

# EVIDENCE

AN INTRODUCTORY PROBLEM  
APPROACH  
Second Edition

Michael H. Graham

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# **EVIDENCE**

## **An Introductory Problem Approach**

**Second Edition**

By

**Michael H. Graham**

*Professor of Law  
University of Miami*

**AMERICAN CASEBOOK SERIES®**

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## Introduction

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*Problem:* The prosecution wants to introduce a typewritten confession to robbing the Seven-Eleven on Gator Street which the government will contend was signed by the defendant in an interrogation room in the presence of John Jones, a law enforcement official. The defendant, if he testifies, will deny that he signed the confession. Prepare to discuss the evidence issues bearing on admissibility and/or weight that might come into play depending upon circumstances surrounding the alleged creation of the confession.

The study of evidence is today the study of the Federal Rules of Evidence which were enacted by Congress effective in 1975. The Federal Rules of Evidence have been amended on several occasions since that time, sometimes pursuant to the rules enabling act and sometimes by direct congressional action. The latest amendments became effective December 1, 2006. Over forty states have now adopted rules of evidence modeled upon the federal rules. Several other states have selectively adopted rules contained in the Federal Rules of Evidence. The multi-state bar examination tests the Federal Rules of Evidence. Today the law of evidence and its future development is intimately connected to the Federal Rules of Evidence.

Over the years law professors faced with the task of instructing students on the subject of evidence have become increasingly dissatisfied with traditional case method presentation. This pervasive dissatisfaction with the case method stems in great measure from the unique nature of evidence as a subject. The law of evidence consists of a multitude of rules developed over the years initially by trial lawyers and trial judges to deal with real everyday problems. While appellate decisions clearly have been extremely instrumental in the development of rules of evidence, individual decisions that may be described as “leading” are few and far between. Only a handful of United States Supreme Court decisions regarding evidentiary issues require study. Moreover, the subject of evidence covers many distinct concepts, with each concept encompassing many subsidiary ideas. Not only must each of these individual concepts be communicated to students, but relationships between such concepts must be understood. For example, when analyzing the admissibility of a document, the student must consider for starters issues involving relevancy, authentication, hearsay, and the original writing rule.

The traditional case method is poorly suited to teach such a diverse, yet integrated subject. The case method in theory involves eliciting all relevant matter from a student or a series of students by means of a series of questions, each fashioned in light of the previous one, each aimed to move each student from a point of initial naive information to a



conclusion enriched by comprehension. The case method is extremely difficult to employ effectively under the best of circumstances, i.e., with first-year students or extremely small upper level classes. The case method is also extremely time consuming. Much of the time consumed unfortunately involves reinventing the wheel. Little time is left for in-depth discussion of complex and difficult to understand concepts, concepts themselves almost impossible to develop when one hides the ball as one does using the pure case method. Moreover, such complex and difficult concepts deserving in-depth analysis are rarely presented adequately in a single appellate opinion or even a series of opinions. Relationships between evidence concepts are even less suited to exploration by studying selected decisions.

Various problem method approaches have arisen in response to the inadequacies perceived with the case method for studying evidence. Unfortunately, the problem method also exhibits significant disadvantages. Given the nature of students, student preparation, and the difficulty of the subject matter, it is simply asking too much to expect that student perusal of text, followed by classroom discussion of a subsequently presented set of diverse problems involving many fact patterns can alone provide comprehensive understanding. Thus, while the presentation of textual material has the advantage of presenting students with various concepts of the law of evidence in a convenient study format, classroom discussion needed to bring the subject to life often fails to materialize.

The approach of this textbook is an attempt to capture the significant advantages of the text and problem approach to the teaching of evidence while also facilitating useful classroom student participation. Prior to presentation of the rule of evidence under consideration and a textual explanation of its operation, this textbook ordinarily presents a "problem." Each "problem" is designed to present a comprehensive hypothetical factual situation as it would arise in practice. Occasionally the breadth of the material requires employment of up to three introductory problems. Many of the fact patterns in the introductory problems have a long history of oral presentation in my evidence class, some dating back 25 years or more. As the student reads the rule and text, which follow immediately, he or she is thus searching for comprehension of the rule in operation that will provide an answer to the problem presented. The "problem" raises issues focusing on the rationale as well as the operation of the rule. Following the textual presentation is ordinarily a series of questions and/or true-false inquiries. The questions raise issues concerning the foregoing rule in a narrow contextual setting while the true-false inquiries are statements of law that are either correct or incorrect. The answers to these true-false questions with explanation are contained in Chapter XIX. Where the particular rule of evidence is for a variety of reasons in context relatively accessible, a truncated version of the foregoing is presented in the interests of time.

The foregoing pattern is altered slightly with respect to the traditional definition of hearsay, Rules 801(a)–(c), as presented in Chapter V. Given the complexity and unitary nature of the definition, significant illustrations are provided in the textual discussion. The textbook returns to the introductory problem, rule, text format with the beginning of the prior statement of witness and admission of a party-opponent components of the definition of hearsay contained in Rules 801(d)(1) and (2). At the conclusion of the presentation of the definition of hearsay are many true-false questions designed to test understanding of the definition of hearsay as applied in context. At the conclusion of Chapter V, Hearsay, is an even larger number of true-false questions. The first part asks if the statement is hearsay as defined in Rules 801(a)–(d), while the second part asks whether such a statement if hearsay meets the requirements of a hearsay exception contained in Rules 803, 804, or 807 or is admissible as multiple level hearsay pursuant to Rule 805.

At the conclusion of the textual presentation Chapter XVIII presents a total of 670 true-false and multiple choice questions testing the operation of all the Federal Rules of Evidence. Answers with explanation are contained in Chapter XX. The presence of these objective questions and answers with explanation greatly facilitates self-testing and study. As previously mentioned, true-false questions appear in numerous locations throughout the textbook as well. Answers with explanation are contained in Chapter XIX. Over the years, many, many students have reported that following a similar but less refined evidence class which included access to objective questions with answers (but no explanations) that they scored higher on the evidence portion of the initial PMBR diagnostic test in preparation for the bar examination than any other subject.

Scattered throughout the text are quoted excerpts from several sources, e.g., United States Supreme Court decisions, Advisory Committee's Notes, treatises written by Professors Wigmore, Morgan, and McCormick amongst others, sample evidentiary foundations, and pattern jury instructions. In many instances these references are to the common law of evidence prior to enactment of the Federal Rules of Evidence in 1975 or to editions of treatises, etc., published shortly thereafter. These references serve many purposes. They explain, expand, illustrate, illuminate, etc., as well as provide a historical prospective of the development of the law of evidence. In every case the reference is as accurate now as when it was written, in many cases many decades ago. This textbook is not designed as a reference tool. For those readers who desire citation support for various propositions, feel free to consult Graham, Handbook of Federal Evidence, Sixth Edition (Thomson/West 2006) from which the text herein is largely derived.

Evidence, An Introductory Problem Approach attempts to put the obvious advantages of a text and problem approach to work effectively in the classroom. The introductory problem provides a vehicle for informative as against time wasting student participation. The uniform structure of this textbook and particularly its textual discussion with illumina-

tions attempts to avoid the feeling of “ungepotche” that arises when the textual material itself is to a significant extent culled from previously existing diverse sources. An important residual effect of the uniform approach presented herein is that the textbook is of such length to realistically permit full exploration in a four credit evidence course, thus avoiding the absence of coverage of entire areas of the law of evidence reflected in the Federal Rules of Evidence, employed by trial attorneys, and tested on the bar examination.

MICHAEL H. GRAHAM

Miami, Florida  
January, 2007



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# **EVIDENCE**

## **An Introductory Problem Approach**

**Second Edition**

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