



# **EVIDENCE**

## **CASES AND MATERIALS**

### **Fifth Edition**

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*To*  
*Margaret Strong,*  
*Margie Broun,*  
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## Introduction to the Fifth Edition

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The timing of publication of the fifth edition of this casebook continues the pattern, evolved over the last twenty-five years, of a period of approximately seven years between revisions. That interval has again seemed a reasonable compromise between the competing objectives of providing the necessary measure of currency to the materials and avoiding the temptation to treat each new and significant development as warranting further depletion of the nation's forests. Of course, complete currency at all times will necessarily remain a will o' the wisp for casebook editors, and we content ourselves with the hope that our basic organizational structure and case selection will make the inevitable substitution and supplementation by individual instructors in coming years a logical and easily effected process.

In the seven years immediately past, many of the most notable developments in Evidence have, not surprisingly, come in decisions of the Supreme Court of the United States. No less than five such decisions appear as new principal cases in the present edition, and several more are treated in the notes, as is the evolving "plain meaning" approach of the Court to the interpretation of the Federal Rules of Evidence. At the same time, however, the editors have remained conscious of the fact that the overwhelming majority of applications of the law of evidence take place in state rather than federal courts, and that the law of evidence remains far from being completely "federalized." Every attempt has been made to include interesting and teachable recent state decisions, and to give students a sense of the extent to which state law and practice remain varied.

Another development since the last edition prompts a more mundane comment. The fourth edition of McCormick on Evidence appeared in 1992, for the first time in both a one-volume student edition and a two-volume practitioner edition. Though the frequent citations to McCormick in the present edition carry the formally required volume indications (e.g., 2 McCormick on Evidence), users of the student edition are advised that the initial numeral may safely be ignored and that he or she need have no uneasiness that a second volume of the student edition was mistakenly left at the bookstore.

Finally we note with sadness that the present edition is the first which does not carry the name of the founding editor, the late Edward W. Cleary. However, since Professor Cleary did not participate in the revision process since 1981, it would no longer be appropriate to impute to him any responsibility for the final result. In any event, Ed's imprint on the law of evidence is certain to prove much more indelible. Ed's formative influence by virtue of his work as Reporter to the Advisory Committee on the Federal Rules of Evidence will continue to be felt for many years to come.

Coincidentally but most appropriately that influence is most recently prominently visible in the *Tome* decision of the Supreme Court, which appears at page 687 of this edition.

J.W.S.

K.S.B.

R.P.M.

## Introduction to the Fourth Edition

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Two significant changes are reflected in this fourth edition of the casebook.

Those familiar with earlier editions will note the addition of two new editors. At the same time, Professor Edward W. Cleary, the "Founding Editor" of the book, has not participated in the preparation of the present version. Despite Ed's decision to retire from active participation, the influence of his ideas remains strong in the present product, perhaps inevitably given the fact that two of the three present editors were Ed's students at the University of Illinois. Moreover, many of Ed's contributions in organization, case selection and note materials are retained in the present edition, as is his name in recognition of his continuing influence upon the book.

The content of the present edition also differs somewhat from that of its predecessors as a result of two beliefs held by the editors. The first is that both the nature of Evidence and the ennui produced in second year law students by continued exclusive reliance on the case method suggest a classroom approach based upon problems. At the same time, the editors continue to prefer the case over the text as the best device for conveying the principles of Evidence, first because of its mnemonic superiority, but also to convey the essential notion that all applications of evidentiary rules are affected by the factual contexts in which they are made. We have therefore coordinated the casebook in organization and coverage with Broun, Miesenholder, Strong and Mosteller, *Problems on Evidence*, with the thought that students may simultaneously be assigned readings in the casebook and problems for class discussion. The problems which were encountered irregularly in previous editions have been removed or transferred to the problem book, leaving the present edition more truly a casebook on the conventional model. Accordingly, we believe that this edition will be usable by both the traditionalist who prefers to approach the subject through the case method in its unadulterated form, and by teachers who prefer the problem method for either exclusive use or as an occasional variation from the standard pedagogy.

Substantively, Chapter 17 of earlier editions, Controlling Government Privilege, has been eliminated. This decision was made in light of the now almost universal curricular allocation of coverage of the Fourth and Fifth Amendments to courses on Criminal Procedure. The overall length of the book has thus been slightly reduced even though a substantial quantity of new material has been added.

Finally, reproduction of the text of various Federal Rules has been avoided in this edition, primarily because those rules are readily available



in a more conveniently usable form in various pamphlet editions. We have assumed that many teachers will prefer students to have the Rules in such a form and that reproduction in the casebook is merely duplicative.

J.W.S.  
K.S.B.  
R.P.M.

July, 1988

## Introduction to the Third Edition

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The edition of this book herewith presented reflects two ongoing developments in the law of Evidence.

The first of these is the rapidity with which the Federal Rules of Evidence, and their clone the Revised Uniform Rules of 1974, have achieved pervasive importance in the field. Almost half the states have adopted the rules, with such variations as may have been considered to be improvements or necessary to maintain local self-respect. As a result, cases construing and applying the rules have appeared in large number. Moreover, in jurisdictions that have not adopted the rules as a body, individual rules have nevertheless often been incorporated into the corpus of the local law by the decisionmaking process.

The second of these developments is the continuation in the Supreme Court of the United States of the process of refining, and to some extent fencing-about, earlier decisions on the rights of persons accused of crime. To a surprising extent decisions of the Supreme Court have now dealt with problems illustrated in earlier editions by decisions of the United States Courts of Appeals.

The organization of the book remains unchanged. However, new materials have been added to illustrate current developments. New materials also have been substituted where thought to deal with an old problem with greater illumination or authority.

E.W.C.  
J.W.S.

June, 1981

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## Introduction to the Second Edition

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Given the recent pace of development in the law of Evidence, a second edition of an Evidence casebook following six years after the appearance of the first needs no apology other than to last year's students now burdened with unsaleable copies of the earlier version. The timing of this edition is, however, worthy of some explanation.

Heraclitus truly observed that it is impossible to enter the same river twice, and casebook editors are perhaps more frequently reminded than most of the accuracy of this dictum. Nevertheless, while the present edition cannot hope to escape obsolescence any more than did its forerunner, two factors present on the current scene give some promise of retarding the process somewhat.

The first factor which makes the present a propitious moment for the appearance of a book on Evidence is the recent enactment by the Congress of the Federal Rules of Evidence. Knowledge of the Federal Rules, effective July 1, 1975, now becomes essential to any prospective attorney looking toward practice in the federal courts. Moreover, in conjunction with the newly promulgated Uniform Rules of Evidence, which are largely based upon them, the Federal Rules seem inevitably destined to exert a substantial influence upon state law as well. The Federal Rules, in their enacted form, are extensively treated in this edition, with the full text reprinted at appropriate places.

A second factor also suggests the desirability of this casebook's revision at this time. The date of the first edition, 1969, marked the conclusion of the so-called "Warren era" of the Supreme Court of the United States. The succeeding years have witnessed not only changes in Court personnel, but also substantial modifications of constitutional doctrine, most notably in the areas of self-incrimination, unlawfully obtained evidence, and unlawfully obtained confessions. In the present edition, materials relating to these areas have been substantially restructured and augmented to reflect the current state of the decisional law.

In the process of incorporating a substantial body of new material, every effort has been made to resist the temptation simply to add new on top of old with the resulting cost of increased overall bulk. Though in some instances a modest increase in length has been unavoidable, the end product is not of substantially greater length than the first edition. As was the case with the earlier edition, we anticipate that all material through Chapter 15 may be covered in a course consisting of 45 classroom hours, and that the entire book may be covered by those fortunate enough to have an allocation of 60 hours.

E.W.C.  
J.W.S.

July 10, 1975

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## Introduction to the First Edition

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The by-now somewhat threadbare style "Cases and Materials" has demonstrated its capacity to describe widely varying compounds of the designated constituents. Since the present volume continues the phrase, an initial word is in order concerning the mixture here offered. The addition of "Problems" to the title augments the call for explanation. We turn first to the mechanics of treatment.

The case method in unadulterated form has a hard time finding adherents today. Its prodigality of time offers a ratio of time to coverage which is unacceptable in chronically straitened curricula, all the more so in areas of the bulk of Evidence. Nevertheless, the decided case remains the best vehicle for exploring the principles and problems indigenous to the subject. The need for accommodation between the demands of quality and those of extent is apparent.

Our compromise has taken the form of preferring a certain amount of note material to a greater number of cases with much of their natural color and complexity removed by more strenuous editing. In particular we have frequently chosen, and forborne to edit, cases reproducing substantial portions of the trial transcript. To avoid hiatuses in substantive coverage, Notes and Questions are included for the purpose of suggesting, in brief form, the variegated contexts in which related problems may arise.

Notwithstanding its basic advantages, the case method has its disadvantages. Though conducted in the most astute and critical fashion, the analysis of at-hand past solutions of problems tends to pall when too long continued. Judge Jerome Frank's analogy to learning botany by the study of pressed flowers comes into play. The student retreat into canned briefs may be a realistic reaction. The Problems which we have included represent an effort to introduce the element of life, or at least a third dimension, to remedy these deficiencies. They are presented somewhat at random and as the occasion offered. Some are suitable for assignment as exercises in writing or formal oral argument, while others are designed to promote facility in coordinating and utilizing principles extracted from a substantial bulk of material. The Problems, however, are not designed to introduce essential substantive points untreated by other materials, and they may therefore be omitted without loss of substantive coverage.

With respect to topics treated, the book reflects no major departure from orthodoxy. The Parol Evidence Rule has, of course, been excluded; its inclusion in Evidence never had a justification more substantial than an unfortunate coincidence of nomenclature. Questions of sufficiency, on the other hand, have unequivocally been claimed as a legitimate province of Evidence.

Our relative emphasis and deemphasis reflect what we conceive to be the present and the future of the law of Evidence: a diminishing importance of the traditional rules of exclusion. Cases will increasingly be decided on the basis of what is admitted rather than what is excluded. The effect is an enhanced importance for techniques of proof and for assessment of the sufficiency of evidence. This process seems to have been promoted in an indefinable way by the current trend in the direction of codifying the rules of Evidence, possibly as the result of the critical examination which codification entails. It must be recognized, however, that some resurgence of exclusion as a means of controlling results is apparent in the constitutional field, particularly in the unchartered potential of the right of confrontation. The future of sufficiency as a measure of constitutionality must be regarded as obscure.

In an increasing number of schools, the use of evidentiary rulings as a means of controlling governmental behavior, centering upon the rights of an accused, is now taught under the heading of Criminal Procedure. Consequently we have placed these materials in the final chapter in order to facilitate omission without impairment of continuity. Without them, we believe that the book may adequately be covered in 45 class hours and the entire book in 60 class hours, or their equivalents. These figures could readily be expanded to fit the pace and techniques of the particular instructor.

E.W.C.  
J.W.S.

June, 1969

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