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2009-2 Cumulative Supplement

WIGMORE ON EVIDENCE

Arthur Best

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EVIDENCE

IN

TRIALS AT COMMON LAW

by

JOHN HENRY WIGMORE

2009-2 CUMULATIVE SUPPLEMENT

by

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Wigmore on Evidence
Evidence in Trials at Common Law

by John Henry Wigmore

Wigmore on Evidence, the preeminent treatise on the American law of evidence, provides exhaustive and authoritative guidance on the Federal Rules of Evidence, state evidence rules and codes, and the common law. Matchless in scope and depth of coverage, *Wigmore* provides clear explanations of the settled law and comprehensive analysis of more complicated evidentiary problems.

Relied on by state and federal courts as the ultimate authority for important evidence questions, *Wigmore* is an invaluable aid in determining the admissibility of evidence in federal and state courts.

Highlights of the 2009-2 Cumulative Supplement

by Arthur Best

Reflecting the dramatic increase in the number of evidence decisions rendered each year by appellate courts, the 2009-2 Supplement brings you up to date on all the important aspects of evidence law, drawing on hundreds of appellate decisions from all state and federal jurisdictions:

Hearsay. Courts identified hearsay and applied numerous exceptions to the hearsay exclusionary rule, with some decisions exhibiting a pro-admissibility preference.

- In *State v. Sanchez*, 177 P.3d 444 (Mont. 2008), the court held that a note a murder victim wrote several days before being murdered was wrongly admitted as a dying declaration. The declarant's statements that she may "become sick" and "perhaps I die" did not indicate she viewed her death as "certain" or "imminent" when she wrote the note.
- In *Valmain v. State*, 5 So. 2d 1079 (Miss. 2009), the court held that the exception for statements made for the purpose of medical treatment can properly permit the introduction of a statement identifying an individual as the perpetrator of sexual abuse. It characterized the identification of an abuser as "necessary for treatment."

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- In *Pelley v. State*, 901 N.E.2d 494 (Ind. 2009), the court held that the state of mind exception could properly apply to a murder victim's statements that he intended to limit his son's activities in connection with a prom. The statements were relevant to show the defendant's motive.

Cross-examination and Impeachment. Decisions considered, among other issues, the proper basis for reputation evidence and the likelihood of unfair prejudice from impeachment of a non-defendant witness.

- In *State v. Tucker*, 968 A.2d 543 (Me. 2009), the court held that the trial court had properly excluded reputation evidence about victim. Because the reputation witness knew only what about eight individuals thought about the victim, the testimony did not constitute permissible evidence of a community-held belief.
- In *King v. State*, 967 A.2d 790 (Md. 2009), the court held that the trial court erred in prohibiting impeachment of a prosecution witness with evidence of her prior conviction on drug charges. The court provided a careful analysis of unfair prejudice, considering how those risks vary according to whether the impeached witness is or is not the defendant.

Confrontation Clause. Courts have continued to consider whether various kinds of statements are testimonial or nontestimonial. Some out-of-court statements, such as autopsy reports, have received different treatment in various jurisdictions.

- In *Sharifi v. State*, 993 So. 2d 907 (Ala. 2008), an autopsy report was deemed nontestimonial because it was within the coverage of the business records exception.
- In *State v. Bell*, 274 S.W.3d 592 (Mo. 2009), the court held that an autopsy report prepared in anticipation of prosecution is a testimonial statement.
- In *Smith v. United States*, 2009 D.C. App. LEXIS 35 (D.C. Feb. 26, 2009), the court held that a report from a government agency identifying something found on the defendant as an illegal drug constituted testimonial hearsay.
- In *State v. Silva*, 960 A.2d 715 (N.H. 2008), the court held that a toxicology report, establishing that victim had morphine in her body when she died, was not testimonial because it was not prepared in anticipation of prosecution and was not directly accusatory.

Expert Testimony. Courts evaluated diverse types of expert testimony, considering whether its subject matter would be appropriately helpful to the finder of fact.

- In *Dean v. State*, 194 P.3d 299 (Wyo. 2008), the court held that expert testimony was properly admitted to show that one out of every four or five domestic abuse victims recants accusations. The court held that information about battered woman syndrome could help the jury understand the alleged victim's conduct.
- In *State v. Legere*, 958 A.2d 969 (N.H. 2008), the court held that expert testimony on gang practices was properly admitted. In the absence of that testimony, the court held, the jury would likely have failed to understand that a person's wearing a particular shirt in a particular place could provide a motive for his murder.

Privileges. Courts considered the appropriate application of numerous privileges, reinforcing the requirement that a privilege applies only where confidential communications have taken place.

- In *People v. Gutierrez*, 200 P.3d 847 (Cal. 2009), lawyer-client privilege did not apply. The client claimed it covered notes found in his prison cell because he had the plan to show those notes to his attorney. The court stated that "intent to show a document to a lawyer does not transform a document into one covered by the attorney-client privilege."
- In *Sitterson v. Evergreen Sch. Dist. No. 114*, 196 P.3d 735 (Wash. Ct. App. 2008), the court applied a balancing test to determine if the attorney-client privilege was waived by inadvertent disclosure. Waiver was properly found because the attorney took no precautions to prevent disclosure, the attorney did not notice or remedy the error for over three years, and the disclosure did not occur in the context of a request for an "enormous" number of documents.
- In *United States v. Banks*, 2009 WL 455491 (9th Cir. Feb. 25, 2009), the court considered whether the usual rule that withdraws the privilege for confidential spousal communications when a prosecution involves a crime against the couple's child should apply where harm was allegedly inflicted on a couple's grandchild. The court allowed the privilege to remain in place because the child was not raised by his grandparents and had infrequent contact with them.

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EDITOR'S PREFACE TO THE 2009-2 SUPPLEMENT

This supplement provides a representative sampling of decisions and statutes from American jurisdictions, correlated to the Wigmore plan of analysis of the law of evidence. This edition is built on prior supplements ably prepared prior to 1995 by the late Professor Walter A. Reiser, Jr.

The supplement and bound volumes of the treatise give extensive treatment of the Federal Rules of Evidence and of the rules and codes of evidence – modeled on the Federal Rules – that have been adopted by states. Most states now have such rules or codes. The supplement to Volume XI contains the complete text of the Federal Rules of Evidence, and, following each rule, there is a reference to the section or sections of the treatise that deal with the rule's subject matter.

I am grateful to Douglas Baer, Christopher Brown, Tricia Laylock, Sean Leventhal, Nicholas Mahrt, Kelly Peterson, and Rose Pryor, students at the University of Denver Sturm College of Law, for their careful and thoughtful help in this project.

I hope that this supplement will be helpful to the bench and bar, and to students of the law of evidence.

Denver, Colorado
October 2009

Arthur Best

WIGMORE ON EVIDENCE
2009-2 CUMULATIVE SUPPLEMENT

This 2009-2 Cumulative Supplement replaces the 2009 Cumulative Supplement and supersedes all previous supplements.

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§4. Rules of evidence in chancery, criminal trials, ex parte proceedings, interlocutory proceedings, proceedings to determine admissibility of evidence, contempt proceedings, grand jury proceedings and preliminary hearings in criminal cases, disciplinary proceedings against lawyers and judges, sentencing proceedings, parole and probation revocation proceedings.

[Note 6, p. 31; add:]

Florida: Doersam v. Brescher, 468 So. 2d 427 (Fla. Dist. Ct. App. 1985) ("in Florida, hearsay statements are not generally admissible in criminal or civil proceedings"; "hearsay evidence should not be admitted in a final hearing in forfeiture proceedings and, of course, such evidence may not form the basis for a factfinder's decision that the property was utilized in the commission of a crime").

Iowa: Iowa R. Evid. 1101(a) (1983) ("These rules apply in all proceedings in the courts of this state, including proceedings before magistrates and court appointed referees and masters, except as otherwise provided by statute, by this rule, or other rules of the Iowa Supreme Court"; rule contains no exception for criminal proceedings generally).

North Carolina: N.C. R. Evid. 1101(a) (1983) ("Except as otherwise provided in subdivision (b) or by statute, these rules apply to all actions and proceedings in the courts of this State"; rule contains no exception for criminal proceedings generally).

Texas: Tex. R. Evid. 101(b) (1998) ("Except as otherwise provided by statute, these rules govern civil and criminal proceedings (including examining trials before magistrates) in all courts of Texas, except small claims courts").

Vermont: Vt. R. Evid. 1101(a) (1983) (like North Carolina rule *supra*).

[Note 23, p. 47; add:]

Federal: United States v. Franco, 874 F.2d 1136 (7th Cir. 1989) ("when making preliminary factual inquiries about the admissibility of evidence under a hearsay exception, the district court must base its findings on the preponderance of the evidence"; "that evidence, however, may include hearsay and other evidence normally inadmissible at trial"; Fed. R. Evid. 104(a) and 1101(d)(1) cited). United States v. Brewer, 947 F.2d 404 (9th Cir. 1991) ("the Federal Rules of Evidence apply in pretrial suppression proceedings"; this includes Rule 615, the rule providing for exclusion of witnesses; treatise cited).

[Note 30, p. 52; add:]

Connecticut: Conn. Code of Evid. §101(d)(6) (2000) (code does not apply to summary contempt proceedings).

Iowa: Iowa R. Evid. 1101(c)(3) (1983) (rules of evidence do not apply in "contempt proceedings in which an adjudication is made without prior notice and a hearing").