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伊曼纽尔法律精要影印系列 law outlines

证据法

[美]史蒂文·L·伊曼纽尔 / 著
(Steven L. Emanuel)

Evidence



第四版



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证据法

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总 序

吴志攀

加入世界贸易组织表明我国经济发展进入了一个新的发展时代——一个国际化商业时代。商业与法律的人才流动将全球化,评介人才标准将国际化,教育必须与世界发展同步。商业社会早已被马克思描绘成为一架复杂与精巧的机器,维持这架机器运行的是法律。法律不仅仅是关于道德与公理的原则,也不单单是说理论道的公平教义,还是具有可操作性的精细的具体专业技术。像医学专业一样,这些专业知识与经验是从无数的案例实践积累而成的。这些经验与知识体现在法学院的教材里。中信出版社出版的这套美国法学院教材为读者展现了这一点。

教育部早在2001年1月2日下发的《关于加强高等学校本科教学工作提高教学质量的若干意见》中指出:“为适应经济全球化和科技革命的挑战,本科教育要创造条件使用英语等外语进行公共课和专业课教学。对高新技术领域的生物技术、信息技术等专业,以及为适应我国加入WTO后需要的金融、法律等专业,更要先行一步,力争三年内,外语教学课程达到所开课程的5%-10%。暂不具备直接用外语讲授条件的学校、专业,可以对部分课程先实行外语教材、中文授课,分步到位。”

引进优质教育资源,快速传播新课程,学习和借鉴发达国家的成功教学经验,大胆改革现有的教科书模式成为当务之急。

按照我国法学教育发展的要求,中信出版社与外国出版公司合作,瞄准国际法律的高水平,从高端入手,大规模引进畅销外国法学院的外版法律教材,以使法学院学生尽快了解各国的法律制度,尤其是欧美等经济发达国家的法律体系及法律制度,熟悉国际公约与惯例,培养处理国际事务的能力。

此次中信出版社引进的是美国ASPEN出版公司出版的供美国法学院使用的主流法学教材及其配套教学参考书,作者均为富有经验的知名教授,其中不乏国际学术权威或著名诉讼专家,历经数十年课堂教学的锤炼,颇受法学院学生的欢迎,并得到律师实务界的认可。它们包括诉讼法、合同法、公司法、侵权法、宪法、财产法、证券法等诸多法律部门,以系列图书的形式全面介绍了美国法律的基本概况。

这次大规模引进的美国法律教材包括:

伊曼纽尔法律精要 (Emanuel Law Outlines) 美国哈佛、耶鲁等著名大学法学院广泛采用的主流课程教学用书,是快捷了解美国法律的最佳读本。作者均为美国名牌大学权威教授。其特点是:内容精炼,语言深入浅出,独具特色。在前言中作者以其丰富的教学经验制定了切实可行的学习步骤和方法。概要部分提纲挈领,浓缩精华。每章精心设计了简答题供自我检测。对与该法有关的众多考题综合分析,归纳考试要点和难点。

案例与解析 (Examples and Explanations) 由美国最权威、最富有经验的教授所著,这套丛书历经不断的修改、增订,吸收了最新的资料,经受了美国成熟市场的考验,读者日众。这次推出的是最新版本,在前几版的基础上精益求精,补充了最新的联邦规则,案例也是选用当今人们所密切关注的问题,有很强的时代感。该丛书强调法律在具体案件中的运用,避免了我国教育只灌输法律的理念与规定,而忽视实际解决问题的能力培养。该丛书以简洁生动的语言阐述了美国的基本法律制度,可准确快捷地了解美国法律的精髓。精心选取的案例,详尽到位的解析,使读者读后对同一问题均有清晰的思路,透彻的理解,能举一反三,灵活运用。该丛书匠心独具之处在于文字与图表、图例穿插,有助于理解与记忆。

案例教程系列 (Casebook Series) 覆盖了美国法学院校的主流课程,是学习美国法律的代表性图书,美

国著名的哈佛、耶鲁等大学的法学院普遍采用这套教材，在法学专家和学生中拥有极高的声誉。本丛书中所选的均为重要案例，其中很多案例有重要历史意义。书中摘录案例的重点部分，包括事实、法官的推理、作出判决的依据。不仅使读者快速掌握案例要点，而且省去繁琐的检索和查阅原案例的时间。书中还收录有成文法和相关资料，对国内不具备查阅美国原始资料条件的读者来说，本套书更是不可或缺的学习参考书。这套丛书充分体现了美国法学教育以案例教学为主的特点，以法院判例作为教学内容，采用苏格拉底式的问答方法，在课堂上学生充分参与讨论。这就要求学生不仅要了解专题法律知识，而且要理解法律判决书。本套丛书结合案例设计的大量思考题，对提高学生理解概念、提高分析和解决问题的能力，非常有益。本书及时补充出版最新的案例和法规汇编，保持四年修订一次的惯例，增补最新案例和最新研究成果，保证教材与时代发展同步。本丛书还有配套的教师手册，方便教师备课。

案例举要 (Casenote Legal Briefs) 美国最近三十年最畅销的法律教材的配套辅导读物。其中的每本书都是相关教材中的案例摘要和精辟讲解。该丛书内容简明扼要，条理清晰，结构科学，便于学生课前预习、课堂讨论、课后复习和准备考试。

除此之外，中信出版社还将推出教程系列、法律文书写作系列等美国法学教材的影印本。

美国法律以判例法为其主要的法律渊源，法律规范机动灵活，随着时代的变迁而对不合时宜的法律规则进行及时改进，以反映最新的时代特征；美国的法律教育同样贯穿了美国法律灵活的特性，采用大量的案例教学，启发学生的逻辑思维，提高其应用法律原则的能力。

从历史上看，我国的法律体系更多地受大陆法系的影响，法律渊源主要是成文法。在法学教育上，与国外法学教科书注重现实问题研究，注重培养学生分析和解决问题的能力相比，我国基本上采用理论教学为主，而用案例教学来解析法理则显得薄弱，在培养学生的创新精神和实践能力方面也做得不够。将美国的主流法学教材和权威的法律专业用书影印出版，就是试图让法律工作者通过原汁原味的外版书的学习，开阔眼界，取长补短，提升自己的专业水平，培养学生操作法律实际动手能力，特别是使我们的学生培养起对法律的精细化、具体化和操作化能力。

需要指出的是，影印出版美国的法学教材，并不是要不加取舍地全盘接收，我们只是希望呈现给读者一部完整的著作，让读者去评判。“取其精华去其糟粕”是我们民族对待外来文化的原则，我们相信读者的分辨能力。

是为序。

About Aspen Law & Business Legal Education Division

Aspen Law & Business is proud to welcome Emanuel Publishing Corporation's highly successful study aids to its list of law school publications. As part of the Aspen family, Steve and Lazar Emanuel will continue their work on these popular titles, widely purchased by students for more than a quarter century. With the addition of the Emanuel titles, Aspen now offers the most comprehensive selection of outstanding publications for the discerning law student.

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Dedication

**In memory of my father-in-law
Herman Mandel**

Abbreviations Used in Text

FRE — *Federal Rules of Evidence*

Graham — Michael Graham, *Federal Practice and Procedure*, Interim Edition (1992)

G&N — Green and Neeson, *Problems, Cases and Materials on Evidence* (2d ed. 1994)

Imwinkelried — Edward Imwinkelried, *Evidentiary Foundations* (2d ed. 1989)

L&S — Lempert & Saltzburg, *A Modern Approach to Evidence* (2d ed. 1983)

Lilly — Graham Lilly, *An Introduction to the Law of Evidence* (2d ed. 1987)

McC — Strong *et. al*, *McCormick on Evidence* (4th ed. 1992)

M&K — Mueller & Kirkpatrick, *Evidence* (1st ed. 1995) (textbook)

M&K Csbk — Mueller & Kirkpatrick, *Evidence Under the Rules* (4th Ed. 2000) (case-book)

S&R — Saltzburg and Redden, *Federal Rules of Evidence Manual* (4th ed. 1986)

W&P — Waltz & Park, *Cases and Materials on Evidence* (8th ed. 1995)

W,M,A&B — Weinstein, Mansfield, Adams & Berger, *Cases and Materials on Evidence* (8th ed. 1988, with 1996 supplement)

W&B — Weinstein & Berger, *Weinstein's Evidence* (1986, with 1995 Supp.)

W&G — Wright & Graham, *Federal Practice and Procedure* (1st ed. 1978 with 1995 Supp.)

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The diagrams on pages 175, 179, 180 and 181 of *Emanuel on Evidence* and the chart on page 560 were adapted in part from Lempert and Saltzburg, *A Modern Approach to Evidence*. Permission by West Publishing Co. to adapt them is gratefully acknowledged.

Preface

Thanks for buying this book.

Here are some of its special features:

- **“Casebook Correlation Chart”** — This chart, located just after this Preface, correlates each section of our Outline with the pages covering the same topic in the four leading Evidence casebooks.
- **“Capsule Summary”** — This is an 80-page summary of the key concepts of the law of Evidence, specially designed for use in the last week or so before your final exam.
- **“Quiz Yourself”** — Either at the end of the chapter, or after major sections of a chapter, we give you short-answer questions so that you can exercise your analytical muscles. There are about 130 of these questions. They are for the most part selected and adapted from *Law in a Flash* on Evidence, which contains 532 flash cards. (We publish the *Law in a Flash* series.)
- **“Exam Tips”** — These alert you to what issues repeatedly pop up on real-life Evidence exams, and what factual patterns are commonly used to test those issues. We created these Tips by looking at literally hundreds of multiple-choice and essay questions asked by law professors and bar examiners. You’d be surprised at how predictable the issues and fact-patterns chosen by profs really are!

I intend for you to use this book both throughout the semester and for exam preparation. Here are some suggestions about how to use it:¹

1. During the semester, use the book in preparing each night for the next day’s class. To do this, first read your casebook. Then, use the *Casebook Correlation Chart* to get an idea of what part of the outline to read. Reading the outline will give you a sense of how the particular cases you’ve just read in your casebook fit into the overall structure of the subject. You may want to use a yellow highlighter to mark key portions of the *Emanuel*.
2. If you make your own outline for the course, use the *Emanuel* to give you a structure, and to supply black letter principles. You may want to rely especially on the *Capsule Summary* for this purpose. You are hereby authorized to copy small portions of the *Emanuel* into your own outline, provided that your outline will be used only by you or your study group, and provided that you are the owner of the *Emanuel*.
3. When you first start studying for exams, read the *Capsule Summary* to get an overview. This will probably take you about one day.
4. Either during exam study or earlier in the semester, do some or all of the *Quiz Yourself* short-answer questions. You can find these quickly by looking for *Quiz Yourself* entries in the Table of Contents. When you do these questions: (1) record your short “answer” on the small blank line

1. The suggestions below relate only to this book. I don’t talk about taking or reviewing class notes, using hornbooks or other study aids, joining a study group, or anything else. This doesn’t mean I don’t think these other steps are important — it’s just that in this Preface I’ve chosen to focus on how I think you can use this outline.

provided after the question, but also: (2) try to write out a "mini essay" on a separate piece of paper. Remember that the only way to get good at writing essays is to write essays.

5. Three or four days before the exam, review the *Exam Tips* that appear at the end of each chapter. You may want to combine this step with step 4, so that you use the Tips to help you spot the issues in the short-answer questions. You'll also probably want to follow up from many of the Tips to the main outline's discussion of the topic.
6. The night before the exam: (1) do some *Quiz Yourself* questions, just to get your thinking and writing juices flowing; and (2) re-scan the *Exam Tips* (spending about 2-3 hours).

This edition was prepared with the assistance of Helene Schonbrun, J.D., whose excellent work I very much appreciate. I'm also very pleased that Emanuel Publishing Corp. is now part of the Aspen Law & Business family; in my opinion, Aspen is the most outstanding publisher of materials for law students and practicing lawyers.

Good luck in your Evidence course. If you'd like any other publication of Aspen Law & Business, you can find it at your bookstore or at www.aspenpublishers.com.

Steve Emanuel

Larchmont NY

CASEBOOK CORRELATION CHART

(Note: general sections of the outline are omitted from this chart. NC = not directly covered by this casebook.)

Emanuel's Evidence Outline (by chapter heading)	Green Nesson, Murray Evidence (3d Ed. 2000)	Wellborn Cases & Mat. on the Rules of Evidence (1st Ed. 2000)	Mueller & Kirkpatrick Evidence Under the Rules (4th Ed. 2000)	Waltz & Park Evidence (9th Ed., 1999)
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CASEBOOK CORRELATION CHART (continued)

Emanuel's Evidence Outline (by chapter heading)	Green Nesson, Murray Evidence (3d Ed. 2000)	Wellborn Cases & Mat. on the Rules of Evidence (1st Ed. 2000)	Mueller & Kirkpatrick Evidence Under the Rules (4th Ed. 2000)	Waltz & Park Evidence (9th Ed., 1999)
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Emanuel's Evidence Outline <i>(by chapter heading)</i>	Green Nesson, Murray Evidence (3d Ed. 2000)	Wellborn Cases & Mat. on the Rules of Evidence (1st Ed. 2000)	Mueller & Kirkpatrick Evidence Under the Rules (4th Ed. 2000)	Waltz & Park Evidence (9th Ed. 1999)
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CAPSULE SUMMARY

This Capsule Summary is intended for review at the end of the semester. Reading it is not a substitute for mastering the material in the main outline. Numbers in brackets refer to the pages in the main outline where the topic is discussed.

CHAPTER 1 BASIC CONCEPTS

I. KINDS OF EVIDENCE

A. Direct versus circumstantial [12]

1. **Direct evidence:** Direct evidence is evidence which, if believed, automatically resolves the issue. (*Example:* W says, "I saw D strangle V." This is direct evidence on whether D strangled V.)
2. **Circumstantial:** Circumstantial evidence is evidence which, even if believed, does not resolve the issue unless *additional reasoning* is used. (*Example:* W says, "I saw D running from the place where V's body was found, and I found a stocking in D's pocket." This is only circumstantial evidence of whether D strangled V.)
3. **Probative value:** The probative value of direct evidence is not necessarily higher than circumstantial evidence, but it will sometimes be more readily admitted by the judge.

B. Testimonial versus real and demonstrative: [458]

1. **Testimonial:** Testimonial evidence arises when W makes assertions in court. The fact-finder must rely on W's interpretation of W's sensory data, W's memory, etc.
2. **Real and demonstrative:** Real evidence is a thing involved in the underlying event (e.g., a weapon, document, or other tangible item). Demonstrative evidence is a tangible item that illustrates some material proposition (e.g., a map, chart, summary). The fact-finder may interpret either real or demonstrative evidence by use of its own senses, without intervening sensing and interpreting by a witness.

II. CONDITIONS FOR ADMITTING EVIDENCE

A. Relevant: Only *relevant* evidence may be admitted. (FRE 402) [11-18]

1. **Definition:** Evidence is "relevant" if it has "any tendency to make the existence of [a material] fact . . . more probable or less probable than it would be without the evidence." (FRE 401)
 - a. **"Brick is not wall":** The piece of evidence need not make a material fact more probable than not; it must merely increase the probability (even by a small amount) that the material fact is so. "A brick is not a wall," and the piece of evidence merely has to be one brick in the wall establishing a particular fact.
2. **Exclusion:** Even relevant evidence may be excluded if its *probative value* is *substantially outweighed* by the danger of: (1) *unfair prejudice*; (2) confusion of the issues; (3)

misleading of the jury; or (4) considerations of undue delay, waste of time, or needless presentation of cumulative evidence. (FRE 403)

B. Offering testimonial evidence

1. Lay (i.e., non-expert) witness:

- a. W must take an *oath*, i.e., solemnly promise to testify truthfully. (FRE 603)
- b. W must testify from *personal knowledge*. (FRE 602)
- c. W must preferably state *facts* rather than *opinions*. At common law this rule is sometimes stated as a firm requirement (although often loosely enforced). Under FRE 701, W may give an opinion if it is: (1) rationally based on his own perceptions; (2) helpful to the fact-finder; and (3) not based on scientific, technical or other specialized knowledge.
- d. At common law, W must be *competent*, and many groups of witnesses are deemed not to be (e.g., atheists, felons, interested parties). Under Federal Rules (and by statute in most states), nearly everyone with first-hand knowledge is competent. See, e.g., FRE 601: *everyone* is competent (except for judges and jurors, made incompetent by Rules 605 and 606 respectively). (But the federal court must generally honor a state rule of competency in diversity cases.)

2. Experts: The same rules apply to *experts* as to lay witnesses, except:

- a. The expert may give an opinion if:
 - ☐ the opinion relates to “scientific, technical or other *specialized knowledge*”;
 - ☐ the opinion will assist the trier to “*understand the evidence* or determine a fact in issue”; and
 - ☐ the testimony is based on *sufficient facts or data* and is the product of “*reliable* principles and methods,” and W has *applied* those principles and methods *reliably* to the *facts of the case*.

FRE 702.

- b. The expert’s opinion need not be based on his personal knowledge — it may be based on information supplied by others. At common law, this is usually done by the hypothetical question. Under Federal Rules, it may be done either by the hypothetical or by out-of-court statements made to the expert (even inadmissible evidence); FRE 703. Under FRE 705, facts relied on by the expert need not be disclosed except under cross-examination or as required by court.
- c. **Qualification:** The expert may be qualified by reason of “knowledge, skill, experience, training, or otherwise” (FRE 702), so formal academic training is not necessary.

3. Ultimate issues: At common law, opinions on “*ultimate*” issues are usually barred. But under FRE 704, even such opinions are allowed (except when they relate to the mental state of a criminal defendant).

C. Offering real and demonstrative evidence: See p. 58 of this Capsule Summary.

D. Making and responding to objections: [4-6]

1. Making objections: