

LEARNING SERIES

LEARNING
EVIDENCE

FROM THE FEDERAL RULES
TO THE COURTROOM

SECOND EDITION

DEBORAH JONES MERRITT ■ RIC SIMMONS

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LEARNING EVIDENCE

FROM THE FEDERAL RULES
TO THE COURTROOM

Second Edition

■ ■ ■

By

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PREFACE TO THE FIRST EDITION

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This book is unusual because students contributed so substantially to its preparation. Our dedicated research assistants researched points of law, found examples, checked cites, proofread pages, and suggested formats. We offer special thanks to the outstanding work of our research team over the last two years: Abigail Andre, Courtney Cook, Daniel Corcoran, Katherine Everett, Christina Y. Han, Doug Hattaway, James Marra, Rex Miller, Megan Shepston Overly, Corrina Roy, Carla Scherr, Jillian Slinger, Ravi Suri, and Stephen M. Wolfson. Students in our Evidence classes helped further refine the materials.

We also thank Loraine Brannon for her efficient and excellent work producing the first in-house copies of these materials; we would not have been able to teach from the manuscript without her help.

Special thanks, finally, to our family members. They were a 24/7 Evidence team, offering encouragement, suggesting examples, discussing pedagogy, and editing text. Andrew and Daniel Merritt, Angela Lloyd, and the young Lloyd-Simmons crew enrich both our lives and this book.

Deborah Jones Merritt
Ric Simmons

Columbus, Ohio
September 15, 2008

To Andrew and Daniel

DJM

To my parents

RS

PREFACE TO THE SECOND EDITION

This second edition of *Learning Evidence* reflects the restyled Federal Rules of Evidence that took effect on December 1, 2011: We have integrated the new rule language throughout the text. The book also updates case law from the last three years, particularly in the dynamic area of Sixth Amendment jurisprudence. But the second edition preserves the chapter numbering, structure, and most examples from the first edition. If you used the first edition of *Learning Evidence*, this edition should feel quite familiar.

Students and colleagues both suggested ideas that we incorporated in this edition or in the teaching materials associated with the book. We especially thank our evidence colleagues Michael Avery, Leah Christensen, Michelle Madden Dempsey, Deborah M. Hussey Freeland, Abraham J. Gafni, Jesse A. Goldner, Kenneth S. Klein, John Mitchell, Martin A. Schwartz, and Deirdre M. Smith for their helpful insights and thoughtful corrections.

We couldn't have produced this second edition without the cheerful assistance of Susan Edwards, Dawn Parker, Gabrielle Stephens and our team of excellent research assistants: Eric M. Bell, Timothy Brownrigg, Andrew DeFranco, Stephanie Fitos, Joe Griesmer, Douglas Hattaway, Chris Immormino, Caitlyn Nestleroth, and Joseph Saks. We thank all of them for their careful, timely work.

Our family members, finally, remain our most important personal and professional supports. They even design and wear *Learning Evidence* t-shirts! We thank them for all they do for us every day.

Deborah Jones Merritt
Ric Simmons

Columbus, Ohio
September 10, 2011

STUDY GUIDE

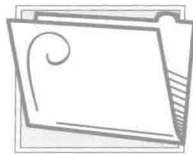
How to Get the Most Out of This Book

The study techniques you have developed in other courses will help you in this course as well. But this book approaches legal study differently than the typical casebook. Here are some tips on how to get the most out of this book:

1. Learning the Basics. The materials in this book teach the basic rules of evidence through textual discussion, analysis of the relevant rules, and concrete examples. The text does not require you to extract principles from cases, respond to questions, or solve problems to grasp these basics. By the end of each chapter, you should understand the basic features of the rule(s) discussed in that chapter.



Key Concepts. Most chapters begin with a text box labeled “Key Concepts” and marked with this key icon. These boxes serve two purposes. First, they will alert you to the most important concepts that you should focus on when reading the chapter. Second, when you review the materials, you should be able to glance at the Key Concepts box for each chapter and readily recall the meaning of those concepts.



Quick Summary. Each chapter ends with a “Quick Summary” of the contents, designated by the “summary folder” icon. These boxes do **not** contain all of the information you need to know from the chapter. You need to master details from the chapter, not just the summary principles. But these summaries will give you a mental framework for organizing the material in the chapter. After reading the chapter, look at the Quick Summary and see how many details you can recall to accompany each principle.

2. Reading Rules. The federal law of evidence has been codified in the Federal Rules of Evidence. To understand the law and practice it effectively, you need to read the rules! Rather than refer you to a statutory appendix or separate rulebook, these materials incorporate relevant sections of the rules in each chapter. The materials attempt to walk you through the rules, so that you will see how the language relates to the issues disputed in the courtroom.

To aid your understanding, we underline key words in the rules and arrange complex lists into bullets. This formatting is not part of the official rules; it is designed to introduce you to each rule. Here is how a hypothetical rule (one that is not part of any evidentiary code) might appear:

Hypothetical Rule: Prohibited Conduct by Jurors.

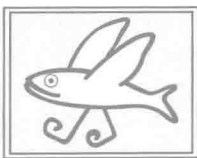
In any civil or criminal trial, jurors may not

- Snore
- Yawn, or
- Roll their eyes

during the presentation of a party's evidence, except when the judge engages in the same behavior.

The full text of the Federal Rules of Evidence appears in an appendix to this book. In addition to studying the rules in each chapter, you should look frequently at the full set of rules; that will help you understand how the rules relate to one another. You may want to annotate the rules in the appendix with notes from your reading and class. This is a good way to learn the rules.

3. Open Questions. Many points of evidentiary law are settled, but a surprising number are still open to dispute. Even when a principle is clear, its application may vary depending on the facts of the case. This book notes when legal issues are unresolved, as well as when application of a principle depends on the facts of the case. In addition to textual explanations, icons mark these points so they are easy to recognize:



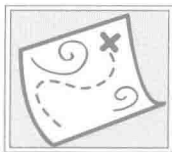
This icon indicates points of law that are still evolving. Evolving issues include (1) legal principles that most parties assume are settled, but that a thoughtful attorney might challenge; (2) issues on which a conflict exists among the federal circuits; (3) unsettled questions raised by recent Supreme Court decisions or rule changes; and (4) issues that no court has yet addressed. The “evolving rule” icon identifies these issues, which are discussed further in the text.



This second icon marks issues on which the legal principle is clear, but the court's decision will depend on the facts of the case. Legal counsel's ability to apply the governing principle to the facts is particularly important in these situations. When you study these issues, the legal principle may seem straightforward. Think, however, about how you would apply the principle to a variety of factual situations. Applying the principle, rather than simply knowing it, is critical to these issues.

4. Organization. Each chapter in this book addresses a particular evidentiary principle. The chapters are self-contained, although later chapters build on earlier ones. True mastery of the Rules of Evidence, however, requires seeing relationships among the rules and using the rules in combination. To help you build that understanding, the book uses two techniques:

First, a **Table of Contents** and **Detailed Table of Contents** show how some of the rules relate to one another. The Table of Contents includes just the title for each chapter, while the Detailed Table of Contents incorporates the Key Concepts for each chapter. These tables may help you see the “big picture” and integrate the individual rules.



Second, **Overview Chapters** and **Paragraphs** offer specific information about how rules relate to one another or to trials in general. When you see this overview icon at the beginning of a chapter, it means that the entire chapter is an organizational one, helping you relate rules to one another. When the icon appears beside a particular paragraph, it means that the paragraph positions the material within the broader Rules of Evidence.

5. How to Prepare for Class. You should read the assigned materials before class! All professors say that, but there is a particular reason to read these materials before class. With the case method, some students (especially in upper level courses) find that it is efficient to read the cases very lightly—or not at all—and wait for class to illuminate the principles contained in the cases. The materials in this book, however, teach the basics directly; there's no quicker way to learn them.

Your professor, moreover, may not review the basics in class. Instead, the professor may focus class on review questions, advanced problems, policy discussion, and simulations. If you haven't read the material, you will not benefit much from the classes.

6. How to Prepare for Exams. You should find these materials helpful, both in preparing for the exam in this course and when reviewing for the bar exam. The techniques outlined below will help you prepare well for both exams:

- a. Be sure that you understand the **Key Concepts** in each chapter. These appear both at the beginning of the chapter and in the **Detailed Table of Contents**.
- b. Read over the **Quick Summary** for each chapter. In addition to understanding the summary, you should be able to recall details relating to each of the points in the summary.
- c. Review the **Rules of Evidence** that you have personally annotated. Most of federal evidentiary law stems from those rules. The language of the Rules should help you track the basics, while your annotations flesh them out.
- d. Review **Overview** chapters and paragraphs to be sure that you understand how the rules relate to one another. Reviewing the **Table of Contents** will also reveal important relationships.
- e. Take special note of **Evolving Issues** and know how you would argue both sides of those issues. You may argue these issues some day in court and you almost certainly will have to argue some of them on an exam.
- f. Pay special attention to **Balancing Scale** principles as well. These rules often seem easy, but the essence of these rules lies in their application. You need to know how to apply these rules carefully to the facts of a problem, seeing arguments that both sides might raise.

Enjoy your study of evidence!

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