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FOURTH EDITION

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Wolters Kluwer
Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-0-73557968-2 (CB)

ISBN 978-0-7355-7967-5 (PB)

Library of Congress Cataloging-in-Publication Data

Mueller, Christopher B.
Evidence / Christopher B. Mueller, Laird C. Kirkpatrick.—4th ed.
p. cm.
Includes bibliographical references and index.
ISBN 978-0-7355-7968-2 (casebound)—ISBN 978-0-7355-7967-5 (pbk.)
1. Evidence (Law)—United States. I. Kirkpatrick, Laird C. II. Title.

KF8935.M836 2009
347.73'6—dc22 2009003428

Evidence

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To Martha, Gretchen, and David

CBM

To Lind, Ryan, and Morgan

LCK

PREFACE

In the first edition of this book, we said our aim was to provide 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, and it has been cited in scholarly articles and judicial opinions across the country, including the Supreme Court. In preparing this fourth edition, our aim is 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. We have been rewarded and gratified in learning that this book continues to find many uses, and we hope this fourth edition succeeds in those ways too. This time our major task has involved adding new content where developments warrant, expanding coverage in some areas, and adding references to (and sometimes discussions of) new cases by cutting back where necessary to keep the book compact.

In this fourth edition, appearing as it does six years after the prior edition, the biggest change was produced by the revolution in confrontation jurisprudence that came with the Supreme Court's decisions in *Crawford*, *Davis*, and *Giles*. *Crawford* shifted the focus of confrontation jurisprudence, which applies in criminal cases to hearsay offered against defendants, from the reliability of the statement and the availability of the speaker to the character of the statement: Is it "testimonial" (which usually means "given to police investigating crimes" or given in proceedings under oath), or is it something else (which usually means private communications)? *Davis* created an apparent "exception" to the *Crawford* rule, so statements made for the purpose of dealing with an emergency can be admitted after all if they fit some hearsay exception. And the decision in *Giles* decided that the "forfeiture doctrine," as it relates to the right to exclude "testimonial" hearsay, is available only if the defendant engaged in wrongful conduct with the *intent of making the declarant unavailable* to testify. These developments led to a complete rewriting of §§8.78 and 8.83-8.91 in this fourth edition.

Other developments in evidence law are recounted in this work. Especially important are many changes in the Rules themselves. We find new language in four of the 63 Rules. These include FRE 404 (admissibility of character evidence), 408 (admissibility offers of compromise in civil cases), 606 (juror testimony offered to impeach a verdict), and 609 (admissibility of prior convictions to impeach). The present edition reflects other changes and developments as well. Thus we have new material on the problems of authenticating emails and web pages (§9.15) and an expanded discussion of the admissibility of forensic lab reports and related materials (§8.51). We have also gone through every page and footnote and have updated citations and made other modifications. This book cites many cases decided in the last two or three years, and many fewer cases decided in the twentieth century.

At this writing, the Rules have been in effect in the federal system for more than 33 years. Their influence on state law is manifest, as 42 states have codes based on them (the list is set out in §1.2, footnote 2). Moreover, 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 it makes good sense for books about American evidence law to follow the organization of the Rules. That is our approach here. 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 elusive, troublesome, or unsatisfying, we say that too. In these areas of uncertainty, we provide the best guidance that 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 the Rules don't even provide broad 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 know 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 something about hearsay, relevancy and its limits, impeaching witnesses, and authenticating exhibits, they have taken huge steps toward becoming competent trial lawyers, and have achieved a level of understanding that will help them in many other aspects of 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, Dean David Getches supported Christopher Mueller's work. At George Washington, Dean Frederick Lawrence supported Laird Kirkpatrick's efforts. Students and former students have also helped. In particular, the authors wish to thank Melissa Aubin and Danielle Rosche, and wish as well to express their appreciation to their evidence students, whose questions and suggestions over the last six year 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 Dana Wilson and Anne Sloniker for work on the manuscript, and also our friends Carol McGeehan and Melody Davies for their support on this project.

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), and to his late mother Henrietta Mueller, to whom

he dedicates this edition with his thanks and appreciation for their love, support, and understanding.

Laird C. Kirkpatrick
Washington, DC

Christopher B. Mueller
Boulder, Colorado

April 2009

About the Authors

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.

Laird Kirkpatrick is the Louis Harkey Mayo Research Professor of Law at the George Washington University Law School. Previously the Philip H. Knight Dean and Hershner Professor of Jurisprudence at the University of Oregon Law School, Professor Kirkpatrick is a former trial lawyer and federal prosecutor who has taught Evidence and related courses for more than 25 years.

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 member of the American Bar Association House of Delegates. He also has served on the Advisory Committee on Evidence and the

Advisory Committee on Criminal Rules for the United States Judicial Conference.

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

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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