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PROBLEMS IN EVIDENCE

Fifth Edition



Kenneth S. Broun
Robert P. Mosteller
Paul C. Giannelli

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By

Kenneth S. Broun

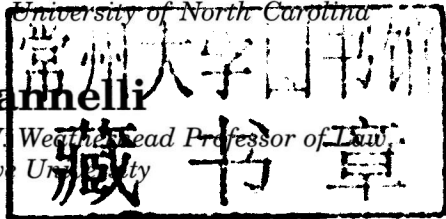
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PREFACE TO THE FIFTH EDITION

Ken Broun and Bob Mosteller welcome Paul Giannelli to this edition. Paul joins us with excellent contributions very much like those made by past co-authors Dean Lou Bilinois, John Strong, and Robert Meisenholder. As has been our consistent practice, while we have made refinements in a number of the problems in the Fourth Edition, the basic framework remains.

We have added more than forty new problems. Many concern the range of issues create by the Supreme Court's new approach to confrontation in *Crawford v. Washington*. A number have been added for expert testimony and revisions have been made regarding DNA evidence. Others deal with character evidence in criminal cases, including other crimes evidence and prior sexual assaults in both civil and criminal cases. Some examine the challenges presented by new technology when evidence comes from cell phones and computer hard drives. A new problem also raises issues that the new federal rule concerning "inadvertent disclosure" of privileged attorney-client material can help resolve.

Long-time users of this Problem Book will find some of the questions in what we believe are more logical locations. Scientific expert testimony has been moved from Chapter 8, which concerns the relevancy concept, to Chapter 12 with other aspects of expert testimony. Conversely, problems concerning the rape shield principle have been moved from Chapter 12 to Chapter 8 where other aspects of character evidence are examined.

As with earlier editions, the Fifth Edition provides citations to the McCormick hornbook to make it convenient for the two books to be used together. It is also coordinated with Broun, Mosteller, and Giannelli, *Cases and Materials in Evidence* (7th ed. 2006).

The authors of this edition owe much to the feedback and suggestions of law professors and students who have provided insights for improvements on existing problems and inspiration for new ones. We find great value and vitality in the use of problems in evidence classes. New generations of students see wrinkles to long-used problems and alterations in technology and social understanding work their own revisions to the appropriate approach to how to answer unchanged questions. We hope our explicit additions to and revisions of the solid foundation of previous editions carry continue its vitality as a valuable teaching tool for the foundational course of evidence.

KENNETH S. BROUN
ROBERT P. MOSTELLER
PAUL C. GIANNELLI

October, 2010

PREFACE TO THE FOURTH EDITION

One of the original authors of this problem book, Kenneth S. Broun, is joined in this edition by an author of the third edition, Robert P. Mosteller, and by a new colleague, Louis D. Bilonis. The authors of this edition gratefully acknowledge the excellent contributions made by John William Strong and Robert Meisenholder to the concept of the book and to a great many of the problems.

Virtually all of the problems contained in the third edition remain in this edition. However, many of them have been rewritten. We have edited all problems, in some instances substantially, in order to make sure that they are all readable, easily understood and accessible to today's law students. We have tried to modernize the problems to take into account current technology, especially in dealing with demonstrative evidence and writings.

In addition, we have added more than seventy new problems. In some instances, the problems were added in order to provide alternative situations involving issues raised by existing problems. In others cases, we have added problems that we think raise interesting evidentiary issues that were not covered in the prior editions. For example, the prior editions contained no problems in Chapter 2, Limitations of the Adversary System. This edition contains four problems dealing with the subject matter of that chapter, which can be used instead of or in connection with cases.

Like the third edition in connection with an earlier version of the same casebook, this edition of the problem book is organized so that it can be used easily with Strong, Broun and Mosteller, Cases and Materials in Evidence (5th Ed. 1995). As was the case with all of the earlier editions, the book can also be used with the McCormick hornbook and no casebook. Citations are provided to the appropriate McCormick sections and to the applicable Federal Rule of Evidence.

The authors of this edition thank the several generations of students and their teachers who have used these problems at many law schools. Many of the improvements in this edition have come about as a result of input from students and faculty throughout the lifetime of this book. We hope that they will continue to provide commentary to us on both the old and the new problems in the book.

KENNETH S. BROUN
ROBERT P. MOSTELLER
LOUIS D. BILONIS

October, 2000

PREFACE TO THE THIRD EDITION

The original authors of this problem book, Kenneth S. Broun and Robert Meisenholder, are joined in this edition by John William Strong and Robert P. Mosteller. Professor Meisenholder has retired but has graciously permitted his name to be continued on the book and allowed the continuation of his excellent contributions to the first and second editions.

Most of the problems contained in the earlier editions remain in the third edition but many new problems are added both as alternatives and as problems which raise issues not covered in the earlier books.

The most significant change in this edition is organizational. The book is now organized so that it can be used easily with the new edition of Cleary, Strong, Broun and Mosteller, "Cases and Materials in Evidence," (West Publishing Co. 1988). The new organization gives the teacher the choice of using the problems with the McCormick hornbook, as was suggested in the first and second editions, or with the Cleary, Strong, et al. casebook. Other casebooks might also be used in connection with the problems although further organizational changes would almost certainly have to be made.

The authors believe that the use of the problems with the McCormick hornbook alone is a viable way in which to present the course. The students have the opportunity to work with the facts as contained in the problems and to refer to the hornbook for the applicable law. Nevertheless, law teachers are used to working with cases and to providing students with examples of legal analysis through the use of cases. Furthermore, cases provide other fact situations and possible solutions to legal problems which may be valuable in class discussion of the problems. The casebook also provides a good opportunity for coverage in some subject matter areas which do not lend themselves well to the problem area. A good example of this is Chapter 2 of the casebook, "Limitations of the Adversary System." The authors believe that this is an area which can be better covered by the case method. A Chapter 2 is included in the problem book for organizational purposes only. No problems are provided.

As a result of the change to possible use with the casebook, Appendix C to the second edition, which consisted of cases, has been eliminated. Appendices A and B, which are case files, have been continued. Teachers who have used Appendix B in the second edition should be alert to some significant revisions in that file.

The new authors of this problem book join with its original authors in expressing their appreciation to a growing number of students at an expanding number of law schools who have used these problems. This new edition, like its predecessors, would not be possible without the input from students on the problems contained in the book and on the usefulness of the problem

method in general. The authors also want to express their appreciation to the many law teachers throughout the country who have used the earlier editions of the book and provided useful comments on various problems.

KENNETH S. BROUN
JOHN WILLIAM STRONG
ROBERT MOSTELLER

June, 1988

PREFACE TO THE SECOND EDITION

Introduction. The first edition has received much greater use and acceptance in more law schools than we could have expected. Of course we are gratified that “our rather ambitious hope” that the first edition would “furnish impetus for use of the ‘problem method’ in the teaching of the usual course in evidence” has been realized. Very important was the use of the first edition by various instructors despite a long tradition of teaching evidence by the case method. We are very indebted to those persons for their pioneering efforts in showing that the use of problems as a basic tool for teaching evidence is feasible.

There are a number of reasons for a second edition. After the first edition was published the Federal Rules of Evidence were adopted for the federal courts and were copied in a number of states. Although the first edition was usable and was used in covering the new federal rules, added or substituted problems make this edition more adaptable for use under a case law system, the Federal Rules or other rule systems. A second important reason for a second edition should be mentioned. Some instructors may have been concerned about using a problem book in several successive years. From our own experience in reusing the first edition (and apparently from the experience of others), we believe that in many ways a problem book is more reusable than a casebook; the class discussion is even less predictable. Nevertheless, the addition of new problems and new types of problems furnishes the basis for a greater selection of problems and thus makes continuing use of the same volume more attractive. In preparing this edition we have retained many of the problems in the first edition, but have also added many new problems in order to increase the number of problems from which selection may be made. Finally, a second edition furnishes the opportunity to add to both the practical and theoretical content of this work in the employment of the problem method. To this end, two new features are added. Appendices A and B contain realistic partial case files that furnish the basis for problems which are distributed throughout the volume and which may be used at the instructor’s discretion. Appendix C contains a few important cases, primarily cases referring to the Sixth Amendment, which the instructor may use in raising constitutional questions that are closely related to certain evidence rules.

Types of Problems Included in this Book. Some of the new problems are similar in form to those in the first edition. Others deal more specifically with the Federal Rules of Evidence or differ from first edition problems in that they are intended solely for use as a basis for student demonstrations of techniques in introducing evidence. Perhaps the most significant innovation in the second edition is the addition of problems based upon the case files contained in Appendices A and B. The use of a number of problems based upon a case file should add both a greater touch of realism to the discussion

and, more importantly, enable the student to appreciate the role of the law of evidence in the entire trial process. The other innovation is the use of the edited cases in Appendix C. The cases concerning the right of confrontation could be covered as a unit in traditional case method fashion. However, we suggest instead that the cases be used as background reading in connection with some of the problems concerning the hearsay rule and exceptions to the hearsay rule.

The McCormick Citations. The first paragraph of the similar heading in the Preface to the first edition is pertinent to this second edition. However, contrary to the explanation in the remainder of this part of the Preface to the first edition, the second edition includes a special chapter of problems relating to the admission and exclusion of evidence (Chapter 11).

The Federal Rules Citations. For coverage of the Federal Rules to the extent that an instructor desires, we have included citations to pertinent federal rules at the beginning of each chapter and after each problem. An instructor may want to require that the student obtain West's Federal Rules of Evidence Pamphlet in addition to the Problem Book and McCormick, 2d. It has been our experience that reference to the contents of this pamphlet furnishes ample basis for discussion of the application of the Federal Rules to the problems. Of course, it is possible for the instructor to add the assignment of a federal case or two for a particular problem. By like token, selected problems are usable for coverage of an individualized local code of evidence or system of evidence rules.

Coverage. The remarks in the Preface to the first edition are particularly relevant here. The instant edition furnishes a larger source of problems for selection in order to cover the course in accordance with the wishes of the instructor.

Conclusion. We acknowledge our appreciation to our students who have contributed to our use of the first edition, and now we can add our expression of appreciation to various instructors who have used the first edition. It is our hope that this second edition will further aid and promote the use of a problem method of teaching, a method which we firmly believe has many advantages.

KENNETH S. BROWN
ROBERT MEISENHOLDER

December, 1980

PREFACE TO THE FIRST EDITION

Introduction. It is our rather ambitious hope that the publication of this volume of evidence problems will furnish impetus for use of the “problem method” in the teaching of the usual course in evidence. In expressing this hope, we recognize that the problem method may take various forms. The authors have used problems as the sole basis for class discussion in 11 different classes in three law schools. For the most part, we have assigned only the problems and the cited McCormick hornbook sections to the student. We have been satisfied with this teaching method and, not surprisingly, this book is designed with such a use in mind. However, we believe that these problems also may be used effectively in other ways. Some source other than the McCormick hornbook, such as a casebook, or a combination of sources, such as a casebook and library references, might also provide an effective basis for discussion of the problems. The problems might also be used as a problem supplement for a course in which a casebook is the primary basis for class discussion.

Types of Problems Included in this Book. The problems in this book are, with only a few exceptions, set in the trial court. Our belief is that it is important for the student to see evidentiary problems in that setting. It is in the trial court that evidence questions are almost always finally decided. In the relatively infrequent instance that an evidentiary question reaches the appellate court, the higher court is not in a good position fully to assess the trial court’s ruling. The rules of evidence, which give considerable discretion to the trial judge, reflect the inability of the appellate courts to recreate the flavor of the trial. For such reasons, interesting and significant appellate opinions in evidence cases are extremely rare. Problems have no such limitations. Thus, we have tried to create problems that are designed not only to illustrate evidence doctrine but which also cause the student to consider how he or she, as trial judge, might exercise the discretion allowed by the law of evidence. The student will also often be called upon to plan the presentation of evidence and, frequently, to decide whether, as a trial lawyer, he or she would exercise the option to bring an evidence rule into play by an objection or offer of proof. The professor may ask the student actually to conduct some examinations of witnesses based upon the information set forth in these problems. To the extent that such an exercise duplicates exercises in courses such as Trial Advocacy, such a duplication is simply reflective of the fundamental role which the law of evidence plays in the trial and in trial advocacy.

The sources of the problems contained in this book are varied. Some are based upon appellate court cases with variations of the facts. Some are based, in varying degrees, upon unreported incidents in the trial courts. Some are the products of the authors’ imaginations.

The problems vary in type, scope, length and difficulty. Our major goal has been to include problems that will suggest variants, that will raise theoretical questions concerning ideal solutions, and that will foster the relation of the law of evidence to practical trial use.

The McCormick Citations. Almost all of the problems in this volume are followed by a citation to McCormick, Evidence (2d Ed. 1972). The citation is shortened to McCormick, 2d Ed., § 00. The cited sections are those which the authors of this book believe are the most pertinent to the issues raised in the problem. It is not our intention to discourage reference to other sections of the hornbook or to any other source. On the contrary, we would encourage both the student and the teacher to consider all aspects of the problem and their variants without limitation to issues raised in particular hornbook sections.

In one area in particular, the McCormick citations may not be complete. Most of the problems will involve, to some extent, questions which concern the procedure of admitting and excluding evidence (McCormick, Chapter 6). However, no attempt is made to refer to pertinent Chapter 6 sections each time such a question is raised. Citations to Chapter 6 sections are included only after problems in the first part of the book on the theory that the student will read those sections in connection with the problems considered early in the course and refer to those sections on his own as new procedural questions arise later. In the event that the teacher elects to omit the early problems which contain the Chapter 6 references, or changes the order in which the problems are to be considered in class, the teacher and the student should both be careful to note the applicability of material contained in Chapter 6 to the problems.

Coverage. The number of problems that we have included in this book is much greater than the number that could be adequately discussed in the average course in evidence. We have deliberately adopted this course in order to provide a choice of problems for coverage of many particular areas—a choice which will permit a reflection of a particular teacher's viewpoint. In our experience, depending upon the type of problem, the usual class coverage will vary from one to three problems.

The selection of problems to be considered in class is, of course, in the discretion of the individual teacher. One may elect to take selected problems from each of the chapters of this book. One may also elect to exclude from coverage certain chapters. For example, one possible exclusion would be the problems contained in Chapters 27 and 28, Burdens of Proof and Presumptions. The subject matter of those chapters may overlap with that of other courses, such as civil and criminal procedure.

One important area of the law of evidence that is entirely excluded from this volume is constitutional privileges. The matter is treated textually in Chapters 13, 14 and 15 of the McCormick hornbook. Neither of the authors covers this material in his basic evidence course. The primary basis for the omission, both from our class coverage and from this book, is the fact that these subjects are usually reviewed adequately in other courses such as

Criminal Law, Criminal Procedure and Constitutional Law. However, intrinsically there is no reason why these subjects may not be covered by problems and individual teachers may wish to supplement this volume with their own problems on constitutional privileges.

Conclusion. By way of acknowledgment, we express our appreciation to our students at the University of Washington, University of North Carolina and University of Texas, who served as a testing ground for almost all of these problems and whose fertile imaginations contributed substantially, not only to the problems themselves, but also to the notion that the problem method could be used successfully in law teaching.

KENNETH S. BROWN

ROBERT MEISENHOLDER

July, 1973

PROBLEMS IN EVIDENCE

Fifth Edition

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TOPIC 1

AN INTRODUCTION TO THE ADVERSARY SYSTEM

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