
EVIDENCE
IN CONTEXT:
EVIDENTIARY PROBLEMS
AND EXERCISES

CHARLES H. ROSE III

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**EVIDENCE IN
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AND EXERCISES**

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By

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Dedication:

“For my family – my heart, my life, my joy.”

“[W]e shall be better and braver and less helpless if we think that we ought to enquire, than we should have been if we indulged in the idle fancy that there was no knowing and no use in seeking to know what we do not know;— that is a theme upon which I am ready to fight, in word and deed, to the utmost of my power.”

PLATO, mathematician and philosopher, (427?–347 BC)¹

“In seeking wisdom, the first step is silence, the second listening, the third remembering, the fourth practicing, the fifth—teaching others.”

IBN GABIROL, poet and philosopher (AD 1022–1058)²

¹ PLATO, *MENO* 56 (Benjamin Jowett trans., Digireads.com 2005). Plato’s exact date of birth is unknown.

² *THE PAINTER’S KEYS*, http://www.painterskeys.com/auth_search.asp?name=Ibn+Gabirol.

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First Edition

The leadership at Stetson University College of Law creates an environment where practical academic scholarship flourishes. Dean Darby Dickerson, Associate Dean Ellen Podgor, and Associate Dean Jamie Fox, supported this project from inception to completion. Dean Dickerson's support for practical scholarly endeavors at Stetson has been a crucial component of their success, and it is just one of the many examples of the opportunities created by her leadership. My work on portions of this text was supported by Stetson's generous scholarship grant program and it would have been impossible to complete without that support.

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The mistakes within, and I am sure that there are many, are, as always, my own.

Enjoy!

Charles H. Rose III
Summer 2010

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Advocacy Teachers

It is considered normal in texts such as this to identify the substantive law contained in appellate cases that are referenced in the following pages. This, however, is a book about oral advocacy and it rests primarily on the foundations of my own experiences, the substantive procedural law, and the wisdom of those from whom I have learned. The book identifies the first two well, but is woefully meager in identifying the third. The following list, incomplete though it may be, is my small attempt to identify the many excellent friends whose ideas I have used and teaching I have admired. If I left you off it was not intentional and I can only plead the advancing effects of middle age. These are the true resources for anyone who practices the art of advocacy, may your list be as long some day.

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Evidence in Context: Evidentiary Problems and Exercises

Chapter 1

How to Use This Book

A. Introduction

This text is designed to create teaching opportunities in evidentiary law by presenting issues in context. This approach requires the student to learn evidence from a practical standpoint. The provided problems and exercises can only be resolved by applying a thorough understanding of evidentiary law to the real-world question concerning the presentation of evidence at trial. This recreates the context of practice and forces the student to bring policy and law to bear on an actual issue that must be solved. The text uses the case files and problems as the framework for evidentiary discussions. This creates a contextual understanding of evidentiary law that addresses how evidentiary principles relate to one another, the way in which specific goals of the litigation impact the admissibility of evidence, and the policy concerns that form the foundation for the application of the rules.

The student must first complete a thorough case analysis in order to successfully answer the problems. This book contains a review of case analysis,¹ specific evidentiary problems and exercises,² a criminal case file,³ a civil case file,⁴ common advocacy assignments,⁵ and common foundations for admitting evidence.⁶ These materials should be used in conjunction with an evidence text that focuses on substantive evidentiary law.⁷ It will also serve as an excellent backdrop for understanding the deeper development of basic advocacy skills.

¹ Those interested in additional discussion of case analysis should refer to “Fundamental Trial Advocacy,” and “Fundamental Pretrial Advocacy.” Both are available through West Publishing.

² See Chapter 3 of this text.

³ See *State v. Alexander* in Chapter 4 of this text.

⁴ See *Washington v. Hartwell* in Chapter 5 of this text.

⁵ See Chapter 6 of this text. These advocacy assignments use a defined assignment/process/outcome approach that ensures a baseline competency when used in conjunction with proper grading paradigms. Both the grading paradigms and the advocacy assignments can be found in the 2nd edition of “Fundamental Trial Advocacy (West).”

⁶ See Chapter 7 of this text. This information is also available in the 2nd edition of “Fundamental Trial Advocacy (West).”

⁷ At Stetson University College of Law we use these case files and problems to form the core of our “tethered evidence” experience. It allows the student to learn evidence through the context of real world situations. The result

B. Case Analysis

Seven Steps to Superior Case Analysis & Preparation:

- Organize the case file
- Identify the legal issues
- Identify the factual issues
- Connect the facts to the law
- Identify the moral theme
- Plan your presentation in reverse
- Verify the evidence

The information contained in this section of the text is based upon chapters found in “Fundamental Trial Advocacy” (West), with additional information that focuses specifically on evidence-driven tasks when conducting case analysis. A thorough understanding of both the mechanics and theory behind case analysis is crucial when learning evidence in context. It is literally the first step to evidentiary mastery.

While case analysis, preparation, and investigation should occur throughout the trial, the first time you are introduced to a case is important for a number of reasons. Advocates make certain decisions during case analysis that will have a long term impact on the resolution of the case.

When conducted properly, case analysis combines an understanding the law, the facts, and human nature to create a cohesive persuasive presentation. For our purposes, an understanding of the interaction between evidentiary law and case themes and theories is crucial. This understanding creates relevancy, the penultimate issue for all evidentiary questions.

Identifying which facts exist that the law will allow you to admit is a key concern. This need drives the investigative steps taken throughout the rest of the trial. Case analysis forces you to identify your factual theory - what you believe happened, your legal theory - how the law impacts the facts, and your moral theme - why your side should win. You will learn the mechanics of how to analyze a case in the next chapter. You must master this skill if you are to successfully use these materials to understand evidence.

During case analysis you review evidence, investigate issues, interview witnesses, and prepare exhibits, while continuously reevaluating the process. You rework this process until the case is complete, modifying as required based upon the portion of the trial in which you find yourself. The goal is a cohesive presentation supported by the facts that is admissible under the current legal standards.

Using case analysis will help you prepare the problems based upon identified issues that tie directly to our evidentiary code. This is impossible without a complete understanding of how evidentiary law impacts the admissibility of evidence. Case analysis is an ongoing organic process, and is particularly important when identifying what evidence is admissible, and why.

Case analysis is the structure that drives every trial advocacy decision. You cannot intelligently make these choices without understanding how evidence and advocacy relate to one another through the analytical process. Successful advocates proceed through each distinct portion of the trial in a specific fashion based upon their case analysis - you should, too.

is a deeper understanding of evidence and an ability to apply advocacy skills in a class that simulates the issues lawyers face every day.

C. Case Files

The scalable and adaptable case files provided here are designed to showcase the issues facing 21st century advocates. They are based on the lessons learned by Stetson's faculty, students, and alumni, reflecting the same commitment to excellence embodied in our Law School's award winning advocacy teams and its national reputation in Advocacy.

A commitment to the law, the skill, and the art of advocacy forms the foundation for persuasive advocacy. The foundation begins with **knowledge** of the process: the way we train, the way we learn, and the way we practice. This is the core of experiential learning, a preferred methodology for teaching adults. These case files focus advocates on specific advocacy skills in a simulated real world environment, allowing participants to learn the skill and the law in the context of a moment in the trial. The exercises found in chapter 6 accompanying the case file assess advocacy **skills** through the rubric of the experiential learning process. The problems found in chapter 3 address the evidentiary issues. The outcome is an approach that allows the advocate to discover the **values** of the legal profession contextually. The entire concept provides a structure that ensures a baseline of competency in the **knowledge**, **skills**, and **values** involved in becoming a better advocate through a structured approach that focuses on **assignment**, **process**, and **outcome**. The assignments contained in Chapter 6 of this text rely upon this concept of defined processes and outcomes to ensure that a baseline level of competency is produced.

The result is a well-crafted, challenging case file that promotes excellence in all facets of advocacy and evidentiary instruction. This unique multi-media product provides both academics and the practicing bar with modular course content producing varied levels of difficulty depending upon the desired teaching outcome.

The following is a brief introduction to the criminal case file:

State v. Alexander

INTRODUCTION

Brandi Alexander was accused of the shooting and killing of her husband, Chris Alexander, on the night of June 6, 20XX-2. Chris Alexander, 32, was having multiple extramarital affairs and was allegedly talking on a cell phone with one of his lovers, a woman named Nikki Long, less than two minutes before he was shot to death in his living room. The Alexander's two children, Ariel and Jasmine, were asleep in a nearby bedroom at the time of their father's murder.

A gunshot residue test was performed on Brandi the night of the shooting. It found one particle of gunshot residue on the back of her left hand. The murder weapon was a .45 caliber pistol and has not been found. One neighbor heard gunshots but did not see a car fleeing, while another said she heard the screeching wheels of a car right after the shooting. The alleged motive for the murder is jealousy, vengeance, and a \$250,000 insurance policy. The defendant argued at the first trial that either an intruder, or possibly another jilted lover, killed Chris. Brandi Alexander was convicted on January 9, 20XX-1, and sentenced to life in prison.

Ten months later, the circuit court threw out her conviction and ordered a new trial, citing discrimination in the jury selection process by the prosecution.

The following is a brief introduction to the civil case file:

Washington v. Hartwell

INTRODUCTION

The children were black. The driver was white. The community was outraged. It was a media circus. Was it one vehicle, two or three? A van? A dark blue Honda? A Toyota? Or was it all three? The witnesses couldn't agree. The car sped away as a horrified crowd of about 200 emptied into the street and began shouting in outrage. Children's shoes and sandals were scattered on the pavement. Next to a puddle of blood was a pillow left behind by paramedics who had treated one of the victims. Were the non-working streetlights also to blame? Did someone hide the car? Was DNA removed from the evidence? What were the unsupervised children doing in a high-traffic area at night? Who would pay? After being sought for days, a high-profile criminal defense attorney, Steve Levine, finally announced that the driver would come forward.

On March 21, 20XX-2 at approximately 7:15 p.m., Ms. Rebecca Hartwell was driving her midnight blue Toyota Echo. She was travelling north on 39th Street. It is undisputed that at some point her car hit at least two of the four children crossing the street. She also fled the scene of the accident. The hit-and-run crash killed two brothers, aged 14 and 3, and seriously injured a 2-year-old boy and a 7-year-old girl. The 3-year-old boy was caught underneath the grill of Ms. Hartwell's car and dragged approximately 150 feet before his body worked its way loose and came to final rest in the middle of 39th Street. The Toyota then fled the scene of the accident.

The criminal case has ended. Judge Jerry Parker oversaw the prosecution for negligent homicide that resulted in a hung jury on July 13, 20XX-1. The prosecution's office has indicated that they have no intention of retrying the case, citing evidentiary concerns and proof difficulties. Steve Levine contends that the nature of this trial caused the hung jury to have the effect of a dismissal with prejudice. The state's office has publically stated that they disagree with that assessment.

A civil case has been filed alleging both wrongful death and defamation. After filing answers and affirmative defenses to the Complaint, civil defense counsel moved for a change of venue. The Motion was denied.

D. Problems & Exercises

The problems and exercises contained in this text are specifically designed to identify individual evidentiary issues in a controlled environment. They build evidentiary knowledge sequentially, connecting each piece of the doctrine to the next. Topics covered include: (1) relevancy, (2) character, (3) authentication & best evidence, (4) impeachment, (5) experts, and (6) hearsay.

Each problem or exercise is presented as a moment in time during a trial or evidentiary hearing where you must marshal the evidence for, or against, the admissibility of the evidence in question. The problems increase in complexity, with later problems requiring an understanding of earlier issues in order to provide a full and complete evidentiary analysis.

E. Advocacy Assignments & Common Foundations

The advocacy exercises and common foundations found in Chapters 6 and 7 are provided for students studying in a tethered evidence course or who are looking for additional complementary methods of learning evidence. Each of the assignments focus on advocacy, but a clear understanding of evidentiary law is necessary to maximize the persuasive impact of the advocacy performance. A superior advocate should be able to look at each advocacy task and identify the potential evidentiary issues that will arise during that portion of the trial. You should use them as supplementary materials to better understand the way in which evidence permeates the trial process. Finally, the common foundations serve as an excellent tool for placing evidentiary foundations into context, particularly when dealing with authentication.

F. Conclusion

Now that we have good sense of how this text is designed to work, it is time to move on to a deeper discussion of case analysis. After reviewing the chapter on case analysis you should prepare a written case analysis for both the civil and criminal file. Conducting a proper case analysis is the key step that must be completed before beginning the problems and exercises.

-Notes-