerning waiver of the attorney-client privilege.

Despite the substantial amount of text, this book is not a treatise on the law of evidence. We have not attempted to cover everything. Rather, we have put together materials that we believe will contribute to the effective teaching and learning of the law of evidence. Our selection of materials has been driven by one criterion alone. We have selected materials that in our judgment are the most effective pedagogical tools.

Perhaps the most important change in this edition has been the addition of our new co-author Alex Stein (Cardozo). Professor Stein is an eminent authority in evidence, torts, medical malpractice, criminal law, and legal theory, and brings a wealth

of expertise to the sixth edition. We are very pleased to have him on board. Professor Swift unfortunately has retired and did not contribute to this revision. We are very sorry to see her go. Because her immense contribution to the previous editions continues in the current edition, Professor Swift's name has been retained among the authors. Her calm and erudite influence will be sorely missed, and we wish her well in her new endeavors.

Ronald J. Allen
David S. Schwartz
Michael S. Pardo
Alex Stein

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WHY STUDY EVIDENCE? A STUDENT'S PREFACE

Evidence law is, in one sense, one of the most practical courses that you will take in law school. It is the study of rules in action, rules that are interpreted and applied in the often heated context of adversarial litigation over matters of life and death, personal rights (and obligations), property rights, human relationships, and even such matters as the structure of government and the meaning of the Constitution. As you read the text, the judicial opinions, and the problems in this book, you will be analyzing and evaluating the impact that evidence law has on the litigants and the outcomes of their cases. One of the most significant manifestations of evidence law is the rules of evidence. We concentrate in this book on the Federal Rules of Evidence. The Federal Rules were adopted by Congress in 1975, and since then more than 40 states have revised their rules of evidence more or less adopting the Federal Rules, in many instances virtually verbatim. When you first read the Federal Rules of Evidence you many think them to be cold and sterile doctrines written in abstract conceptual terms, but you will soon find them imbued with the human drama of the courtroom. Behind the formalities of the law there are real people who are called on to testify concerning matter of great personal and social import, as well as parties whose cases rest on that testimony.

The study of evidence, however, is not just the study of the rules of evidence. It is the study of the vast complex of ideas, principles, customs, and values underlying the process of litigation. The rules of evidence give form and content to this process—they determine the admissibility of evidence, define the roles of all the participants at trial (judge, jury, advocates, and witnesses), and structure the relationships among these various actors. They reflect our society's views on many issues, among them: (1) the appropriate means of resolving disputes; (2) the nature of knowledge, what it means to "know" something, and how knowledge is transmitted to others; (3) the dynamics of small group decision-making, and the confidence that we invest in the common person to reach wise and informed judgments that affect the lives of fellow citizens; (4) moral and ethical concerns, such as how difficult it should be for the prosecution to obtain a conviction in a criminal case, or whether certain individuals (spouses, children, friends) should have a privilege not to testify against those close to them; and (5) the relationship between the ideal of justice and the value of efficiency. The rules of evidence rest on and are a crystallization of these various, often conflicting, views. To understand the rules requires an understanding of the compromises

they make between competing beliefs and interests; thus, to study the rules one must engage with the foundation of beliefs that underlies them.

The study of evidence will serve any lawyer well, no matter what specialization that person pursues. Obviously litigators must know and understand the rules of evidence in order to use them effectively. Do not overlook that while litigation is virtually always the worst-case scenario of any legal transaction, competent lawyers must always be prepared for it no matter what the nature of the relevant legal enterprise happens to be. If a contractual relationship fails or a merger is not consummated and litigation results, what will matter is how well the parties will be able to defend their respective positions. That will be determined in significant measure by the application of the rules of evidence in the trial itself, and by their implications throughout pretrial procedures, including negotiations leading to settlement.

To use the rules effectively, one must understand their meaning, source, and purpose. To do so requires that one see the rules in relationship to the assumptions, values, and concerns that give rise to them. Even if—indeed, especially if—one intends to become a litigator, it will not do to be content with a cursory grasp of the language of the various rules. One must be in a position to work with the rules, and to argue for one's position from the perspective of the purposes that underlie the relevant provisions.

Whatever legal path the student may be planning to follow, a thorough grasp of the law of evidence and its conceptual foundations is a critical component in the education of a responsible attorney. The value of the inquiry lies not just in some future utility but instead in its enlightenment of our shared vision of how disputes should be resolved in a civilized society. With that enlightenment may come—indeed, we hope *will* come—disagreement. You may not like all that you see; and if you do not, you will be in a better position to work for change through the legislative and rule-making processes.

We attempt in these materials to facilitate an inquiry into the meaning and use of the rules of evidence and all that underlies them. At times we focus extensively—in fact, almost exclusively—on the rules themselves, while at other times we deal quite explicitly with the assumptions and values from which the rules originate. On completion of this inquiry, you should have a thorough understanding of the rules of evidence, as well as considerable appreciation for the concerns that give rise to them.

SPECIAL NOTICE ON CITATIONS

In general, some citations and footnotes have been omitted from quoted material without indication. Footnotes are numbered consecutively in each chapter; that is, the original footnote numbers in quoted material have not been retained. Footnotes in quoted material that are written by the casebook authors are marked "—EDS." In addition, throughout the text we quote from the Federal Rules of Evidence and from the Federal Rules' legislative history without giving specific citations. The Federal Rules quoted in the text are the restyled Rules that became effective on December 1, 2011. These Rules are available at http://www.supremecourt.gov/orders/courtorders/frev11.pdf and https://www.law.cornell.edu/rules/fre.

The Notes of the Advisory Committee appointed by the Supreme Court to draft the rules remain applicable to the restyled Rules. The Advisory Committee Notes are set forth at 56 F.R.D. 183. The judiciary committees of both the House of Representatives and the Senate held hearings on the Federal Rules. The report of the House Committee is H.R. Rep. No. 650, 93d Cong., 1 Sess. (1973), appearing at 1974 U.S.C.C.A.N. 7075; and the report of the Senate is S. Rep. No. 1277, 93d Cong., 2d Sess. (1974), appearing at 1974 U.S.C.C.A.N. 7051. The Conference Committee report is H.R. Rep. No. 1597, 93d Cong., 2d Sess. (1974), and appears at 1974 U.S.C.C.A.N. 7098.

We have deleted *cert. denied* references throughout the book.

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