

# EVIDENCE

THIRD EDITION

GEORGE FISHER

FOUNDATION PRESS

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THIRD EDITION

*by*

GEORGE FISHER

Judge John Crown Professor of Law  
Stanford Law School



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*For Lu and Dick.*

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## PREFACE

My aim in writing this book has been above all to create an evidence book students will love. And if this goal has proved past my reach, I hope the book at least grabs and holds students' interest. The challenge has been to present the law's gritty details in a way students find intellectually compelling and sometimes even fun. I've followed several strategies—some substantive, some stylistic, some purely pedagogical:

**Focus on the Criminal Context:** Courtrooms come alive when examined through a criminal law lens. Criminal cases seem earthier, more vital than mill-run civil actions. The pages ahead therefore focus on criminal cases and scenarios. But because some evidence rules operate mainly on the civil side and because I've aimed to cover every important evidence topic, some civil cases join the mix. Still, whenever the doctrine has let me choose, I feature the rough-and-tumble of the criminal process.

**Emphasize History:** Most evidence casebooks add intellectual content by exploring the epistemology of proof. Though the goal is worthy, the approach seems doubtful. Epistemology never grabbed students in my day, and I suspect it would work no better today. But the history of evidence law sometimes simply fascinates. Consider how the racial politics of the Civil War era stalled the inevitable collapse of many old and unrelated witness competency rules. (See pages 364–71.) Or take the back story of *Mutual Life Insurance Co. v. Hillmon* of 1892, a grisly tale of dirty dealings on the frontier. (See pages 522–31.) And the history of the 1960s classic, *People v. Collins*, reveals the hidden hand of a future legal legend, then a 25-year-old law clerk, who ghostwrote much of the famous opinion. (See pages 75–79.) History is not just for fun, of course. Studying the stories behind the law strengthens students' grasp of the principles that drive our evidence rules and deepens understanding of how the law works today.

**Make It Timely:** Rich in history, evidence law is also a happening field. Since launching the *Crawford* revolution in 2004, the Supreme Court has decided nine major cases in a quixotic quest to define how tightly the Sixth Amendment Confrontation Clause constrains admission of hearsay against criminal defendants. Chapter 8 details the latest skirmishes among the Court's warring factions, struggling to make this chaotic doctrine more predictable. Meanwhile the National Academy of Sciences lit a brushfire with its 2009 report scorching the methods and standards of the so-called forensic "sciences." Suddenly it was thinkable that courts might yield to timeworn defense demands, now girded by the NAS report, to bar or limit expert testimony about fingerprint or handwriting identification or hair or firearms analysis. Chapter 9 traces the defense bar's rising hopes, largely disappointed, of undermining these familiar techniques. Amid this strife in the courts, change came too from the rule writers. In

September 2010 the U.S. Judicial Conference approved a full-scale restyling of the Federal Rules of Evidence. As of December 2011, when the newly restyled evidence rules took effect, virtually every rule has a new text, and some rules have new numbering schemes. Confrontation law upended; forensic sciences attacked; evidence rules recast—these seismic events demanded this new edition, which strives to make students masters of the latest rules and caselaw.

**Mix It Up:** But rules and caselaw are not all of law. Other sources—news articles, journal articles, behavioral and scientific studies—inform law and are informed by it. Exploring the doctrine from many perspectives helps students see how evidence law suits (or doesn't suit) our whole system of justice. Moreover, many students like flowcharts, diagrams, and tables because visual images of the law often reveal its structure more clearly than any verbal description. The occasional map, photo, cartoon, or poem can enlighten analysis or reflect the force of the law in action. Cases, too, remain a critical component. Real-world disputes breathe life into law, and disagreements among parties challenge students to flex their advocacy skills. And case-based narratives stick in the mind. Wrapping a rule's tangled verbiage inside a memorable story makes that rule easier to remember and apply later.

**Use Real-Life Problems:** Problems also are essential, but pose hazards. Students seem to resent the hidden hand of the law professor, guiding them toward supposedly spontaneous moments of intellectual discovery. There are many forms of this pedagogical device, though rhetorical questions and elaborate hypotheticals are the two most obvious. I've avoided rhetorical questions almost entirely. As for hypotheticals, I think the best problems spring from life. So whenever possible, I have based problems on facts quoted from cases or news articles, complete with citations. My hope is that students will ask themselves, "How would a good lawyer attack this problem?" rather than "What is the professor driving at?"

**Help Students Swim:** I never have succeeded in teaching all of the Rules' intricacies through caselaw and commentary—and I doubt even the best student could learn evidence law without some straightforward guidance through doctrinal labyrinths. So at many critical junctures in the book, I've laid out the details of doctrine as clearly as I can. The introductions to propensity evidence and hearsay, which address some of the toughest territory in evidence law, aim to give students a firm base on which to build the unwieldy doctrines of these two realms. They are just two of dozens of areas where I've felt a quick, treatise-like interjection could resolve confusions.

**Fight the Bulge:** A malady strikes casebooks as they age into later editions. New cases come along, and new studies and news stories follow. Earnest authors add them to the mix. Older cases, meanwhile, past their prime, somehow elude the author's sharpened pencil and survive into

the next edition. Page counts swell, margins shrink, and smaller fonts strain students' eyes and patience. I've resolved to fight the bulge, erasing one old case for each new case and resisting temptations to cover every topic. But with confrontation caselaw in disarray and forensic sciences under assault, the book has thickened to my regret. I will continue to fight the bulge and hope the book will remain as I intended it—one that lets professors assign and students enjoy every page.

These have been my strategies. Over the years they have worked for my students and me. I hope they will work for you. But if I have taken a misguided course or missed a fruitful one, I trust that you (both students and professors) will let me know. The next edition will profit from your thoughts.

—GF

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## ACKNOWLEDGMENTS

I begin with a confession: No matter how many pages I consume and names I mention, I will leave out too many people who deserve thanks. Countless friends and helpful strangers have sent ideas and citations and the best sorts of criticisms. There are too many such folks for me to remember, much less to list. I regret any I leave unacknowledged.

I have leaned on no one so heavily as the small army of student research assistants, paid and unpaid, who have dug out forgotten cases and obscure articles and cite-checked, proofread, and indexed. They have assembled fifty-state surveys of odd aspects of evidence law, and they have offered student-sensitive insights, warning me when my drafts are confusing or arcane or dull. As if by magic they have converted hand-drawn charts and diagrams into blueprint-quality art forms. To say that collectively they have been indispensable is no exaggeration, and several can claim that distinction independently. The list is long: My thanks to Billy Abbott, Stephanie Alessi, Matt Alexander, Justin Barnard, Fred Bloom, Binyamin Blum, Jake Gardener, Christine Hwang, Vivek Kothari, Steve Mansell, Katherine McCarron, Duane Pozza, Anitha Reddy, Karen Saah, Zoe Scharf, and Anthony Sun. To Gabe Schlabach goes credit not only for making unnumbered contributions to this volume, but for engineering the rulebook that accompanies this edition. Mark Menzies likewise has done dual duty, enriching this text and suffering production of the index, a task that brooks no imprecision.

Helping both students and me in myriad ways are the endlessly resourceful members, past and present, of our law library. Among those who have saved us more than once from ignorance and error are Alba Holgado, Sonia Moss, Rich Porter, Rachael Samberg, Kate Wilko, George Wilson, and Sarah Wilson. And Bobbi Dufek has performed miraculous administrative feats, keeping our gears in motion when deadlines loomed.

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Many kind folks scattered across the country have added color and depth to important cases. Gene Talerico of the Lackawanna County District Attorney's Office and André Stuart of 21st Century Forensic Animations helped secure the animation featured in *Commonwealth v. Serge* (page 49). Jake Ersland of the National Archives at Kansas City dug out and scanned the photos that accompany *Mutual Life Insurance Co. v. Hillmon* (page 529). David Mark of the Bristol County District Attorney's Office helped gain access to the 911 call examined in *Commonwealth v. Nesbitt* (page 643). And Christopher Holm of Lucasfilm Ltd. bestowed permission to reprint the famous image at issue in *Seiler v. Lucasfilm* (page 921).

To the exceptionally talented and astonishingly patient production crew at Foundation Press goes all credit for the handsomely proportioned pages, the easy-reading text, and the meticulous error detection. Tessa Boury, Sharon Pizzi, and Greg Olson suffered the headaches caused by my many missed deadlines with seemingly bottomless patience and complete professionalism. Backing them and bearing the brunt of my delays were Christina Eschbach, Laura Holle, Cathy Lundeen, Holly Saari, Jennifer Schlagel, and Bekke Schneider. Paul Thomson has supplied essential support day in, day out, year after year. And Editor-in-Chief John Bloomquist, with sheer competence and understated command, has steered to print two editions of this book, never hinting when I have needed his time that mine is just one of many books he oversees. Together these good people have given corporate headquarters an unusually homey name.

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Thanks finally to my Aunt Lu and Uncle Dick, who have lent moral support as long as I can remember. Their generous spirits and open minds have been lifelong inspirations. I have dedicated this volume to them.

—GF



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