AMERICAN CASEBOOK SERIES

# A MODERN APPROACH TO EVIDENCE:

## TEXT, PROBLEMS, TRANSCRIPTS AND CASES

Fourth Edition

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Richard O. Lempert, Samuel R. Gross,
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# Preface to the Fourth Edition

The first edition of *A Modern Approach to Evidence* was written with two ambitious goals. The first was to create an excellent teaching tool, using an approach then new in law school pedagogy, the problem method. The second was to contribute to the development of evidence scholarship by presenting an original discussion of the law of evidence in a textbook, a format that permits the publication of ideas in a few lines or paragraphs rather than in a lengthy article. We believe that the success of the first edition of *A Modern Approach to Evidence*, and of the second and third as well, reflects the degree to which these goals were achieved.

These same goals motivated us as we wrote the fourth edition. The book will have a familiar feel to those who have used earlier editions. Like its predecessors, it is built around the Federal Rules of Evidence. Once again, we attempt to communicate clearly and directly with students. They are not asked to decipher long cases or cryptic rules, but instead are invited to join with us in an exploration of the rules and their applications. The book includes a large assortment of problems, at all levels of complexity, so that professors may use those that work best for them and their students. We continue to explore the values that are implicated by different interpretations of the evidence rules. We often state our own preferences, but we do so explicitly, making it clear when our views are not those that Congress or the courts have chosen.

At the same time there are substantial changes in the fourth edition, beginning with the authors. Professors Richard Lempert and Samuel Gross of the University of Michigan Law School and James Liebman of Columbia Law School, authors of the third edition, are joined by Professor John Blume of Cornell Law School, Professor Stephan Landsman of the DePaul University College of Law School and Professor Fredric Lederer of William and Mary Law School. Every chapter in the book has been updated based on revisions to the Federal Rules of Evidence, new case law and recent legal and social scientific research. In most cases, the changes do not significantly alter the structure of the book or its basic analysis. The main exception is Chapter Seven, on the Confrontation and Compulsory Process Clauses of the Sixth Amendment, large portions of which were rewritten to reflect a fundamental change in the Supreme Court's interpretation of the Confrontation Clause that began with *Crawford v. Washington* in 2004.

As in the third edition, we break up the text at frequent intervals with one or two problems that are designed to highlight the material that has just been covered. Students read these as they go through the text, and come naturally to stop and reflect on what they have learned and on what they may not understand. Other, more numerous "Additional Problems"—including

many that are more complex—are grouped at the ends of most chapters, and at major break points in a few of the longer ones, so that professors can choose issues to focus on.

In writing this edition of *A Modern Approach to Evidence* we were helped by several excellent research and secretarial assistants. For their research assistance we thank Miriam Epstein, Carolyn Nguyen, Anne Rowles, Cameron Smith, and Zachery Withers. For their secretarial work, we thank Laura Harlow, Karen Rushlow, and Phyllis Sullivan. We are also grateful to Louis Higgins, Editor in Chief, Bonnie Karlen, Acquisitions Editor, Roxanne Birkel and Rebecca Conlin of West Law School Publishing for their patience, their enthusiasm and their even-tempered help in turning our manuscript into a book.

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November 2010

# USING THIS BOOK

## I. AN APPROACH TO EVIDENCE

This is not a casebook. It bears little resemblance to the materials used in most law school courses. This book consists largely of text, problems and transcripts. The cases we include are used primarily to raise policy issues, not to teach substantive points of law. We have found that teaching the substantive law of evidence primarily through case analysis makes little sense. Great amounts of time are devoted to reading and analyzing cases in order to extract principles that can be stated in a paragraph or less. Often little time is left for serious policy analysis. Codifications of evidence law, increasingly important to the modern practitioner, are inevitably slighted. The case approach can also frustrate students who correctly sense that appellate courts are far removed from the setting in which most evidentiary battles are resolved.

Nor is this a treatise or handbook. Although we provide an orderly description of evidentiary law and practice in the US, we go beyond description to critically analyze the way courts and lawyers make evidentiary decisions, and we offer our considered opinions—as a trigger to yours—on how to improve things. We pay particular attention to the realities of how evidence rules come to be adopted and are applied; the validity of the policies usually offered to justify the rules and the possibility that unstated explanations are actually at work; and the real-world implications of the rules for parties, witnesses, and others who are affected by litigation (e.g., the victims of sexual abuse, insurance companies, government agencies). As befits a book on evidence, this one is attentive to the actual facts of all these matters and routinely cites examples from practice and the available social scientific research.

We believe that evidence is one of the most interesting and exciting courses in the law school curriculum. It is at once eminently practical and highly intellectual. There are rules to be learned and concepts to be pondered. The rules of evidence may be examined from historical, logical and psychological perspectives. They may also be examined as tools that lawyers use to win cases. Ethical issues are close to the surface in this course and are important to an understanding of what it is to be a lawyer. Underlying everything is the often unexplored relationship between rules of evidence and the quality of justice that a legal system delivers. We have found that by using textual material, critical analysis and problems, we can explore each of these aspects of evidence law in greater depth than we could by using either the case method or a handbook format.

Most students who take evidence are concerned primarily with the practicalities of litigation. Nonetheless, we believe that even the most practically oriented will benefit from serious reflection on the policies behind the rules. In evidence, as in much of law, practical and philosophic concerns

complement each other. We hope our book vindicates this point of view and that future Thayers, Wigmores, Morgans, McCormicks and Weinsteins will benefit from considering the issues we raise.

A strength of our approach lies in the ability it gives students to learn the rudiments of evidence law from the text itself and to use the problems to test their mastery. To facilitate independent learning, we try to be as straightforward as possible in our explication of the rules. Discussion of the problems in class then provides an excellent vehicle for assuring that students understand the basic application of the rules, for addressing issues that students find most difficult to grasp and for bringing out nuances and ambiguities and confronting questions of policy.

This book is designed to be a self-contained teaching device. It is written so that students will not have to resort to hornbooks, nutshells, texts or other works in order to understand these materials or to answer the problems. Nevertheless we recognize that some students find two treatments of an issue more helpful than one. For them, we recommend McCormick's excellent treatise, although there is significant overlap between that work and this one.

Those who have not taught or learned from problems before may find that using problems takes considerably more time than they anticipate. A problem only a paragraph in length may present all the salient facts of a reported case. In writing this book we faced a choice: either to include only the problems that we like best and believe can all be taught in a three-or four-hour course, or to include many more problems than could ever be covered in a single course, so that instructors can pick the problems that they find most interesting or most relevant to the needs of their students. We have opted for the latter course.

In the interest of time, instructors may also want to eliminate certain textual material. In some chapters, such as those on exhibits and on expert evidence, we offer detailed examples of the use of these types of evidence, knowing that most instructors will not want (or have time) to explore every example. In other chapters, instructors may not want to discuss every evidence rule or subrule that we choose to analyze or every case excerpt that we present as an illustration. The book was written with the expectation that instructors would feel no compulsion to assign every chapter, or everything that is in a particular chapter, or to discuss everything that is assigned, or to cover the topics in the order in which we present them. Our hope was to include enough material to allow instructors to emphasize those areas of evidence law that they believe are most important, in the order that works best for them.

The book is organized around the Federal Rules of Evidence ("FREs"). This was a sensible choice in 1977, when the first edition was published, two years after the Federal Rules went into effect. By now it is all but inevitable. The Federal Rules serve as the basis for evidence codes in over forty states, the United States Military, the Commonwealth of Puerto Rico—and, of course, they govern directly in federal courts. We reproduce all of the rules that we discuss in the text, but they are scattered throughout the chapters. Several comparatively unimportant rules are not reproduced any place, and—far more important—we do not systematically reprint the Advisory Commit-

tee Notes on the rules, or any portions of their legislative history. For these purposes, it is useful to assign a current version of the Federal Rules of Evidence, including the Advisory Committee Notes, together with this book.

## II. NOTES ON STYLE

To avoid lengthy citations and make our text read more smoothly, we have adopted the following conventions for the works we cite most frequently. We cite Wigmore's *Treatise on Evidence*, as "Wigmore," Weinstein and Berger's *Weinstein's Federal Evidence* as "Weinstein," and McCormick's treatise, *McCormick on Evidence*, as "McCormick." Unless otherwise noted all such citations are to the most recent version of the work. For Wigmore that is the Fourth Edition, which posthumously revised the author's multi-volume 1940 edition and was published in stages between 1961 and 1988; for Weinstein it is the Second Edition, a looseleaf publication published in 1997 and updated by regular releases; for McCormick it is the Sixth Edition, published in 2006 under the general editorship of Kenneth S. Broun.*

We save space and make judicial opinions read more easily by eliminating most internal citations. These deletions are not noted. Deletions of textual material in opinions and articles are noted by ellipses. We also delete most footnotes found in opinions and articles without indicating the deletions. Where we choose to keep footnotes appearing in the material we reproduce, we identify these footnotes by lower-case letters. Our own footnotes are noted by Arabic numerals.

We have given names to the characters that appear in most problems in order to make them seem more human. Except in some instances where names are drawn from actual cases, the characters are not intended to bear any relationship to real people. If we have inadvertently used your name for a hypothetical axe murderer, we hope you are not offended by the coincidence.

## III. BIBLIOGRAPHY

Many sources are cited in the footnotes. In addition, each chapter but the first ends with a suggested list of additional readings. These sources might be of special interest to those who wish to pursue particular topics in greater depth and to those who believe that we have treated some familiar doctrines inadequately or unfairly.

For general coverage of the law of evidence, one cannot go wrong by reading widely in Wigmore's treatise, still the single most respected source. The historically minded may also wish to inspect Thayer's *Preliminary Treatise on Evidence*, a superb work of scholarship, published in 1898 but still cited for certain propositions. For quick reference we recommend McCormick's treatise. Students interested in shorter classics may like Maguire's

* McCormick now appears in two versions, a one-volume Hornbook Series "Student Edition" with very few references, and a two-volume "Practitioner's Treatise Series" edition that is much longer because it has many detailed references. The text and the chapter and section numbers of the two versions are identical, but the pagination is not. To facilitate use of either version, our citations to McCormick and some other similar works include section numbers but not page numbers.

*Evidence—Common Sense and Common Law* (1947) and Morgan's *Basic Problems of Evidence* (1962).

The process of codifying the rules of evidence that produced the Federal Rules is discussed in Appendix 1 of Chapter Two. Comparing the 1969, 1971, 1972 (Supreme Court approved) drafts and the final version of the Federal Rules of Evidence with each other and with state-approved versions highlights both general and specific problems of codifying evidence rules. The Advisory Committee Notes to the Federal Rules are an exceptionally useful treatment of many important interpretive and historical questions, and students are well-advised to read carefully the Notes accompanying each rule they read to prepare for class and for examinations. For further discussion of the Federal Rules of Evidence, you might investigate several multivolume works: Weinstein and Berger's *Weinstein's Federal Evidence* (2d ed.); Wright and Graham's *Federal Practice and Procedure* § 5000 et seq.; and Mueller and Kirkpatrick's *Federal Evidence*. For a useful and concise single-volume handbook, see Paul C. Giannelli, Understanding Evidence (3d ed. 2009). For those who are interested in a richer understanding of the facts behind interesting and leading evidence cases, most of which are mentioned in the text, see R. Lempert (ed.), *Evidence Stories* (2006).

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# TABLE OF CASES

**The principal cases are in bold type. Cases cited or discussed in the text are in roman type. References are to pages. Cases cited in principal cases and within other quoted materials are not included.**

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