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*Third
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Evidence

CASES, COMMENTARY, AND PROBLEMS

Third Edition

David Alan Sklansky

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To Deborah and to Joseph

PREFACE

Evidence law is steeped in the drama of trials. It is critically important for any lawyer who might ever set foot in a courtroom. And it is just plain fascinating. For all these reasons, I love teaching the subject, and most students seem to enjoy learning it.

But students also tend to find evidence law difficult. The rules of evidence are notoriously complicated and confusing. Much of evidence law makes sense only against the backdrop of Anglo-American trial procedure, with which law students typically have only limited familiarity. And students, along with lawyers and judges, often are puzzled by the very nature of evidence law. Is it statutory, judge-made, or a matter of applied logic?

I have tried in this book to capitalize on the inherent attractions of evidence law and to minimize its difficulty. Because actual cases are more interesting and more memorable than made-up problems, the book has more cases than problems. The cases have been selected to illustrate the central concepts and controversies of evidence law, not to provide encyclopedic coverage of the subject, and they have been edited tightly. Problems have been used selectively, sometimes to test students' understanding of the rules, sometimes to highlight ambiguities, and sometimes to encourage reflection on what the rules are trying to accomplish and how well they succeed. Many of the problems are drawn from real cases. Because the Federal Rules of Evidence provide a convenient and now pervasive framework for thinking about evidence law, the structure of the book tracks, wherever possible, the structure of the federal rules. The major exceptions to the ban on hearsay, for example, are addressed in the same order here as in the Federal Rules of Evidence. Because the legislative history of the federal rules, particularly the Advisory Committee's Notes, have proved so highly influential, the cases are accompanied by edited excerpts from the Advisory Committee Notes and, where relevant, congressional reports and floor debates. Because academic commentary has played such a large role in the development of evidence law—and because much of that commentary is so interesting—I have added excerpts from the writings of a wide range of scholars. Wigmore and Morgan are here, but so are Mirjan Damaška and Jennifer Mnookin. These excerpts, too, have been edited tightly, in part to allow room for multiple perspectives.

For this third edition, I have again revised the materials on hearsay, taking into account the Supreme Court's continuing reinterpretation of the Confrontation Clause. I have also added new materials, and dropped some

older cases and commentary, regarding character evidence in cases of sexual assault, subsequent remedial conduct, scientific evidence, attorney-client privilege, and demonstrative evidence. Additional problems have been introduced throughout the book, and some of the older problems and editorial text have been revised. The book is still designed, though, so that it can be presented cover to cover in a four-unit course. The topics are arranged in the order that I address them when I teach evidence law, but other instructors may choose to vary the sequence. In view of the steadily increasing importance of scientific evidence, probabilistic proof, expert testimony, and demonstrative exhibits, I have included more materials on these topics than evidence casebooks typically contain. I also have included readings on certain other topics traditionally slighted in evidence courses, such as questioning by the judge and by the jury. I have found that students enjoy studying all of these issues, and I think they are sufficiently important to warrant the space I have given them. But instructors who disagree can easily skip those portions of the book or assign readings from them selectively.

My greatest debts by far are recorded in the dedication. But I also owe some other thanks. Paul Bergman, Ken Graham, Eleanor Swift, Jan Vetter, and John Wiley taught me much of what I know about teaching evidence. My parents, Jack and Gloria Sklansky, taught me much of what I know, period. Hundreds of law students at UCLA, Berkeley, and Harvard have sharpened my understanding of evidence law and made teaching the subject a joy. Several students, in particular, gave countless hours of their time to help me improve this book and its supporting materials: on the first edition, Carolyn Hoff, Christina Johnson, Hien Nguyn, Meghan Habersack, Robert Horton, and Jonathan Phillips; on the second edition, Katie Wozencroft. My editors at Aspen—Lynn Churchill, Anne Brunell, Barbara Roth, and the incomparable Carol McGeehan—have been wonderful to work with. Steven Clymer, Daniel Richman, and a number of anonymous reviewers criticized early drafts of the book perceptively and constructively. Michael Beach graciously helped me with the “probability primer” in Chapter 9. A number of instructors who used earlier editions of the book have given me sound and valuable advice for revising it; I owe special thanks in this regard to David Eggert, James Tomkovicz, and the late Welsh White. The book has benefited considerably from conversations I have had with Scott Brewer, Andrea Roth, and Alex Whiting. And I have been blessed at UCLA, at Berkeley, and at Harvard with terrific librarians and strong clerical support.

David Alan Sklansky

January 2012

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