

# SCIENTIFIC EVIDENCE IN CIVIL AND CRIMINAL CASES

FIFTH EDITION

ANDRE A. MOENSSENS

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SHARON G. PORTWOOD

FOUNDATION PRESS

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# SCIENTIFIC EVIDENCE IN CIVIL AND CRIMINAL CASES

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The authors dedicate the 5th edition of this book to:

*To my children, Monique, Jacqueline, Michele, Suzanne and Mark*

A.A.M.

*To my mother, Mary Henderson, and the NCSTL staff*

C.E.H.

*To my wonderful family—Glen, Bryant, and Grant*

S.G.P.

\*



## IN MEMORIAM FRED E. INBAU

A true giant in the field of scientific evidence was lost to the world when, in 1998, at the age of 89, Fred E. Inbau was struck and killed by a taxi in front of his home in Chicago. He had just returned from his work at the law school. He was a co-author of the first four editions of this book.

Professor Inbau's accomplishments in law and in fostering the effective uses of forensic evidence in court are legion. His accomplishments in teaching, writing and lecturing to lawyers, law students, and forensic scientists seeking to improve their professional skills are truly astounding. His passing was also a great personal loss to this writer. I had known Fred for almost a half century, during which time he was not only a mentor and colleague, but indeed a close personal friend.

I had the good fortune to meet Fred Inbau for the first time when I attended the 1960 Annual Meeting of the American Academy of Forensic Science (AAFS)—of which he was one of the founders—in Chicago. He became a loyal friend for life. The honors he gained, the awards he received, the professional activities in which he engaged during his lifetime, and the esteem he earned worldwide, are all a matter of public record. For that reason, in this brief testimonial, we will focus only on a few of his special achievements in promoting the use of scientific evidence.

Following the 1929 Chicago St. Valentine's Day Massacre, Northwestern University established a scientific crime detection laboratory to foster the use of scientific approaches to combating crime; it was the first such establishment in the United States. Professor Inbau joined its staff as a specialist in legal psychology in 1933. He also served on the law faculty as an instructor in police science. In 1938, he became the crime detection laboratory's director. When the laboratory was donated to the Chicago Police Department, acceptance was conditioned on Fred continuing to serve as its director, a condition he fulfilled until 1941. He then entered the practice of law as a litigator in the firm of Lord, Bissel & Kadyk in Chicago, but rejoined the full-time faculty of Northwestern University School of Law in 1945. There, he ultimately became the John Henry Wigmore Professor, a distinction he retained when he retired on emeritus status in 1977. Fred continued in retirement to devote time to academic pursuits and writing. Indeed, he spent his days in his office at the law school until his untimely death.

Long before CLE programs became a common phenomenon, Fred originated, organized, and managed Northwestern University's week-long summer programs for prosecutors each July, and for defense attorneys in criminal cases in August. A very significant component of these short courses for trial lawyers involved scientific evidence testimony, with renowned subject specialists coming in to lecture on an annual basis

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from all over the country. These short courses continued after his retirement until well into the new millennium.

A prolific writer, Fred Inbau authored and co-authored 18 books (totaling 32 with revised editions included) on criminal law and scientific evidence, among them the past four editions of this book. Incidentally, he invited and encouraged the undersigned lead author to develop and plan a scientific evidence book as early as in 1969, the first of which was published in 1972, followed in short order by the first edition of this tome in 1973.

Having served as the editor-in-chief of the *Tulane Law Review* (1931–32), it was no surprise that he would later also become the editor-in-chief of the *Journal of Criminal Law, Criminology and Police Science* (1965–1971) and hereafter of the *Journal of Police Science and Administration* (1973–1978). He also participated in preparing most of the 85 “friend of the court” (*Amicus Curiae*) briefs filed in the United States Supreme Court and of the 35 briefs filed in other courts.

On a personal note, I knew Fred not only as a consummate professional, but also as a loyal friend, a loving husband to his late wife Jane, a wonderful host at social events, and a truly gentle person. While Fred left his mark on forensic science in United States courts, he left a void in the lives of many who were close to him when he passed on.

ANDRE A. MOENSSENS

At Shriner Lake, 2006

*IN MEMORIAM FRED E. INBAU*



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## PREFACE TO THE FIFTH EDITION

More than thirty years have elapsed since the first edition of this book saw the light. In subsequent revisions we have sought to keep up with the fast changing face of the forensic sciences. In doing so, we were guided by what lawyers, judges, forensic scientists, and students taught us about the needs of these users of the treatise. In this edition, we continue that maturing process by not only bringing up to date the fast changing scientific, technical, and legal discussions, but also by refining the organization of the material to better represent the users' needs of the book.

There are indeed many radical changes in this edition. The principal ones are: (1) the extensive treatment of Daubert-related issues wherever legal developments have been observed; (2) annual supplements will henceforth be published so that the treatise will keep pace with the ever accelerating progress in forensic science; and (3) three additional chapters have been added in areas of expertise in which there has developed a growing interest and judicial need.

No one quite foresaw, when the previous edition was published, how radically the then just released *Daubert v. Merrell Dow Pharmaceuticals* opinion of the United States Supreme Court would change the expert witness landscape. That case, and subsequent refinements of it by the Court and other reviewing tribunals, forced the authors to consider its applicability in all of the chapters on forensic science disciplines.

In order to enhance the credibility of the technical and scientific discussions, we requested subject specialists to either rewrite or update subjects and have given them recognition for doing so at the beginning of each chapter if they permitted us to do so.

Scientific research in forensic science has expanded exponentially in the last decade and continues unabated, which increases the danger that any text on the subject may quickly become out of date in some areas. In order to keep *Scientific Evidence in Civil and Criminal Cases* more current, the authors will publish, on an annual basis, cumulative supplements so that readers can be alerted to recent scientific developments as well as applicable law. The first one of these Supplements is scheduled to be prepared for release in 2008.

Several new chapters have been added. No one remains unaware of the exposures of multiple instances of massive corporate civil fraud in regulated industries. It has gone hand in hand with a marked increase in prosecutions for white-collar offenses. Both of these developments have resulted in one area of expert witnessing gaining greater prominence

## *PREFACE TO THE FIFTH EDITION*

through the presentation of opinion testimony. Thus, we have added a chapter on Forensic Accounting.

Similarly, the veritable explosion of computer usage and widespread popular acceptance of the internet has also given birth to a new discipline to deal with the misfortunes that can beset users of computers such as the restoration of or corrupted computer data. Hackers and the privacy issues that have resulted because of "identity theft," an unfortunate by-product of the general acceptance of Internet buying and credit card usage, raise many public as well as private security issues. These vexing problems convinced us the time was right to add a chapter on Forensic Computer Analysis authored by a subject specialist.

The growth of psychiatric and psychological involvement in the legal process, and the gaining of a new co-author who has extensive practical and academic experience in mental health issues as well as in law persuaded us to add an additional chapter to the final part of the treatise dealing with behavioral science evidence.

As always, in selecting subject coverage, difficult decisions had to be made. While we continue the treatment of the traditional areas in which expert evidence is presented, there are disciplines that remain beyond the limitations imposed by one-volume treatment of forensic science. Thus, we continue to concentrate on those areas of the forensic sciences where admissibility issues are the most vigorously battled in court.

We have also not addressed techniques that are geared toward the future but which remain strictly experimental and without current application. By way of example, studies are in process suggesting that neuroscientists will be able to capture images stored in the brain, turning them into visible pictures. Similarly, the identification of individuals through their unique body odors by means of sniffing devices is the subject of much experimentation. Many other esoteric techniques are being explored by scientists and research laboratories. These futuristic predictions remain on the frontiers of forensic science and have not progressed to the point where workable models exist that are shown to give reliable and replicable results. Some expectations, if realized, may also raise legal issues other than those pertaining simply to admissibility of test results. Treatment of some such subjects in future editions of this book may perhaps become appropriate if the state of the art reaches practicality.

We note a change in the line-up of the coauthors of this book. Professor Fred E. Inbau, who was the inspiration for the first edition of this tome, regrettably passed away in 1998. His lifelong commitment to scientific evidence is memorialized hereafter. Also, Professor James E. Starrs of George Washington University left the team to engage in pub-



*PREFACE TO THE FIFTH EDITION*

lishing ventures of his own. As always, we acknowledge with gratitude the contributions of these individuals as well as those of many individuals and subject specialists who have aided us in the preparation of each chapter, whether or not they agreed to be identified as chapter authors or as revisers in the footnotes. As is also noted in the Preface to the Fourth Edition, the co-authors of this treatise, however, bear the sole responsibility for any errors that may be discovered.

A.A.M.  
C.E.H.  
S.G.P.

## PREFACE TO THE FOURTH EDITION

Most trial lawyers, legal scholars and students of the law know that legal proof is rapidly evolving into a multidisciplinary mosaic of law, science and technology. As a consequence of our modern age, in which increasing specialization is being held out as a desirable means of solving difficult problems, a recognition of the functions of scientific evidence and expert testimony has become indispensable in the trial of civil and criminal cases.

The importance of expert testimony in the trial of all types of cases continues to increase, not only in the frequency of its use, but also in the new techniques and disciplines which find their way into the courtroom. We have seen, in past years, entire new disciplines springing up, sometimes out of existing fields of endeavor, and on other occasions as the result of a genesis of their own. For instance, we have witnessed the introduction in paternity suits and in criminal cases of deoxyribonucleic (DNA) evidence. In established disciplines, new tests are developed, the results of which find their way into the courtroom even before the novel tests have been validated, on the coattails of the recognition the discipline which spawned the tests had already achieved. In yet other cases, new theories have sprung up which give birth to “expert” evidence of a type that can hardly be called “scientific”.

The term scientific evidence covers, of course, a range of opinion testimony varying widely in probative value, weight, and persuasiveness. Some disciplines allow the formulation of an opinion with near-mathematical certainty; others are less precise and are intermixed with art. The various sciences and techniques are allied, however, in at least one respect: their secrets are unlocked by specially trained experts. Data disclosed in the laboratory or testing facility has no real meaning in law until presented to the trier of fact. Lawyers must rely on expert testimony as a vehicle for communicating this data, and common sense teaches us that myopic presentation can be avoided only by maintaining an intelligible dialogue with the expert. Unfortunately, legal education and experience in the practice of law have, on the whole, failed to equip trial lawyers for this task. It often happens that both sides to a controversy fail to fully utilize, or to even adequately appreciate, the great potential of expert testimony as a courtroom technique for proving or disproving facts.

This book was written to assist trial lawyers in obtaining a concise understanding of the scope of the most commonly encountered types of expert testimony, and the nature of the results which may be expected from the specialists. As we explored both the potentialities and the limitations of various types of expert proof, we also gave consideration to the qualifications needed for expertise in these various professional disciplines. Furthermore, in addition to discussing the status of the law concerning the subjects covered in the book, suggestions are offered about

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the future development of the law as it pertains to some areas in which expertise or certainty of conclusion remains elusive.

Apart from the value which we believe our book has for trial lawyers, we feel that it will also greatly benefit legal educators as a tool in structuring courses in scientific evidence, in the nature of proof, or a source book for more sophisticated trial advocacy programs. The book also directs itself to students in the criminal justice area, for they, too, are in need of general information regarding various scientific and technical disciplines which may be expected to be used in criminal trials.

Although *Scientific Evidence in Civil and Criminal Cases* is not a technical treatise for the specialist in any given area, it does give the expert an overview of the legal status in that expert's specialty, and an opportunity to become acquainted with other sciences and techniques with which contact may be anticipated, both inside and outside the courtroom.

The decision as to what materials to cover in this book and which ones to omit was made largely on the basis of the authors' collective experiences with the spectrum of scientific proof most commonly encountered in civil and criminal cases. The depth, or lack of it, with which individual topics were treated required difficult decisions. Some topics may appear to be explored in too much detail, while others may seem to be inadequately covered, but we settled upon our own best judgment, consistent with such factors as single-volume space limitation and present professional needs.

The fourth edition on *Scientific Evidence in Civil and Criminal Cases* is not merely an updating of the third edition. The decision to add, to the treatment of criminal evidence upon which the previous editions focused, discussions on the applications of these same techniques to civil litigation and the addition of chapters dealing entirely with expert testimony offered only in civil cases forced the authors to devise a different framework within which to mold the various topics. Thus, the book is now divided into four main Parts.

In Part I, the first four chapters of the book deal with general concepts underlying the use of expert opinion testimony, with the use of real and demonstrative evidence, and with opinion testimony of the non-expert "skilled witnesses" who testify routinely in DUI and speeding cases. In Part II, a number of chapters deal with expert testimony based upon the physical sciences, including questioned document examinations in civil and criminal cases, firearms and toolmark evidence, arson and explosives testimony, fingerprint identification evidence, trace evidence, and voice spectrographic recognition investigations. A new chapter on accident reconstruction evidence is also included in Part II.

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In Part III, we focus on the biological and life sciences, where chapters deal with forensic pathology, toxicological examinations of biological fluids, the identification of drugs, and forensic odontology. In this part is also contained the extensive and brand new chapter on DNA, as well as one on forensic anthropology. The final Part IV deals with expert testimony in the behavioral sciences, containing the two new chapters dealing with forensic psychiatry, psychology, and neurology, and with the proliferation of “syndrome” evidence offered by the behaviorists. Also discussed are issues such as the degree of reliability of eyewitness testimony. Many of the topics discussed in this part deal exclusively with expert psychiatric and psychological testimony in civil cases, among them custody determinations and civil commitment hearings. The concluding part also contains the chapter on the detection of deception.

In the preparation of legal materials and for research assistance, we were also fortunate to have the valuable help of a number of bright law students who acted as research assistants to the authors. We gratefully acknowledge the invaluable research assistance of the following persons while students at their respective law schools. At the University of Richmond Law School, Gloria Frey and Tracy Houck; at the West Virginia University College of Law, Teresa Postle and Christina Nehls; at the George Washington University National Law Center, Melissa K. Rashbaum, Mary Beth Malefy, Edward Bedrosian, Jr., and George J. Farrugia; at the George Washington University Dept. of Forensic Sciences, Kendra Styers-Smith; at Nova Southeastern University, Eugene Bardakjy, Paul Ghougasian, Beth Leboff, Alphonso Peets, Anthony Scaletta, Timothy Schulz, and Brian Waxman.

The scope of the book was so extensive that the authors also needed the frequent advice and counsel of many specialists in various fields of forensic science. Two such specialists' work, that of Charles R. Midkiff and Kenneth E. Melson, was so extensive that it deserved special mention at the beginning of the chapters for which they were primary authors. We would specially like to thank the advice and counsel of Linda J. Hart, Clarence E. Phillips, and Todd Reeves. Many other forensic scientists gave us valuable advice, read parts of the manuscript, offered helpful suggestions, or furnished us with illustrations. None of the persons whose counsel we sought, nor any of the ones mentioned in the text, in footnotes, or through inclusion of their publications, should be faulted for any of the shortcomings of this book. That is a responsibility which rests upon the authors alone.

A.A.M.  
J.E.S.  
C.E.H.  
F.E.I.

September, 1994

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