

美国法精要·影印本

West Nutshell Series

联邦证据法

第4版

Federal Rules of Evidence



【美】迈克尔·H·格莱姆/著

MICHAEL H. GRAHAM



法律出版社



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Federal Rules of Evidence in a Nutshell

MICHAEL H. GRAHAM

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总序

许传玺*

在美国法律教育界与律师实务界,这套“美国法精要”是颇具特色的一套小书。这套书最突出的特点当推它们的简捷明快、深入浅出。每种书均由富有教学经验的法学院教授执笔,在三、四百页的篇幅内集中介绍某一法律部门的基本原理、主要法规和重点案例。

由于这些特点,这套丛书受到了无数美国读者的欢迎和喜爱。众多法学院的学生将这套书作为课外的辅助教材,由此掌握美国各主要部门法的精义。执业律师也经常借助这套书,以迅速了解自己尚未熟习的某些部门法,或者温习过去曾经学过的某些课程。

相信这套书也能赢得国内读者的欢迎。无论是法律专业的本科生、研究生,还是执业律师或其他人士,都能从这套丛书中获得有关美国法律的大量知识,对自己的学习和工作有所裨益。此外,通过阅读原汁原味的英文来学习美国法律也应能提高读者的法律英语水平,促进与美国同行的交流与合作。

应原出版者的要求,这套丛书的国内版增加了中文前

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言,以介绍美国各部门法的概况、每种书的内容及原书作者。这些前言作者都是在美国受过专业教育或从事专门研究的中国法律学者甚或专家。相信他们的介绍会对读者有所帮助。

Happy reading!

1999 年 4 月
于哈佛法学院

前 言

姬 军 *

美国证据法的重要意义是我开始在美国律师事务所工作后才深刻认识到的。我所在的事务所十分重视对新进律师的培训。其中之一就是给每位新进律师分配一个经验丰富的合伙人。就像中国的师傅带徒弟一样,手把手地传授经验。记得当我第一次向我的师傅请教时,我问他“你认为什么法对律师来说最重要?”他毫不犹豫地回答说“证据法!因为证据法是律师特有的对问题的理解方法和特有的证明事物的方法,它体现了律师职业的专业性。对一个诉讼律师来说,证据法是指导他证明一个案子的基本原则,对一个从事商务交易的律师来说,证据法是他在确定每一份合同文本的证据效力,落实每一个谈判结果时所必须考虑的。一个律师要不断地训练自己对不同证据的理解、判断和运用的能力和意识,使之成为自己的一种本能。因为它是一个律师最根本的职业素质。”师傅的教诲在实际工作中得到了充分的印证。无论从诉讼一开始的证据开示、取证、质证人,到如何运用证据证明己方的诉求,如何质证、反驳对方的证据,以及在法庭上对证据的认证,证据法的运用是一

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个律师所面临的最初也是最终的问题。证据法的重要性迫使我不得不重新找来证据法的教科书,而我打开的第一本书便是这本由西方出版公司出版的“美国法精要”丛书中的《联邦证据法精要》。

这本《联邦证据法精要》是由美国证据法界的著名学者 Michael H. Graham 教授编写的。Graham 教授在法律实务和学术上都有着丰富的经验和建树。他于 1967 年毕业于哥伦比亚法学院,曾担任过美国联邦法院的法官助理,也曾作为律师执业 4 年。他获得过英国剑桥大学的刑事学硕士学位,并于 1974 年开始执教于伊利诺伊大学法学院。从 1984 年至今,他作为迈阿密大学法学院的教授,主教证据法和侵权法。在证据法方面,他著书丰厚。他独立撰写的关于证据法的著作就有 9 本,与他人合著的有 4 本。特别是他所著的《联邦证据法手册》(Handbook of Federal Evidence)更是为执业律师和在任法官所推崇备至的实务必备书。

与两大厚册的《联邦证据法手册》相比,这本小册子实在太薄太小。但是,它的影响并不因薄小而逊色。以短小的篇幅、通俗的语言、简单明了的方式,整体地介绍一门艰深难懂的法律,对一个学者来说远比详尽的论述要更为艰难。但是, Graham 教授成功地做到了这一点。他采用了最简单的论述方式,即按照条文的顺序逐条解释,但在论述中又不失条文和条文之间的联系。为使读者能有效地在短时间内对美国证据法有整体的认识和了解,而不陷于细节中, Graham 教授略去了详细的注解,而注重流畅通俗的介绍。对于抽象难懂的部分附有实例和插图,在每一章的开始都著有提纲挈领的简述。当您手拿这本书时,您所拥有的是一部完整的美国联邦证据法。而且,这本书不仅告诉您美

国联邦证据法是怎样规定的,还告诉您为什么这样规定,实践中所关注的焦点是什么,以及它的发展、变化的过程和今后的趋势。因此,这本书在美国法律界深受欢迎。对初学者来说它是一本通俗易懂的启蒙书,对实务工作者来说它是一本简便的工具书,对著书立说的学者来说它是一本简明扼要的通论。

这本书对我们中国的读者来说也有它的特殊意义。首先,中国经济的国际化,特别是与美国经贸往来的不断增加,要求我们了解美国的法律,特别是以证据法、诉讼法为主的程序法。美国作为我们最主要的经贸伙伴,随着与之往来的加强,中国公民、法人作为当事人出现在美国法庭上的现象越来越多,并呈不断增加的趋势。以我个人的调查,自1980年以来,仅在美国的联邦法庭上,中国公民、法人作为当事人的案件就逾200件,其中不乏中国当事人因不懂美国程序法而败诉的案件。美国的证据法与其他程序法一样,与合同法、侵权法等实体法不同,它比后者少有各国所通用的原则,而多有其独具的特点,无法凭藉我们在中国法中所获得的常识去理解判断。这就要求我们在学习美国法律时,对美国的证据法、诉讼法等程序法给予特别的注意。

如果放眼于我们正在进行的司法改革,美国的证据法对建立中国的程序法体系有很大的借鉴意义。无论在哪个社会、哪个国家,司法公正都是一个社会的脊梁,是社会正义的最后保障,而司法公正的实现必须基于程序的公正。没有程序公正的司法公正是有缺陷的、没有权威的,不是真正的司法公正。在我们为实现社会主义的法治国家而进行的司法改革中,追求程序的公正是我们以前所忽视、而现在必须加强的观念。证据法是保证司法程序公正的重要手段。证据的运用也是在现今我国司法实践中最为突出和

亟待解决的问题。如何建立我国的证据开示制度,怎样确定当事人的举证责任,在法庭上对证据的真实性、合法性、关联性的质证方法和认证原则等等,都亟需通过立法建立制度,在实践中积累经验。美国联邦证据法自1974年生效以来,至今已积累了逾40,000个判例,其中还不包括1974年以前的判例和各州的判例。从这丰富的法律实务和理论资源中,我们可以吸取美国证据法在其发展中的经验和教训,以补充和完善我们的证据法律制度。但是,面对这海洋般的成文资料,我们从何借鉴起?从这本小册子开始!如果您是个法律系的学生,这本书会让您对美国的证据法有整体的了解,以助您更好地反思中国的证据制度;如果您是执业律师或在职法官,这本书会对您解决在实践中所遇到的问题有所帮助,或许它不能给您完整的答案,但至少它可以给您有益的启示和继续研究的线索;如果您是个立法者,这本书会给您提供一个可参照的法律体系,告诉您每一个规定的意义所在。

这本书是针对美国的法律制度而写的,要使它有益于中国社会,则是我们每一位读者的任务。

1999年春于美国洛杉矶

To
My Parents, Milton and Sylvia Graham

*

PREFACE TO FOURTH EDITION

The last twenty-one years have seen the Federal Rules of Evidence assume their rightful place of importance alongside the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. Not only do the Federal Rules of Evidence govern proceedings in the federal court, thirty-eight states have promulgated rules of evidence modeled on the Federal Rules. While evidence courses in law school in the mid nineteen seventies taught the common law of evidence employing the Federal Rules of Evidence to highlight and contrast, today's students of the law of evidence study principally the Federal Rules of Evidence with often only passing reference to common law antecedents. Even closer to home is the relationship of the Federal Rules of Evidence to the multistate bar examination.

The Federal Rules of Evidence have proven extremely capable of satisfying the mandate set forth for them in Rule 102:

PURPOSE AND CONSTRUCTION

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Analysis of decisions dealing with coconspirator's statements, Rule 801(d)(2)(E), other crimes, wrongs, or acts,

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Rule 404(b), and the admissibility of an expert's opinion, Rule 702-705, shows the ability of the Federal Rules of Evidence to fulfill the mandate of promoting the growth and development of the law of evidence to the end that truth may be ascertained and proceedings justly determined. The nearly 30,000 citations in reported federal decisions evidence the vitality of the Federal Rules of Evidence.

The structure of this Nutshell, Fourth Edition, is to present each rule of the Federal Rules of Evidence in the order in which it appears in the Federal Rules followed by commentary explaining and exploring the concepts underlying the particular rule. Commentary sections also discuss the relationship between rules so that a complete picture may be obtained. Textual changes have been made in the Fourth Edition to reflect several Amendments as well as judicial interpretations of the rules culled from the over 5,000 citations to the Federal Rules of Evidence appearing since publication of the Third Edition in 1992. Generally speaking, consistent with the nature of a Nutshell, the commentary sections are crisp and to the point. However with respect to the definition of hearsay and exploration of the most commonly encountered exceptions more exhaustive treatment is provided. The importance of hearsay to the course in evidence and its complexity warrant the additional attention.

The Federal Rules of Evidence address the area of privilege in Article V in a single rule, Rule 501, which requires that privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experi-

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ence." To further assist the student, the common law privileges of lawyer-client and husband-wife are discussed along with the general question of waiver. Similarly, while the Federal Rules of Evidence do not address presumptions in criminal cases or burdens of proof specifically in either civil or criminal cases, these matters are explored in considerable detail in conjunction with the discussion of presumptions in civil cases, Article III of the Federal Rules of Evidence.

Certain areas of the law of evidence in addition to hearsay are best understood in the context of concrete illustrations. To this end illustrations are provided in footnote form with respect to the operation of presumptions in civil cases, the collateral—noncollateral distinction, expert witness reasonable reliance, prior consistent statements, the business record hearsay exception and the Original Writing Rule.

This Nutshell on the Federal Rules of Evidence contains very few citations for two reasons. First, as an aid to student understanding of the law of evidence, citations to numerous authorities are not only not helpful but serve to destroy the natural flow of the commentary sections. Second, the text of the commentary sections of this Nutshell tracks very closely the text of Graham, Handbook of Federal Evidence (4th ed., West 1996), a two volume handbook for trial attorneys and judges. Students desiring authorities in support of stated propositions are referred to the exhaustive footnotes contained in the Handbook.

It is sincerely hoped that the discussion of the Federal Rules of Evidence contained in this Nutshell will assist

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the student in coming to grips with the law of evidence and at the same time make the task both easier and more enjoyable.

MICHAEL GRAHAM

January, 1996

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- Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988), 369
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- Bourjaily v. United States, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987), 326, 328, 334, 335
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- Frye v. United States, 293 F. 1013 (D.C.Cir.1923), 257, 258, 259, 260
- Gertz v. Fitchburg R.R. Co., 137 Mass. 77 (1884), 203
- Inadi, United States v., 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986), 333, 334, 335

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- McDonald v. Pless, 238 U.S. 264, 35 S.Ct. 783, 59 L.Ed. 1300 (1915), 176
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- Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), 69
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- Upjohn Co. v. United States, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981), 157
- White v. Illinois, 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992), 334, 335
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