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EVIDENCE
UNDER THE RULES
Text, Cases, and Problems

*Sixth
Edition*



Wolters Kluwer

Law & Business

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Text, Cases, and Problems

SIXTH EDITION

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To Martha, Gretchen, and David

CBM

To Lind, Ryan, Morgan, and Meredith

LCK

PREFACE

As we wrote in the Preface to earlier editions, the focus of this book is the Federal Rules of Evidence. American evidence law underwent a sea change in 1975 when the Rules were adopted: They are the law in the federal system and in 42 of the 50 states, where we find rules or codes that closely track the federal model (listed in footnote 2 of Chapter 1). Huge bodies of interpretive tradition have gathered around these Rules, and today few decisions on evidence issues can be made without taking the Rules into account. Hence they provide a natural core for studying evidence. Most of the Problems in this book, and most of the cases, notes, and the narrative presentations too, examine the Rules and how they work.

The enthusiasm of professors and students using this book has reinforced the ideas we had in mind in writing it: To study evidence law effectively, we need more than cases. We refer to the present work as a *coursebook* that combines the better features of standard materials (casebook, problems, hornbook). Here the basics are set forth in narrative form, with live issues presented in cases and problems that we put together, trying to be sure to include enough facts to make the evidence issue concrete and vivid. We hope these materials are self-contained—we think a conscientious student can grasp what is most important about the subject from this book alone, without constantly going elsewhere to fill in gaps.

The subject of evidence law—what evidence law is *about*—carries great intrinsic interest. That subject is akin to epistemology: In an adversary system, how do we go about finding the facts? The challenge for the Rules is to regulate the process of inquiry in a setting in which lawyers, witnesses, courts, and jurors are the important players. In this setting, we encounter issues of policy, principle, and philosophy, often with constitutional dimensions. And because we have the Rules, we also grapple with narrower issues of application and construction. This book aims to raise both the larger and the narrower issues, to be philosophical and policy-oriented as well as practical and concrete. Not surprisingly, and we hope we may be forgiven as teachers for making the following claim, we think the course in Evidence is the most absorbing course in law school.

The coming of the Rules did not mean that evidence law stopped growing or changing. A standing Advisory Committee reviews and recommends formal

changes in the Rules themselves, and of course their meanings evolve as courts apply them in new situations. Among the more important modern developments is the coming of the “hearsay forfeiture exception” that was codified in 1997. The Supreme Court went out of its way to approve the principle underlying this exception, both in the *Crawford* case in 2004 and in the *Davis* case in 2006. There the Court said in considered dicta that misconduct by defendants can forfeit their rights not only to exclude hearsay but also to raise objections under the Confrontation Clause. The new exception and the Court’s approval of the underlying principle have led to many decisions in states adopting similar principles—sometimes without bothering to amend state versions of the Rules. We include one such decision (the *Moreno* case from Colorado) in Chapter 4 as a means of considering this important subject.

Other changes appearing in 2006 affect FRE 408 and 609: The former was amended so that it now expressly bars at least some aspects of civil settlements from later criminal trials (the matter was in doubt before), and the latter was amended to narrow the category of prior convictions that are “automatically” usable to impeach testifying witnesses (usually defendants in criminal cases). We explore these points with new material (Problem 5-Q, “*This is Criminal; You Can’t Exclude Civil Settlements Here*,” and Problem 8-C, “*A History of Lying*”).

The confrontation jurisprudence that began with the *Crawford* case in 2004 has become a mighty river of cases. For coursebook authors, the question is whether to deal with *Crawford* at the beginning of hearsay because it affects so many exceptions, or at the end of hearsay because it does not formally amend or change the exceptions, which operate independently of *Crawford* in civil cases and sometimes continue to operate unimpeded in criminal cases too (the coconspirator exception being a prime example). We have elected to do a preview and summary of *Crawford* at the beginning of our coverage of the hearsay exceptions in Chapter 4, with scattered additional references in the body of the material on the exceptions. Then at the end of Chapter 4 we place *Crawford* itself, and the later decision in *Davis*, and at this time we take a closer look at developing confrontation jurisprudence. We also consider the impact of the Confrontation Clause in cases where prosecutors offer prior statements by witnesses who testify at trial and can be cross-examined at that time, which has become a critically important aspect of the new doctrine (Problem 4-O, “*Your Witness*”).

In some other areas, we decided it was time for a fresh look at some old problems. Hence this edition uses the Sixth Circuit decision in *Arnold* to illustrate use of the excited utterance exception, the Ninth Circuit decision in *Osterhoudt* to consider application of the attorney-client privilege to fee arrangements, the Supreme Court’s decision in *Zolin* to illustrate the crime-fraud exception to the attorney-client privilege, and the Ninth Circuit opinion in *Montgomery* to illustrate the spousal confidences privilege. We have also replaced a few problems, and added some new ones, beyond those already mentioned. In the former category are replacement problems illustrating the difference between admissibility and conditional relevancy under FRE 104 (Problem 2-I, “*Those Library Books Don’t Prove He Stole A Truck*”), the use of admissions from criminal cases in later civil suits (Problem 4-C, *An Encounter Gone Bad*), and judicial notice of historical facts (Problem 11-E, *Delayed Shipment*). In the latter category are problems on the rape shield provision in sexual

harassment suits (Problem 5-K, *Acting Out on the Assembly Line*) and the difficulty of expert reliance on hearsay (Problem 9-C, “*They Saw It the Same Way I Did*”). We have also restored, because of requests from users and because we have missed it ourselves, a problem that appeared in the first three editions of this book (Problem 2-B, *Boys on the Bridge*).

In offering what we have called a coursebook, and claiming for it a kind of completeness that cannot be found in casebooks, we don’t mean at all to steer students away from other sources. Excellent studies of evidence law abound, and even students using this coursebook may find value in consulting some of these. Here are some of the books we recommend:

- Paul Gianelli, *Understanding Evidence* (2d ed. 2006)
- Michael Graham, *Handbook of Federal Evidence* (6th ed. 2006) (5-volume set with supplementation)
- Graham Lilly, *Introduction to the Law of Evidence* (4th ed. 2006) (compact single-volume summary)
- McCormick on Evidence (6th ed. 2006) (compact single-volume source; classic work)
- Christopher Mueller & Laird Kirkpatrick, *Evidence* (3d ed. 2003) (compact single-volume source)
- Christopher Mueller & Laird Kirkpatrick, *Federal Evidence* (3d ed. 2007) (6-volume set with supplementation)
- Roger Park, David Leonard & Steven Goldberg, *Evidence Law: A Student’s Guide* (2d ed. 2004) (compact single-volume source)
- Glen Weissenberger & James J. Duane, *Federal Rules of Evidence: Rules, Legislative History, Commentary and Authority* (5th ed. 2007) (compact single-volume source)
- Charles Wright & Kenneth Graham, *Federal Practice and Procedure*, volumes 21-26A (FRE 101 through Rejected Rule 513); 27-29 (C. Wright & V. Gold) (FRE 601-706); 30 (K. Graham) (Hearsay Policy); 31 (FRE 801-1103) (M. Graham)

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Laird C. Kirkpatrick
Washington, DC

Christopher B. Mueller
Boulder

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SPECIAL NOTICE

The problems and examples in this book are drawn, for the most part, from actual cases. But facts have been changed for predictable reasons—to add human interest, to adapt the situation to classroom use, to combine in a single example the conflicts that have arisen in several decided cases, to present particular issues or sharpen the presentation of issues, and to achieve other educational purposes. Names used in the problems and examples are inventions of the authors. None of the examples or problems should be read as referring to an actual person, and none is intended to make any comment about any person.

CBM
LCK



EVIDENCE UNDER THE RULES

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