

ASPEN STUDENT TREATISE SERIES

EVIDENCE

FIFTH EDITION



Christopher B. Mueller
Laird C. Kirkpatrick



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PREFACE

In the first edition of this book, we said our aim was to set out for students an account that is readable and detailed enough to paint a true picture of evidence law in its most important applications. We have been pleased to discover that the book has proved useful to judges and scholars too. It has been cited in law review articles and books, and in reported opinions by courts across the country, including the Supreme Court. In preparing this fifth edition, we hope once again to provide a source that is clear and concise enough for students in their first encounter with evidence law, yet comprehensive enough to be a book that they can carry forward into the profession. Again we have added content where developments warrant, expanded coverage in some areas, and added references to (and sometimes discussions of) new cases by cutting back where necessary to keep the book compact.

In this fifth edition, coming as it does only three years after the prior edition, the biggest changes result from the restyling project, which amended the wording in nearly every provision of the Rules, effective December 1, 2011. The hope of the restylers was to add clarity and achieve consistency in form and language. The changes were intended to be “stylistic only,” and the restylers disclaimed any “intent to change any result in any ruling on evidence admissibility” (these quoted phrases appear in the ACN to each Rule). State versions of the Rules do not yet reflect these textual alterations, except in two states (Arizona and Utah) that have already made corresponding changes in their Rules, and reportedly the restyling project is moving forward in Pennsylvania and Texas too.

There is also progress to report in the revolution in confrontation jurisprudence that came with Supreme Court’s decisions in *Crawford*, followed quickly by the *Davis* and *Giles* cases. Now we have the 2009 decision in *Melendez-Diaz*, the 2011 decision in the *Bullcoming* case (both taking up issues relating to forensic laboratory reports offered in criminal cases), and the 2011 decision in the *Bryant* case (which applies the “emergency” exception). *Melendez-Diaz* and *Bullcoming* are noted in §8.51 and *Bryant* is noted in §8.85 of this work.

Preface

At this writing, the Rules have been in effect in the federal system for 37 years. Their influence on state law is manifest, as 43 states have codes based on them (the list is set out in §1.2, footnote 2). It must be said as well that state variations and experimentation with versions of the Rules are paying off in yielding new approaches to persistent problems (one of the benefits of federalism). Hence this book follows the organization of the Rules. Again in this edition, we include the text of each Rule prior to the discussion that goes with it, and we employ marginal tags on each page (“ears” as they are known among printers), which cite the Rule being discussed.

This book tries both to raise and to answer questions. When we think the answer is clear, we say so. When we think the answer is not clear, we say that too. In areas of uncertainty, we provide the best guidance we can, based on policy and our own assessment of the approach that is most appropriate in light of the suggestion in FRE 102 that the Rules should be construed, *inter alia*, to “secure fairness” and to promote “growth and development” of the law.

There are many places where the Rules provide little or nothing of a prescriptive nature, and places where they don’t even provide standards. In areas like these—and they include privileges, criminal presumptions, and much of the topic of impeachment of witnesses—the whole focus is on caselaw, on policy, and on the wisdom or folklore of the common law, which survived enactment of the Rules for just such uses.

As before, we have not ignored constitutional values lurking behind evidence issues. Thus we include consideration of the confrontation clause as it relates to hearsay evidence offered against defendants in criminal cases, and also discussions of the *Bruton* problem (using admissions by co-offenders), the *Doyle* problem (using silence by the accused), the doctrines developed in *Havens*, *Harris*, and *Harvey* (using evidence barred by the fourth, fifth, or sixth amendments to impeach), and the *Giles* doctrine, which affects application of the hearsay forfeiture exception. Also, much of the discussion of criminal presumptions is in fact a discussion of constitutional principles.

As teachers for many years, we think that evidence law is both vivid and engaging, and that it captures the interest of almost everyone. The hearsay doctrine has to do with language and meaning, with courtroom testing and fears over untested evidence from human sources. And when students struggle with the basic concept, and eventually the light goes on, we know they have changed their understanding of the world in a way that will last them a lifetime. The law relating to proving prior bad acts has to do with human character, and with concerns over prejudice to defendants and to victims, and looking at the Rules that govern this material is another eye-opening experience.

Mastering evidence law is a crucial part of the professional education of lawyers. When students learn about hearsay, relevancy and its limits, impeaching witnesses, and authenticating exhibits, they have taken huge steps toward becoming competent lawyers. They have reached a level of understanding that will help them in many other aspects of

Preface

their professional lives, whether the problem at hand involves contract negotiation, initiating or resisting government enforcement actions, dealing with workplace injuries and grievances, or drafting wills. In short, understanding evidence law is part of the background knowledge that every lawyer needs.

We hope our commitment and interest in the subject comes across in these pages, and that what we have set out in this book is of use to students, judges, and practitioners alike.

We owe debts of gratitude to our schools for supporting this project. At Colorado, the late Dean David Getches supported Christopher Mueller's work, as has Dean Phil Weiser. At George Washington, we thank Dean Paul Schiff Berman for his support. Students and former students have also helped. In particular, the authors wish to thank Melissa Aubin, and wish as well to express their appreciation to their evidence students, whose questions and suggestions over the years have led us to consider and discuss many of the issues raised in these pages.

Any author quickly learns the importance of administrative assistants. At Colorado we thank Barb Cooper and Cynthia Carter, and at George Washington we thank Kierre Hannon.

This edition owes much as well to the support and efforts of people at Aspen Publishers. We wish to thank Kris Klerkin, Vice President of Legal Education, John Devins, Managing Editor, and Troy Froebe, Manuscript Editor, and also our friend Carol McGeehan, Publisher, for their support on this project and many others over the years.

Finally, every author knows how important is the understanding and support of family. Laird Kirkpatrick dedicates his work on this revision to his wife Lind, to his sons Ryan and Morgan, and to his sister Meredith, with love and appreciation. Christopher Mueller owes much to his wife Martha Whittaker, and to his children Gretchen and David (now very much grown and independent, but still important in the author's life), to whom he dedicates this edition with his thanks and appreciation for their love, support and understanding.

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April 2012

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Christopher Mueller is the Henry S. Lindsley Professor of Procedure and Trial Advocacy at the University of Colorado Law School, where he has been teaching since 1985. Concentrating on Evidence, Civil Procedure, and Complex Civil Litigation, Professor Mueller's area of scholarly research has been Evidence. Professor Mueller has written widely throughout the last 35 years in articles dealing with privileges, hearsay, character evidence, cross-examination, presumptions, and impeachment of jury verdicts. Professor Mueller has given many presentations to state and federal judges and practitioners in Colorado and elsewhere.

Serving on the Colorado Civil Rules Committee and the Colorado Evidence Rules Committee, Professor Mueller is also an elected member of the American Law Institute. He has served on the faculty of the National Judicial College, teaching advanced Evidence courses to judges. Professor Mueller has also taught in the law schools of the University of Wyoming (1972-1981), Emory University (1981-1982), and the University of Illinois (1982-1985). Immediately following law school, he practiced law for Pillsbury, Madison & Sutro in San Francisco from 1969 to 1973.

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Professor Kirkpatrick has served as counsel to the head of the Criminal Division, U.S. Department of Justice, and was a member of the United States Sentencing Commission. The former chair of the Evidence Section of the American Association of Law Schools, Professor Kirkpatrick is also an elected member of the American Law Institute, a life fellow of the American Bar Foundation, and a former elected member of the American Bar Association House of Delegates. He also has

About the Authors

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In addition to this book, Professors Mueller and Kirkpatrick have coauthored several authoritative volumes on Evidence, including *Evidence Under the Rules, Seventh Edition*, with Aspen Publishers.

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Serving on the Colorado Civil Rules Committee and the Colorado Evidence Rules Committee, Professor Mueller is also an elected member of the American Law Institute. He has served on the faculty of the National Judicial College, teaching advanced evidence courses to judges and lawyers. He has also taught in the law schools of the University of Wyoming (1977-1981), Emory University (1981-1982), and the University of Illinois (1982-1985). (Previously, following the school he practiced law for Pillsbury, Madison & Sutro in San Francisco from 1969 to 1979.)

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TABLE OF ABBREVIATIONS

ACN	Advisory Committees Notes on the Federal Rules of Evidence
CONFERENCE REPORT	House of Representatives Conference Report No. 94-414, 94th Cong. 1st Sess. (1975)
FRCP	Federal Rules of Civil Procedure
FRCrimP	Federal Rules of Criminal Procedure
FRE	Federal Rules of Evidence
HOUSE REPORT	House of Representatives Report No. 93-650, 93d Cong., 1st Sess. (1973)
SENATE REPORT	Senate Report No. 93-1277, 93d Cong., 2d Sess. (1974)
URE	Uniform Rules of Evidence

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