FACT INVESTIGATION

FROM HYPOTHESIS TO PROOF

David A. Binder
Paul Bergman

American Casebook Series®

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To Andrea

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Preface

This book attempts to fill a few gaps of long standing in legal education. At trial, the substantive rules of law invoked depend upon what facts the factfinder believes have been proven. Yet, to our knowledge, law school courses and scholarly texts have never systematically considered the process by which litigators gather, analyze and use evidence to prove facts.

In substantive law courses, facts are given and doctrinal discussions follow. True, through hypotheticals an instructor may change the facts, but these changes are designed merely to facilitate doctrinal analysis. Like their predecessors, the new facts too are a given. Law school evidence courses are no exception. Despite fleeting reference to the concept of relevance, evidence courses focus almost exclusively upon rules that exclude relevant evidence and the policies that underlie such rules. Finally, even clinical courses such as trial advocacy and interviewing pay little attention to a conceptual analysis of how facts are proved. Most trial advocacy courses emphasize effective presentation of evidence found in witness statements. As in substantive law courses, the information with which the students work is a given. In interviewing courses, the focus is typically not on the evidentiary significance of the questions asked, but rather is upon the forms of questions and the interpersonal skills useful in motivating clients and witnesses to reveal information. Thus, many students may be excused for graduating from law school thinking that facts are like starving trout, ready to be reeled in at the drop of a question or two.

Experienced litigators, by contrast, tend to have far fewer misconceptions about the ease of gathering evidence to prove facts. For one thing, they understand that no one can reel in facts. At most, one can gather evidence from which facts can be proved. Second, they recognize that, far from lurking near the surface, items of evidence tend to lay on the murky bottom, hidden beneath layers of abstract legal principles, uncertain memory, people's desires to remain silent and competition fostered by the adversary system. As a result, litigators spend most of their time trying to peel away layers to gather evidence which might prove favorable facts.

Given the distance between litigators' activities and the coverage of legal education, gaps in the wall of legal education are apparent.

To fill those gaps, we offer a limited but we think important kind of mortar. We focus on disputes that are litigated in a formal set-

ting in which the parties are at odds with respect to past happenings. In so doing, we recognize that one may have great difficulty gathering evidence unless one has a basic understanding of how facts are proved. To build such an understanding, we endeavor to provide a conceptual description of the thought processes which people use, whether consciously or subconsciously, in deciding disputed questions of fact.

The book is a blend of the theoretical and the practical. No less than the law of evidence or the law of torts, the processes by which people think about evidence are complex and demand close conceptual analysis. At the same time, for us theory cannot be divorced from practice. Since lawyers play a major role in resolving and litigating disputes, a theoretical understanding of the proof of facts is not sufficient. Lawyers must also understand how people describe events and how the use of interpersonal skills may affect those descriptions. Similarly, lawyers must analyze abstract legal issues in factual terms, marshal evidence according to those issues and record information in some meaningful way. In writing this book, our attention has never been far from these "practical" skills. We hope that our use of numerous examples and sample dialogues, as well as the hypothetical case of *Phillips v. Landview* which unfolds through many chapters, underlines our concern for both practical and intellectual understanding.

We hope too that our book stimulates among both law teachers and practicing litigators greater study of the proof of facts.

DAVID A. BINDER
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February, 1984

Acknowledgments

There were those who insisted that this book could not be written. Unfortunately, they were wrong. We gratefully acknowledge the contributions of many scholars, colleagues and students, whose ideas and phrases we have shamelessly incorporated. To the extent we have been able to, their contributions are memorialized either in footnotes or in the names of characters who populate the many examples scattered through the text. To those whose contributions are unnoted, especially students with whom we have discussed many of our ideas, we assure you that you are not unremembered, but perhaps just lucky.

Among those who read drafts of various chapters, we especially want to thank Patrick Patterson, Carrie Menkel-Meadow, Al Moore, Susan Gillig, Gary Palm, Sue Bryant, Michael Wolfson, Marsha Diedrich, Jerry Lopez, Ken Graham, Steve Yeazell and Melinda Binder. While, and even after he was our colleague, Paul Boland contributed many useful ideas. Over a period of three or four years we were assisted by excellent student research assistants, including Dorothy Shubin, Sara Deubner, Steve Ellis, Mary Royce and Allison Graves. Kim Bobby and Pat Truscello labored long and magnificently in the absence of word processors. We used many of the same words that were used earlier by William Shakespeare and William Faulkner, though of course we used the words in different order. While we accept ultimate responsibility for the entire book, readers who find errors may want to keep the above names in mind should they ever contemplate publication.

We wish also to thank our publisher, which stoutly supported us and refused suggestions of some readers to publish the book only in Swedish.

Finally, what can one say about Kenny Hegland?

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