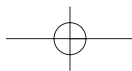


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Problems, Cases and Materials

Peter Nicolas

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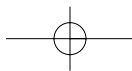
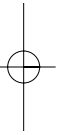
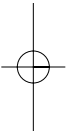
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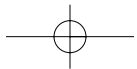
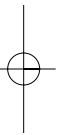
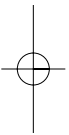
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To Mom and Dad





Contents

Preface	xix
Acknowledgments	xxiii
Table of Cases	xxv
Table of Federal Rules of Evidence	xxxix
Chapter 1 Relevance	3
A. Rule 402: The Gateway to Admissibility	3
Problem 1-1: The Case of the Missing Cheesecake	4
Notes and Questions	5
B. Defining Relevance: Rule 401	6
Problem 1-2: Statutory Rape	7
Problem 1-3: One Too Many for the Road	7
Notes and Questions	7
C. Inferential Relevance	9
Problem 1-4: Tampering with Evidence	9
<i>United States v. Dillon</i>	9
<i>State v. Wisdom</i>	12
Notes and Questions	13
D. Determining Relevance	15
Problem 1-5: Same-Sex Sexual Assault and Child Molestation	15
Notes and Questions	16
E. Conditional Relevance	16
Problem 1-6: Green Baseball Cap	18
Notes and Questions	19
F. Pragmatic Relevance: Rule 403	19
Problem 1-7: I Killed Sally	20
Problem 1-8: Sexual Assault, Child Molestation, and Grand Theft Auto	20
Problem 1-9: Pornographic Photographs	20
Problem 1-10: Videotape	20
Problem 1-11: Hate Crime	21
<i>Old Chief v. United States</i>	21
<i>Campbell v. Keystone Aerial Surveys, Inc.</i>	28
Notes and Questions	30
G. Rule 105: An Alternative to Exclusion	32
Notes and Questions	32
H. Rule of Completeness	33
Notes and Questions	34
I. Relevance of Probabilistic Evidence	34
<i>People v. Collins</i>	34

<i>United States v. Chischilly</i>	42
Notes and Questions	45
Chapter 2 Authentication	49
A. Introduction	49
<i>Ricketts v. City of Hartford</i>	50
Notes and Questions	52
B. Authentication of Physical Objects	53
Problem 2-1: Coke and Guns	53
<i>United States v. Cardenas</i>	54
<i>United States v. Abreu</i>	56
Notes and Questions	57
C. Authentication of Written Documents	58
Problem 2-2: The Threatening Note	58
<i>United States v. Scott</i>	58
<i>United States v. Jones</i>	61
Notes and Questions	63
<i>United States v. Kairys</i>	64
Notes and Questions	65
D. Authentication of Audio Recordings, Photographs, and Video Recordings	66
Problem 2-3: A Picture Is Worth a Thousand Words...	66
Problem 2-4: The Secret Recording	67
<i>United States v. Rembert</i>	67
<i>United States v. Tropeano</i>	70
Notes and Questions	71
E. Authentication of Telephone Conversations	72
<i>United States v. Khan</i>	72
<i>First State Bank of Denton v. Maryland Casualty Co.</i>	73
F. Authentication of Electronic Communications: E-Mail and the Internet	74
<i>United States v. Siddiqui</i>	74
<i>United States v. Tank</i>	76
Notes and Questions	78
G. Shortcuts for Authenticating Evidence	78
Chapter 3 Relevance and Prejudice Refined	81
A. Evidence of Character	81
1. Character of Accused and Victim	82
Problem 3-1: Violent or Non-Violent?	83
Notes and Questions	83
2. Character As an Element of a Crime, Claim, or Defense	85
Notes and Questions	86
3. Proving Character and Challenging Such Proof	86
<i>United States v. Monteleone</i>	87
Notes and Questions	91
4. Evidence of Other Crimes, Wrongs, or Acts Used for "Other Purposes"	92
<i>Huddleston v. United States</i>	93
Notes and Questions	97

CONTENTS

<i>United States v. Carroll</i>	98
Notes and Questions	101
Problem 3-2: What Are the Odds?	102
Notes and Questions	102
5. Character Evidence in Sexual Assault and Child Molestation Cases	103
Problem 3-3: He Said, She Said	103
Problem 3-4: He Said, She Said Redux	106
Notes and Questions	106
Problem 3-5: He Said, She Said Redux II	109
<i>Johnson v. Elk Lake School District</i>	109
Notes and Questions	114
B. Evidence of Habit	115
Problem 3-6: Who Ran the Light?	116
Problem 3-7: Seat Belt Snafu	116
<i>United States v. Yazzie</i>	117
Notes and Questions	120
C. Subsequent Remedial Measures	121
Problem 3-8: Road Work	122
Problem 3-9: Slip and Fall	122
<i>Diehl v. Blaw-Knox</i>	123
<i>Bush v. Michelin Tire Corporation</i>	125
Notes and Questions	128
D. Compromises, Payment of Medical Expenses, and Liability Insurance	129
Problem 3-10: NASDAQ Attack	130
Problem 3-11: Distracting Cell Phone	130
Problem 3-12: Car Accident	130
Problem 3-13: Arson	130
<i>United States v. Bailey</i>	131
Notes and Questions	133
E. Pleas and Plea Discussions	136
<i>United States v. Greene</i>	137
Notes and Questions	138
Chapter 4 Witness Qualification, Competency, and Examination	141
A. Competency of Witnesses	141
Problem 4-1: Interstate Bicycle Accident	143
<i>Equitable Life Assur. Soc. of U.S. v. McKay</i>	143
<i>Legg v. Chopra</i>	145
Notes and Questions	147
Problem 4-2: How Sausage Is Made	148
Problem 4-3: An Honest Misunderstanding	149
<i>Tanner v. United States</i>	149
Notes and Questions	155
B. Oath Requirement	158
<i>United States v. Ward</i>	158
Notes and Questions	161
C. Direct and Cross-Examination of Witnesses	161
<i>United States v. Riccardi</i>	165

	<i>Nutramax Laboratories, Inc. v. Twin Laboratories, Inc.</i>	168
	Notes and Questions	172
D.	Personal Knowledge Requirement	173
	<i>Kemp v. Balboa</i>	173
	Notes and Questions	175
E.	Calling and Interrogation of Witnesses by the Trial Judge	177
	<i>United States v. Martin</i>	177
	Notes and Questions	179
F.	Opinion Testimony by Lay Witnesses	180
	Problem 4-4: Funny Lookin' and Funny Smellin'	180
	Problem 4-5: "He Sounded Like a Black Man"	181
	<i>Asplundh Manufacturing Division v. Benton Harbor Engineering</i>	181
	<i>United States v. Glenn</i>	184
	Notes and Questions	185
G.	Expert Witnesses	187
	1. Qualification of Expert Witnesses	187
	Problem 4-6: Pot-Smoking Expert Witness	187
	<i>Waldorf v. Shuta</i>	187
	Notes and Questions	190
	2. Reliability of Expert Witness Testimony	190
	<i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i>	190
	Notes and Questions	196
	3. A Closer Look at Daubert and the Helpfulness Requirement	199
	a. DNA Evidence	199
	<i>United States v. Chischilly</i>	199
	<i>United States v. Hicks</i>	203
	b. Fingerprint and Handwriting Analysis	206
	<i>United States v. Crisp</i>	206
	c. Polygraph Evidence	214
	<i>United States v. Prince-Oyibo</i>	214
	<i>United States v. Scheffer</i>	218
	d. Eyewitness Reliability	224
	<i>United States v. Lester</i>	224
	e. Battered Woman Syndrome	231
	<i>United States v. Young</i>	231
	Notes and Questions	234
	4. Bases for Expert Witness Testimony	234
	<i>United States v. Stone</i>	235
	Notes and Questions	237
	5. Opinion on the "Ultimate Issue"	239
	<i>Woods v. LeCureux</i>	240
	Problem 4-7: Gay Panic Defense	242
	<i>United States v. Finley</i>	243
	<i>United States v. Hayward</i>	245
	Notes and Questions	246
	6. Court-Appointed Experts	247
	<i>FTC v. Enforma Natural Products, Inc.</i>	247
	Notes and Questions	251
H.	Exclusion and Sequestration of Witnesses	252

CONTENTS

<i>United States v. Rhynes</i>	252
Notes and Questions	261
Chapter 5 Privileges	263
A. Introduction	263
Notes and Questions	265
B. Attorney-Client Privilege	266
Problem 5-1: Drinking & Driving	266
Problem 5-2: A Guilty Conscience	267
<i>In re Grand Jury Subpoenas</i>	267
Notes and Questions	271
<i>Upjohn Company v. United States</i>	273
Notes and Questions	278
Problem 5-3: Monica-Gate	280
<i>United States v. Zolin</i>	281
<i>Swidler & Berlin v. United States</i>	287
Notes and Questions	291
Problem 5-4: The Misdirected E-Mail	293
<i>Gray v. Bicknell</i>	294
Notes and Questions	296
C. Spousal Privileges	297
Problem 5-5: Love & Loyalty	297
<i>Trammel v. United States</i>	298
<i>United States v. Singleton</i>	303
<i>United States v. Sriram</i>	306
Notes and Questions	309
D. Psychotherapist Privilege	311
<i>Jaffee v. Redmond</i>	311
Notes and Questions	321
E. Parent-Child Privilege	323
Problem 5-6: The Bond between Mother and Child	323
<i>In re Grand Jury</i>	323
Notes and Questions	334
F. Clergy-Communicant Privilege	335
Problem 5-7: Forgive Me, Father...	335
<i>In re Grand Jury Investigation</i>	336
Notes and Questions	344
Chapter 6 The “Best Evidence” Rule	347
A. Introduction	347
Notes and Questions	348
B. What Qualifies As a “Writing, Recording, or Photograph?”	348
Problem 6-1: The Libelous Billboard	348
<i>United States v. Duffy</i>	349
<i>Seiler v. Lucasfilm, Ltd.</i>	350
Notes and Questions	352
C. What Qualifies As an Original?	353
Problem 6-2: Dangerous	353

	<i>United States v. Rangel</i>	353
	Notes and Questions	354
D.	What Constitutes Proving Contents of a Writing, Recording, or Photograph?	355
	Problem 6-3: The Libelous Billboard Revisited	355
	Problem 6-4: A Picture Is Worth a Thousand Words Revisited	355
	Problem 6-5: The Alibi	356
	<i>United States v. Gonzales-Benitez</i>	356
	<i>United States v. Bennett</i>	357
	Notes and Questions	359
E.	Duplicates	360
	<i>United States v. Haddock</i>	361
	Notes and Questions	362
F.	Production of Original Excused	362
	<i>United States v. Marcantoni</i>	362
	Notes and Questions	364
G.	Summaries	366
	<i>United States v. Bray</i>	366
H.	Role of Judge and Jury	370
	Notes and Questions	371
Chapter 7 The Rule against Hearsay		373
A.	Introduction	373
	Notes and Questions	375
B.	What Does It Mean to Be Offered to Prove the Truth of the Matter Asserted?	375
	Problem 7-1: Blowing Hot and Cold	376
	<i>Goodman v. Pennsylvania Turnpike Comm'n</i>	376
	Problem 7-2: The Elm Street Garage	378
	<i>United States v. Hanson</i>	378
	Problem 7-3: The Slanderous Statement	380
	Problem 7-4: I'm Alive!	380
	<i>United States v. Montana</i>	381
	Notes and Questions	381
	Problem 7-5: I'm the President	382
	<i>United States v. Parry</i>	382
	Problem 7-6: The Bumper Sticker	383
	<i>United States v. Snow</i>	384
	Notes and Questions	385
C.	What Is an "Assertion"?	385
	Problem 7-7: Nobody Else Complained	385
	Problem 7-8: Say Something If It Hurts...	385
	<i>Wilson v. Clancy</i>	386
	Problem 7-9: Did You Know?	387
	<i>United States v. Wright</i>	388
	Problem 7-10: Under a Watchful Eye	389
	<i>Miller v. Dillard's, Inc.</i>	390
	<i>United States v. Zenni</i>	391
	<i>United States v. Snow</i>	395
	Notes and Questions	396

CONTENTS

xiii

D. Statements That Are “Not Hearsay”	397
1. Prior Statements by Witness	398
<i>United States v. Dietrich</i>	398
Problem 7-11: The Improper Motive	400
<i>Tome v. United States</i>	401
<i>United States v. Owens</i>	406
Notes and Questions	409
2. Admissions of a Party-Opponent	411
a. Individual Admissions	412
<i>United States v. Reed</i>	412
<i>Pau v. Yosemite Park and Curry Co.</i>	412
Notes and Questions	413
b. Adoptive Admissions	414
<i>United States v. Ward</i>	414
<i>Southern Stone Co., Inc. v. Singer</i>	416
<i>United States v. Paulino</i>	418
Notes and Questions	420
c. Admissions of Agents and Employees	421
Problem 7-12: The Slip-and-Fall	421
<i>Mahlandt v. Wild Canid Survival & Research Center, Inc.</i>	421
Notes and Questions	425
d. Coconspirator Admissions	426
Problem 7-13: The Drug Cartel	426
<i>Bourjaily v. United States</i>	427
<i>United States v. Johnson</i>	431
Notes and Questions	432
E. Unrestricted Hearsay Exceptions	436
1. Present Sense Impressions and Excited Utterances	436
Problem 7-14: The Instant Message	436
Problem 7-15: The Cottage Cheese	436
<i>United States v. Mejia-Velez</i>	437
<i>Miller v. Keating</i>	439
<i>Miller v. Crown Amusements, Inc.</i>	441
Notes and Questions	444
2. Statements for Purposes of Medical Diagnosis or Treatment	446
Problem 7-16: The Hit & Run Accident	446
<i>United States v. Renville</i>	446
Notes and Questions	449
3. Then-Existing Mental, Emotional, or Physical Condition	451
Problem 7-17: The Reverberating Clang	451
Problem 7-18: The Last Meeting	451
<i>Mutual Life Ins. Co. of New York v. Hillmon</i>	452
<i>Shepard v. United States</i>	455
<i>United States v. Houlihan</i>	457
Notes and Questions	460
4. Past Recollection Recorded	463
Problem 7-19: The License Plate	463
<i>Parker v. Reda</i>	463
<i>United States v. Hernandez</i>	465

	Notes and Questions	468
5.	Records of Regularly Conducted Business Activity	470
	<i>United States v. Vigneau</i>	471
	<i>Ebenhoech v. Koppers Industries, Inc.</i>	474
	<i>United States v. Gentry</i>	477
	Notes and Questions	477
6.	Public Records and Reports	481
	Problem 7-20: The Police Report	481
	Problem 7-21: Cocaine and Cartography	482
	Problem 7-22: The Unregistered Firearm	483
	<i>United States v. Oates</i>	483
	<i>Beech Aircraft Corp. v. Rainey</i>	488
	Notes and Questions	492
7.	Prior Court Judgments	494
8.	Reputation & Personal or Family History	496
	Problem 7-23: They Say It's Your Birthday...	496
	<i>Blackburn v. United Parcel Service</i>	497
	Notes and Questions	503
9.	Learned Treatises and Other Documents	504
	<i>Costantino v. David M. Herzog, M.D., P.C.</i>	504
	Notes and Questions	509
F.	Restricted Hearsay Exceptions	511
1.	Unavailability	512
	<i>United States v. Williams</i>	512
	<i>United States v. Carson</i>	513
	<i>United States v. McGuire</i>	514
	<i>United States v. Kehm</i>	515
	<i>United States v. Peterson</i>	518
	Notes and Questions	519
2.	Former Testimony	520
	Problem 7-24: The Absent-Minded Witness	521
	Problem 7-25: The Maple Syrup	521
	Problem 7-26: The Car Accident	522
	Problem 7-27: Arson	522
	<i>United States v. DiNapoli</i>	522
	Problem 7-28: The Antitrust Action	527
	<i>Lloyd v. American Export Lines, Inc.</i>	528
	Notes and Questions	532
3.	Dying Declarations	533
	Problem 7-29: The Last Breath	533
	<i>Shepard v. United States</i>	533
	<i>United States v. Angleton</i>	535
	Notes and Questions	542
4.	Statements against Interest	543
	Problem 7-30: The Car Accident	544
	Problem 7-31: Herpes	544
	<i>Heddings v. Steele</i>	545
	Notes and Questions	547
	Problem 7-32: "I Killed That S.O.B."	548

CONTENTS

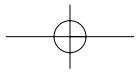
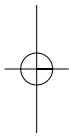
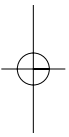
<i>Williamson v. United States</i>	549
Notes and Questions	555
5. Forfeiture by Misconduct	556
Problem 7-33: The Grand Jury Witness	556
<i>United States v. Cherry</i>	557
Notes and Questions	561
G. The Residual Exception	563
Problem 7-34: The Grand Jury Witness II	563
<i>United States v. Laster</i>	563
Notes and Questions	568
H. Hearsay and the Confrontation Clause	570
<i>Mattox v. United States</i>	570
Notes and Questions	573
<i>Barber v. Page</i>	574
Notes and Questions	575
<i>California v. Green</i>	575
Notes and Questions	581
<i>Ohio v. Roberts</i>	583
Notes and Questions	585
<i>United States v. Inadi</i>	586
Notes and Questions	588
<i>Idaho v. Wright</i>	589
Notes and Questions	593
<i>Lilly v. Virginia</i>	593
Notes and Questions	597
<i>Crawford v. Washington</i>	598
Notes and Questions	607
Chapter 8 Judicial Notice	609
Problem 8-1: The Alibi	610
Problem 8-2: The Sweltering Heat	610
Problem 8-3: Currency Exchange	610
<i>United States v. Marvin P. Jones</i>	611
<i>United States v. Bello</i>	613
<i>United States v. Lewis</i>	617
<i>United States v. Gould</i>	619
<i>United States v. William Allen Jones</i>	622
<i>United States v. Amado-Núñez</i>	623
Notes and Questions	626
Chapter 9 Burdens of Proof and Presumptions	631
A. Burdens of Proof in Civil Cases	631
B. Presumptions in Civil Cases	633
Problem 9-1: Proving Discrimination	637
<i>In re Yoder Company</i>	638
<i>Legille v. Dann</i>	641
<i>St. Mary's Honor Center v. Hicks</i>	644
<i>Alabama By-Products Corporation v. Killingsworth</i>	647

Notes and Questions	649
C. Burdens of Proof and Presumptions in Criminal Cases	650
Problem 9-2: Proving Hate	651
<i>Patterson v. New York</i>	652
<i>County Court of Ulster v. Allen</i>	659
<i>Sandstrom v. Montana</i>	663
Notes and Questions	667
Chapter 10 Impeachment and Rehabilitation of Witnesses	671
A. Introduction	671
B. Character for Untruthfulness	672
1. Untruthful Character and Conduct	672
Problem 10-1: Lying for Beer, Lying for Jobs	672
<i>United States v. Whitmore</i>	673
<i>United States v. Manske</i>	678
Notes and Questions	681
2. Prior Convictions	682
Problem 10-2: The Criminal Resume	684
<i>Altobello v. Borden Confectionary Products, Inc.</i>	684
<i>United States v. Browne</i>	686
<i>United States v. Cathey</i>	688
Notes and Questions	691
C. Impeachment for Bias or Motivation	695
<i>United States v. Abel</i>	695
<i>Firemen's Fund Ins. Co. v. Thien</i>	698
Notes and Questions	700
D. Sensory Perception	701
<i>United States v. Pryce</i>	701
<i>United States v. DiPaolo</i>	702
Notes and Questions	703
E. Impeachment by Contradiction	704
<i>United States v. Beauchamp</i>	704
Notes and Questions	705
F. Impeachment by Prior Inconsistent Statement	706
Problem 10-3: The Turn-Coat Witness	707
<i>United States v. Ince</i>	708
Notes and Questions	711
G. Rehabilitation of Witnesses	712
<i>United States v. Dring</i>	713
Notes and Questions	716
H. Impeachment and Rehabilitation of Hearsay Declarants	717
Problem 10-4: The Dead Witness	717
<i>United States v. Saada</i>	718
Notes and Questions	721
Chapter 11 Appellate Review of Evidentiary Rulings	723
A. Introduction	723
Problem 11-1: A Second Bite at the Apple	724

CONTENTS

xvii

B. Preserving Claims of Error for Appellate Review and the Timing of Appellate Review	725
<i>United States v. Meserve</i>	725
<i>United States v. Wynn</i>	727
<i>United States v. Adams</i>	728
<i>Crowe v. Boldoc</i>	730
<i>Luce v. United States</i>	731
<i>Ohler v. United States</i>	733
Notes and Questions	734
C. Standards of Review of Claimed Errors in Interpreting and Applying Rules of Evidence	737
Peter Nicolas, <i>De Novo Review in Deferential Robes?: A Deconstruction of the Standard of Review of Evidentiary Errors in the Federal System</i>	738
Notes and Questions	740
D. Harmless Error Doctrine	741
<i>United States v. Piper</i>	742
Notes and Questions	744
Index	745



Preface

One of the biggest challenges facing those who teach the rules of evidence—and by extension those who write textbooks on the subject—is striking the proper balance between the amount of reading assigned to students and the breadth and depth of coverage. The Federal Rules of Evidence—around which this textbook is organized—consist of 67 separate rules, most of which contain multiple sub-rules as well as interpretive ambiguities. While devoting a large number of credit hours to the course in evidence might be the ideal solution for some, the reality is that at most American law schools, no more than three or four credit hours are devoted to the subject. Thus, a major goal of mine in undertaking this project was to provide teachers and students of evidence with a book that comprehensively covers the rules of evidence yet is short enough that it can realistically be taught in three semester hours.

This textbook is comprehensive in that it covers virtually every single one of the federal rules of evidence. Some textbooks attempt to solve the length-coverage dilemma by omitting coverage of those rules deemed to be “less important.” Yet what may as a general matter be unimportant may be of critical importance in any given case that a student may encounter in the future, and lack of exposure to those rules when learning the rules of evidence as a student is likely to translate into lack of awareness when practicing. Accordingly, in my evidence course as well as in this textbook, I cover rules that are typically neglected, such as the so-called “minor” exceptions to the hearsay rule, the rules governing the calling and interrogation of witnesses by judges, and the parent-child and clergy-communicant privileges. My decision to do so is reinforced by stories from former students who have surprised opposing counsel and judges alike by successfully invoking such often-ignored rules.

Yet in providing broad coverage, I did not want to sacrifice depth of coverage. Thus, the textbook digs deep into the nuances of the rules of evidence, raising and attempting to answer such questions as: How does one authenticate an e-mail message? Is a remedial measure undertaken by a third party subject to exclusion under Rule 407? Does the adverse spousal testimony privilege apply in civil cases? When a rule of evidence references state law in cases with multi-state contacts, to *which* state’s law is it referring? Does forensic handwriting analysis satisfy *Daubert*? Is a billboard a “writing” subject to the strictures of the best evidence rule? Can the dying declaration exception to the hearsay rule be invoked in *attempted* murder cases?

By using a balanced mix of cases, problems, textual narrative, and explanatory notes, the textbook is able to provide broad and deep coverage of the rules of evidence without sacrificing brevity. Chapter 1, as an example, contains just six edited cases but has eleven problems, forty-three explanatory notes, and several pages of textual narrative. Learning to read judicial decisions is an important skill, which is why there are several edited cases in each chapter, yet it is but one of many skills that students must master.

Moreover, cases are an inefficient vehicle for conveying large amounts of information. Accordingly, cases are used sparingly, and when used, are carefully chosen and rigorously edited.

The approach used in most sections of the textbook thus proceeds as follows. First, students are given several pages of introductory narrative designed to introduce them to the rule covered in that section, including its history and underlying policy justifications. That narrative is followed by a problem or series of problems, designed for use in class as a vehicle for raising and addressing the conceptual ambiguities that arise in interpreting and applying the rule. Resources for answering those questions are provided by the materials following the problems, usually a case or two followed by a series of explanatory notes.

The extensive use of problems throughout the textbook—ninety in-depth problems in all, or on average about two or three for each class hour—allows students to master the *application* of the rules of evidence. By the time law students take the course in evidence, most of them have learned how to read cases and to recite the holdings of those cases. Yet many students find it difficult to apply those principles when presented with alternative factual scenarios. These problems thus provide students with ample opportunity to hone their skills in applying the rules of evidence and to receive feedback on the same.

The topics in the textbook are organized in the order in which I normally teach them, but the chapters are sufficiently independent of one another that they can be taught in a different sequence without difficulty. Chapter 1 introduces the basic concepts of relevance and prejudice. Chapter 2, which covers the rules governing authentication of evidence, logically follows from Chapter 1's discussion of conditional relevance. Chapter 3 then introduces the categorical rules—such as those addressing character evidence, subsequent remedial measures, and the like—that refine the concepts of relevance and prejudice introduced in Chapter 1. The focus of Chapter 4 is on witnesses, examining the rules governing their competency, qualification, and examination. Chapter 5 turns to privileges, with a focus on the attorney-client, spousal, psychotherapist-patient, parent-child, and clergy-communicant privileges. The next two chapters cover the two sets of rules that express a preference for what is thought to be superior evidence, the best evidence rule in Chapter 6 followed by the hearsay rule, its exceptions, and the Confrontation Clause in Chapter 7. The following two chapters examine two methods of shortcutting normal methods of proof, with Chapter 8 focusing on the rules governing judicial notice and Chapter 9 examining evidentiary presumptions. Chapter 10 examines the various methods of impeaching and rehabilitating witnesses, and finally, Chapter 11 examines the rules governing appellate review of evidentiary rulings.

Throughout, the textbook incorporates recent changes in substantive law as well as changes in technology that raise special challenges in applying the rules of evidence. The book includes the Supreme Court's 2004 decision in *Crawford v. Washington*, which redefined the relationship between the hearsay rule and the Confrontation Clause, as well as notes on post-*Crawford* developments in the lower courts. The book also examines proposed changes to Rules 404, 408, 606, and 609 that are being considered as this book goes to press in early 2005. The book includes an enriched section on scientific evidence that considers the application of the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* to a variety of forms of expert testimony, including DNA analysis, fingerprint analysis, handwriting analysis, and polygraph testing, as well as to expert testimony on eyewitness reliability and battered woman syndrome. In addition, the textbook considers the rules of evidence in a modern context by considering their

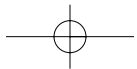
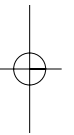
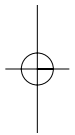
PREFACE

xxi

application to electronic evidence, such as e-mail messages, postings on the Internet, and output generated by global positioning system devices and computers.

In putting this textbook together, I am indebted to several student assistants who provided extraordinary assistance in researching and proofreading the book. Two student assistants in particular—Matthew Koenigs and Elizabeth A. Tutmarc—were involved in the project from start to finish, each researching several chapters of the book and each meticulously proofreading the entire book. In addition, student assistants Matthew W. Daley, Kyla C.E. Grogan, and Sarah Shirey each played a key role in researching individual chapters of the book. I also wish to thank Ms. Tutmarc and my secretarial assistant, Wendy Condiotty, who together played a crucial role in researching and editing the separate statutory supplement for this textbook. Finally I wish to thank the students in my Autumn 2004 evidence course, who gave these materials a trial run and provided me with valuable feedback as I prepared the materials for press.

Peter Nicolas
Seattle, Washington
January 2005



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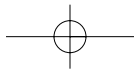
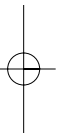
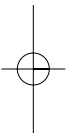


Table of Cases

- A & M Records, Inc. v. Napster, Inc., 250
 A.J. Faigin v. Kelly, 727
 Abbott Laboratories v. Alpha Therapeutic Corp., 296
 Abuan v. Level 3 Communications, Inc., 736
 Advent Sys. Ltd. v. Unisys Corp., 237
 Aetna Life Ins. Co. v. Ward, 221
 Affiliated Mfrs., Inc. v. ALCOA, 134
 Alabama By-Products Corporation v. Killingsworth, 647
 Alberty v. United States, 10
 Alford v. United States, 696
 Alldread v. City of Grenada, 295
 Aloe Coal Co. v. Clark Equip. Co., 188
 Altobello v. Borden Confectionary Products, Inc., 684
 Amoco Production Co. v. United States, 362
 Anderson v. Ford Motor Co., 157
 Anderson v. Miller, 156
 Andrews v. Neer, 147
 Andrews v. State, 45
 Annett v. University of Kansas, 504
 Ansell v. Green Acres Contracting Co., Inc., 98
 Apprendi v. New Jersey, 668
 Arcoren v. United States, 232
 Asplundh Manufacturing Division v. Benton Harbor Engineering, 181
 Awkard v. United States, 89
 B.B. v. Continental Ins. Co., 294
 Baird v. Koerner, 269–270
 Baker v. Dalkon Shield Claimants Trust, 741
 Baker v. Elcona Homes Corp., 489
 Baldwin v. Fidelity Phenix Fire Insurance Co., 639
 Barber v. Page, 516, 520, 574, 580, 584, 603
 Beech Aircraft Corp. v. Rainey, 192, 404, 406, 459, 488, 734
 Bellis v. United States, 364
 Benson v. United States, 141–142
 Berry v. City of Detroit, 241
 Blackburn v. Crawfords, 288
 Blackburn v. United Parcel Service, 497
 Blau v. United States, 299, 302
 Bombard v. Fort Wayne Newspapers, Inc., 450
 Boren v. Sable, 426
 Bourjaily v. United States, 96, 194, 427, 432, 590, 603
 Boyd v. University of Maryland Med. Sys., 169
 Branzburg v. Hayes, 290
 Brewer v. City of Napa, 138
 Brooks v. Am. Broad. Cos., 145
 Brown v. United States, 172
 Bruton v. United States, 33, 414
 Bush v. Michelin Tire Corporation, 125
 Butler Mfg. Co., Inc. v. Americold Corp., 170
 Cabral v. INS, 459
 Cain v. George, 397
 Caldwell v. District Court, 286
 California v. Green, 559, 575, 582, 584–585, 603
 Callahan v. Woods, 159
 Campbell v. Greer, 685
 Campbell v. Keystone Aerial Surveys, Inc., 28
 Carpenters v. United States, 665
 Carson v. Polley, 85
 Carter v. Hewitt, 720
 Carver v. United States, 534
 Cavallaro v. United States, 266
 Cedeck v. Hamiltonian Fed. Sav. & L. Ass'n., 423
 Central R.R. Co. v. Monahan, 182
 CFTC v. Weintraub, 280
 Chambers v. Mississippi, 219, 595
 Circle J Dairy, Inc. v. A.O. Smith Harvestore Prod., Inc., 188

Citizens to Preserve Overton Park, Inc. v. Volpe, 460	Estate of Gryder v. Commissioner, 365
Civil and Criminal Jury Trials, 181	Estate of Wooters ex rel. Klein v. Goujjane, 147
Clark v. Takata Corp., 233	Estelle v. McGuire, 103
Clark v. United States, 283	Faries v. Atlas Truck Body Mfg. Co., 494
Clarke v. State, 13	Ferguson v. CIR, 161
Clausen v. Sea-3, Inc., 128	Ferrier v. Duckworth, 29
Clifford v. Commonwealth, 185	Finch v. Hercules, Inc., 700
Collums v. Union Planters Bank, N.A., 539	Firemen's Fund Ins. Co. v. Thien, 698
Commonwealth v. Trefethen, 456	First State Bank of Denton v. Maryland Casualty Co., 73
Conoco Inc. v. Dep't of Energy, 566	Fisher v. United States, 141, 283, 289
Consolidation Coal Co. v. Bucyrus-Erie Co., 279	Flaminio v. Honda Motor Co., 126-127
Cook v. Hoppin, 569	Fletcher v. Weir, 712
Cooper v. Asplundh Tree Expert Co., 681	Fox v. Dannenberg, 190
Costantino v. David M. Herzog, M.D., P.C., 30, 504	Francis v. Southern Pacific Co., 301
County Court of Ulster v. Allen, 659, 664	Frye v. United States, 191-192, 211, 220, 222
Crawford v. Washington, 555, 570, 598	FTC v. Enforma Natural Products, Inc., 247
Crawford v. Yellow Cab Co., 86	Funk v. United States, 142, 290, 299, 314
Crowe v. Boldoc, 730	Gannet v. First Nat. State Bank of New Jersey, 297
D.S.C. Communications Corp. v. Next Level Communications, 135	Garner v. Wolfenbarger, 279
Daily v. Grand Lodge, 478	Gauthier v. A.M.F., Inc., 127
Daubert v. Merrell Dow Pharm., Inc., 145, 190, 196-199, 201-203, 206-217, 220, 223, 225-229, 232, 234	Geders v. United States, 255
David v. Pueblo Supermarkets of St. Thomas, Inc., 440	General Electric Co. v. Joiner, 197, 222, 739-740
Davis v. Alaska, 696	Georgetown Manor, Inc. v. Ethan Allen, Inc., 295-296
Davis v. United States, 160 U.S. 469 (1895), 653	Gibbs v. State Farm Mut. Ins. Co., 126
Davis v. United States, 865 F.2d 164, 168 (8th Cir.1988), 188	Glasser v. United States, 428
Diaz v. Johnson Matthey, Inc., 188	Glover v. Patten, 288, 291
Diehl v. Blaw-Knox, 123	Gomez v. Ahitow, 29
Dimino v. New York City Transit Auth., 134	Gomez v. Great Lakes Steel Div., Nat'l Steel Corp., 368
Diversified Indus., Inc. v. Meredith, 271	Gomez v. Rivera Rodriguez, 426
Dixon v. Int'l Harvester Co., 124	Goodman v. Pennsylvania Turnpike Comm'n, 376
Doe ex rel. Rudy-Glanzer v. Glanzer, 114	Gordon v. Robinson, 476
Doe v. United States, 108	Gordon v. United States, 680
Douglas v. Alabama, 584	Government of Canal Zone v. Burjan, 615, 628
Dowling v. United States, 97	Government of the Virgin Islands v. Toto, 33
Doyle v. Ohio, 420	Government of the Virgin Islands v. Joseph, 499
Dutton v. Evans, 582, 585, 588, 601, 603	Government of Virgin Islands v. Byers, 45
Ebenhoech v. Koppers Industries, Inc., 474	Government of Virgin Islands v. Carino, 98
Elcock v. Kmart Corp., 113	Gray v. Bicknell, 294
Elkins v. United States, 302, 313	Greater Kansas City Laborers Pension Fund v. Thummel, 354
Ellicott v. Pearl, 402, 404	Grenada Steel Indus. v. Alabama Oxygen Co., 126
Equitable Life Assur. Soc. of U.S. v. McKay, 143	Griffin v. McCoach, 144
Erie R.R. Co. v. Tompkins, 145, 193, 319	Gross v. United States, 89
Estate of Cowart v. Nicklos Drilling Co., 254	

TABLE OF CASES

xxvii

Grove v. Mead School District, 159	In re Grand Jury Proceedings (Starr), 333
Guam v. Shymanovitz, 16	In re Grand Jury Proceedings, 142 F.3d 1416 (11th Cir. 1998), 158
Gutter v. E.I. Dupont De Nemours, 292	In re Grand Jury Proceedings, 517 F.2d 666 (5th Cir.1975), 269
Hagner v. United States, 639	In re Grand Jury Proceedings, 664 F.2d 423 (5th Cir.1981, Unit B), 305
Hall v. American Bakeries Co., 173	In re Grand Jury Proceedings, 680 F.2d 1026 (5th Cir.1982), 269
Hancock v. Dodson, 322	In re Grand Jury Proceedings, 87 F.3d 377 (9th Cir. 1996), 291
Hancock v. Hobbs, 322	In re Grand Jury Proceedings, 896 F.2d 1267 (11th Cir.1990), 269
Hanna v. Plumer, 126, 265	In re Grand Jury Subpoena, 831 F.2d 225 (11th Cir. 1987), 305
Hard v. Burlington Northern R. Co., 157	In re Grand Jury Subpeona, 274 F.3d 563 (1st Cir. 2001), 272, 280
Harper & Row Publishers v. Decker, 278	In re Grand Jury Subpoena of Witness, 310
Harris v. New York, 712	In re Grand Jury Subpoena Served Upon Doe, 270
Hawkins v. United States, 141, 298–300, 302, 627	In re Grand Jury Subpoenas, 803 F.2d 493 (9th Cir.1986), 268
Heddings v. Steele, 545, 548	In re Grand Jury Subpoenas, 906 F.2d 1485 (10th Cir. 1990), 267
Heflin v. Stewart County, 241	In re John Doe Corp., 286, 292
Hellenic Lines Ltd. v. Gulf Oil Corp., 418	In re John Doe, Inc., 292
Herman v. United States, 300	In re Long Visitor, 90
Herrera v. Collins, 291	In re Osterhoudt, 268, 270
Herrick v. Garvey, 495	In re Paoli R.R. Yard PCB Litig., 188
Hilyer v. Howat Concrete Co., Inc., 438, 444	In re Sealed Case, 107 F.3d 46 (D.C. Cir. 1997), 292
Hiskett v. Wal-Mart Stores, Inc., 173	In re Sealed Case, 352 F.3d 409 (D.C. Cir. 2003), 84
Hoffman v. Palmer, 479	In re Sealed Case, 676 F.2d 793 (1982), 286, 295
Hoffman v. United States, 167	In re Sealed Case, 877 F.2d 976 (D.C.Cir.1989), 295
Hood v. Knappton Corp., 650	In re Shargel, 270
Horton v. Allen, 608	In re Winship, 46, 290, 654, 663, 666
Hough v. Pacific Ins. Co., 8	In re Yoder Company, 638
Howard v. Wal-Mart Stores, Inc., 47	Inciso v. United States, 459
Huddleston v. United States, 18–19, 31, 93, 97, 110–111, 404	Indian Coffee Corp. v. Procter & Gamble Co., 237
Hudspeth v. CIR, 134	Inge v. United States, 726
Hughes v. United States, 620	INS v. Cardoza-Fonseca, 489
Hunt v. Blackburn, 283	Inselman v. S & J Operating Co., 728
Hutchinson v. Groskin, 726	International Land Acquisitions v. Fausto, 734
Hyde v. United States, 151	Jackson v. Firestone Tire & Rubber Co., 29
Hydraflow, Inc. v. Enidine Inc., 295	Jacobs Press, Inc. v. Hartford Steam Boiler Inspection & Ins. Co., 135
Idaho v. Wright, 536, 589, 595	Jaffee v. Redmond, 311, 325, 329–330
In re A & M, 333	Jenkins v. Anderson, 712
In re Air Crash Disaster Near New Orleans, 29	
In re Certain Complaints Under Investiga- tion, 305	
In re Erato, 333	
In re Grand Jury, 103 F.3d 1140 (3d Cir. 1997), 323	
In re Grand Jury Investigation (Schroeder), 291	
In re Grand Jury Investigation, 723 F.2d 447 (6th Cir.1983), 269–270	
In re Grand Jury Investigation, 918 F.2d 374 (3d Cir.1990), 331, 336	
In re Grand Jury Proceedings (84-5), 310	
In re Grand Jury Proceedings (Gregory P. Vi- ollette), 321	

- Jewell v. CSX Transportation, Inc., 413
 Johnson v. Elk Lake School District, 109
 Johnson v. Lutz, 473, 477
 Johnson v. United States, 61
 Jones v. United States, 668
 Jordan v. Massachusetts, 155
 Kaminsky v. Hertz Corp., 47
 Kansas Pac. Ry. Co. v. Miller, 353
 Kelly v. Crown Equipment Co., 126
 Kemp v. Balboa, 173
 Kirchoff v. Flynn, 135
 Klaxon Co. v. Stentor Electric Manufacturing Co., 144
 Knight v. Otis Elevator Co., 188
 Knotts v. Black & Decker, Inc., 148
 Kornicki v. Calmar Steamship Corporation, 440
 Kowalski v. Gagne, 148
 Krist v. Eli Lilly & Co., 48
 Krulewitch v. United States, 33
 Kumho Tire Co., Ltd. v. Carmichael, 196
 Larsen v. Valente, 341
 Ledford v. Sullivan, 252
 Lee v. Illinois, 551, 591, 595
 Legg v. Chopra, 145
 Legille v. Dann, 641
 Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc., 612
 Lillie v. United States, 158
 Lilly v. Virginia, 555, 593, 602–603
 Lippay v. Christos, 426
 Lis v. Robert Packer Hospital, 172
 Lloyd v. American Export Lines, Inc., 528
 Lloyd's London v. Sinkovich, 476
 Lolie v. Ohio Brass Co., 124
 Longmire v. Alabama State Univ., 85
 Loven v. State, 507
 Luce v. United States, 731, 734, 737
 Luddock Feed Lots, Inc. v. Iowa Beef Processors, 186
 Lutheran Medical Ctr. v. Contractors, Laborers, Teamsters & Eng'rs Health & Welfare Plan, 295
 Lutwak v. United States, 310
 Lynch v. City of Boston, 186
 Mahlandt v. Wild Canid Survival & Research Center, Inc., 421
 Maltas v. Maltas, 147
 Mancusi v. Stubbs, 584–585
 Manley v. Ambase Corp., 157
 Martin v. Funtime, Inc., 367
 Martin v. Ohio, 669
 Martin v. Savage Truck Line, 425
 Martin v. Thrifty Rent A Car, 120
 Matter of Fischel, 273
 Matter of John Doe Grand Jury Investigation, 290
 Mattox v. United States, 151–152, 534, 536, 542, 570, 573–574, 580, 584–585, 594, 602–603
 Mayhue v. St. Francis Hosp. of Wichita, Inc., 157
 McBride v. Heckler, 500
 McCandless v. Beyer, 670
 McCullough v. Consolidated Rail Corp., 156
 McDonald v. Pless, 151–152
 McDonnell Douglas Corp. v. Green, 645–646
 McFarland v. American Sugar Rfg. Co., 655
 McFarlane v. Caterpillar, Inc., 128
 McInnis v. A.M.F., Inc., 126
 McKentry v. Secretary of HHS, 639
 McKenzie v. Harris, 311
 McLaughlin v. United States, 100
 McLaughlin v. Vinzant, 440
 McMorrow v. Schweiker, 503
 McQueeney v. Wilmington Trust Co., 63
 Mehojah v. Drummond, 124
 Mendenhall v. Barber-Greene Co., 295
 Meschino v. North American Drager, Inc., 507
 Metropolitan St. Ry. v. Gumby, 531
 Meyer v. United States, 120
 Michelson v. United States, 23, 82, 86, 88–89, 91, 96, 501, 675
 Michigan v. Lucas, 219
 Miller v. Crown Amusements, Inc., 441
 Miller v. Dillard's, Inc., 390
 Miller v. Keating, 439, 443
 Miller v. Universal City Studios, Inc., 259
 Mills v. Estelle, 689–690
 Mitchell v. United States, 172
 Mobile, J. & K. C. R. Co. v. Turnipseed, 650
 Moe v. Avions Marcel Dassault-Breguet Aviation, 126
 Morgan v. Foretich, 449–450, 592
 Morissette v. United States, 666
 Morvant v. Construction Aggregates Corp., 261
 Moss v. Ole South Real Estate, Inc., 735
 Motes v. United States, 584–585
 Mullaney v. Wilbur, 653–654, 656, 663, 667–669
 Mullen v. United States, 339
 Mullins v. United States, 88
 Murphy Auto Parts Co., Inc. v. Ball, 445

TABLE OF CASES

xxix

Mutual Life Ins. Co. of New York v. Hillmon, 452	Piquett v. United States, 206
Mutuelles Unies v. Kroll & Linstrom, 515	Plummer v. Springfield Terminal Ry. Co., 156
Nash v. United States, 33	Pointer v. Texas, 585, 587, 599
Neron v. Tierney, 157	Polys v. Trans-Colorado Airlines, Inc., 728
New Jersey v. Portash, 732	Purtell v. State, 548
Newman v. Hy-Way Heat Systems, Inc., 235	Radiant Burners, Inc. v. American Gas Ass'n, 278
Nipper v. Snipes, 495	Ramrattan v. Burger King Corp., 443
NLRB v. Transportation Management Corp., 648	Raymond v. Raymond Corp., 124, 128
Noriega v. United States, 73	Reed v. United States, 55
Northwestern Memorial Hosp. v. Ashcroft, 322	Reeves v. General Foods Corp., 640-641
Nutramax Laboratories, Inc. v. Twin Laboratories, Inc., 168	Reilly v. United States, 249
O'Dell v. Hercules, Inc., 124, 128	Remmer v. United States, 151, 157
O'Neal v. Morgan, 72	Reynolds v. United States, 571, 604
O'Rourke v. Darbishire, 283	Rhode Island v. Innis, 602
Ohler v. United States, 733	Richardson v. Marsh, 33, 224
Ohio v. Roberts, 516, 583, 590, 596, 598, 603	Ricketts v. City of Hartford, 50
Old Chief v. United States, 21, 740	Riley v. K Mart Corp., 426
Opus 3 Ltd. v. Heritage Park, Inc., 254, 261	Rimkus v. N.W. Colo. Ski Corp., 124
Palmer v. Hoffman, 476, 479, 491, 729	Robinson v. Mandell, 206, 210
Parker v. Gladden, 151	Rock v. Arkansas, 219
Parker v. Reda, 463	Rocky Mountain Helicopters, Inc. v. Bell Helicopters, 128
Pasadena Research Laboratories v. United States, 56	Rogers v. United States, 172
Patterson v. Caterpillar, Inc., 322	Rosen v. United States, 142
Patterson v. New York, 652, 663, 667, 669	Rowland v. American General Finance, Inc., 568
Pau v. Yosemite Park & Curry Co., 412	Rowland v. United States, 706
Paul F. Newton & Co. v. Texas Commerce Bank, 433	Rutan v. Republican Party of Illinois, 376
Pavlik v. Cargill, Inc., 294	Ryan v. Commissioner, 307
Penguin Books U.S.A., Inc. v. New Christian Church, 66	S.E.C. v. Towers Financial Corp., 85
People v. Campobello, 345	Sanders v. New York City Human Resources Admin., 173
People v. Collins, 34, 43	Sandstrom v. Montana, 663
People v. Eli, 90	Sanitary Grocery Co. v. Snead, 445
People v. Green, 576	Santos v. Murdock, 711
People v. Hill, 395	Schafer v. Time, Inc., 85
People v. Jennings, 207	Schering Corp. v. Pfizer, Inc., 569
People v. Monterroso, 608	Schlup v. Delo, 290
People v. Sarzano, 534	Schneider v. Revici, 507
People v. Watson, 41	Sea Hawk Seafoods, Inc. v. Alyeska Pipeline Service Co., 157
Pereira v. United States, 304	Sea-Land Service, Inc. v. Lozen International, LLC, 420
Perrin v. Anderson, 85, 119	SEC v. Peters, 92
Pfeil v. Rogers, 539	Seiler v. Lucasfilm, Ltd., 350, 365
Philadelphia v. Westinghouse Electric Corp., 277	Shelton v. Consumer Products Safety Com'n, 480
Phillips v. Hillcrest Med. Ctr., 728	Shepard v. United States, 455, 533, 537
Pierce v. E.R. Tripler & Co., 133	Silver v. New York Cent. R. Co., 397
Pillsbury Co. v. Cleaver-Brooks Div. of Aquachem, Inc., 420	Silverstein v. Chase, 556
Pinkerton v. United States, 551, 558-559	Simmons, Inc. v. Pinkerton's, Inc., 705
	Simms v. Dixon, 68

Simpson v. Jefferson Standard Life Insurance Co., 639	Toucet v. Maritime Overseas Corp., 235
Sindell v. Abbott Laboratories, 48	Trammel v. United States, 283, 298, 304, 313–314, 325, 330
Smith v. Phillips, 151	Trindle v. Sonat Marine, Inc., 693
Smith v. Rapid Transit, 47	Tucker v. United States, 297
Snyder v. General Paper Corp., 8	Twin City Fire Ins. Co. v. Country Mut. Ins. Co., 381, 508
Society of Jesus of New England v. Commonwealth, 345	United States v. Cohen, 544 F.2d 781 (5th Cir. 1977), 688–689
Sosna v. Iowa, 301	United States v. Cohen, 631 F.2d 1223 (5th Cir. 1980), 461
Southern Pac. Co. v. Jensen, 507	United States v. Abcasis, 156
Southern Stone Co., Inc. v. Singer, 416	United States v. Abel, 192, 406, 695
Specht v. Jensen, 246	United States v. Abreu, 56
Sphere Drake Insurance PLC v. Trisko, 237	United States v. Acker, 310
Sporck v. Peil, 170	United States v. Adair, 89
St. Mary’s Honor Center v. Hicks, 644, 649	United States v. Adams, 728
Stanton v. Stanton, 302	United States v. Adedoyin, 496
State ex. rel Great Am. Ins. Co. v. Smith, 295	United States v. Alaniz, 100
State v. Alcorn, 546	United States v. Albert, 71
State v. Brown, 186	United States v. Alexander, 287 F.3d 811 (9th Cir. 2002), 271
State v. Burden, 598	United States v. Alexander, 331 F.3d 116 (D.C. Cir. 2003), 445
State v. Glenn, 345	United States v. Allen, 341 F.3d 870 (9th Cir. 2003), 30
State v. Hampton, 8	United States v. Allen, 542 F.2d 630 (4th Cir. 1976), 255
State v. Kuone, 592	United States v. Allen, 579 F.2d 531 (9th Cir. 1978), 716
State v. Lingar, 295	United States v. Allery, 300
State v. Lyons, 205	United States v. Almeida, 272
State v. Macumber, 290	United States v. Alperin, 322
State v. Microsoft Corp., 445	United States v. Alzanki, 232
State v. Norlin, 103	United States v. Amado-Núñez, 623
State v. Powers, 607	United States v. Ammar, 310
State v. Robinson, 592	United States v. Andrus, 416, 434
State v. Rushing, 16	United States v. Angelini, 84
State v. Satterfield, 538	United States v. Angleton, 535
State v. Sneed, 41	United States v. Anifowoshe, 102
State v. Sorenson, 592	United States v. Arnott, 172
State v. Steele, 259	United States v. Arthur Andersen, LLP, 721
State v. Taylor, 16, 69	United States v. Avants, 532, 607
State v. Webb, 600	United States v. Bagaric, 677
State v. Wisdom, 12	United States v. Bahadar, 519
Steele v. Wiedemann Mach. Co., 124	United States v. Bahe, 310
Sternhagen v. Dow Co., 537	United States v. Bailey, 319 F.3d 514 (D.C. Cir. 2003), 97, 495
Summers v. Tice, 48	United States v. Bailey, 834 F.2d 218 (1st Cir. 1987), 85
Swidler & Berlin v. United States, 287	United States v. Bailey, 327 F.3d 1131 (10th Cir. 2003), 131
Tanner v. United States, 149	United States v. Baines, 433
Taylor v. Illinois, 219	
Tennessee v. Street, 588, 603, 608	
Tesser v. Board of Educ., 322	
Texaco Puerto Rico v. Dep’t of Consumer Affairs, 295	
Texas Dept. of Community Affairs v. Burdine, 645–646	
TLT-Babcock, Inc. v. Emerson Elec. Co., 124	
Tome v. United States, 401, 717	
Tot v. United States, 655, 662	

TABLE OF CASES

xxxii

United States v. Baker, 132	United States v. Campos, 221 F.3d 1143 (10th Cir. 2000), 30
United States v. Barlow, 566	United States v. Campos, 217 F.3d 707, 711 (9th Cir.2000), 244
United States v. Barnard, 220	United States v. Candelaria-Silva, 433
United States v. Barone, 71	United States v. Card, 185
United States v. Barrera, 478	United States v. Cardenas, 54
United States v. BDO Seidman, 271	United States v. Carmona, 13
United States v. Beauchamp, 704	United States v. Carroll, 860 F.2d 500 (1st Cir. 1988), 362
United States v. Bednar, 706	United States v. Carroll, 207 F.3d 465 (8th Cir. 2000), 98
United States v. Beechum, 95	United States v. Carson, 513
United States v. Bello, 613, 626	United States v. Carter, 33
United States v. Benavente Gomez, 726	United States v. Castro-Ayon, 399
United States v. Bennett, 161 F.3d 171, 185 (3d Cir.1998), 245	United States v. Catabran, 77
United States v. Bennett, 363 F.3d 947 (9th Cir. 2004), 357	United States v. Cathey, 688, 693
United States v. Best, 101	United States v. Cestnik, 474
United States v. Beverly, 46	United States v. Chapman, 305
United States v. Biaggi, 139	United States v. Charles George Trucking Co., 460
United States v. Bibbs, 712	United States v. Chase, 322
United States v. Big Crow, 90	United States v. Check, 726
United States v. Black, 77	United States v. Chen, 292
United States v. Blackburn, 494	United States v. Cherry, 557
United States v. Blackwell, 69	United States v. Chischilly, 42, 199, 204
United States v. Blakey, 438	United States v. Citron, 370
United States v. Blunt, 615	United States v. Clark, 712 F.2d 299 (7th Cir. 1983), 310
United States v. Booz, 467	United States v. Clark, 18 F.3d 1337 (6th Cir. 1994), 435
United States v. Bowers, 29, 615	United States v. Clarke, 565, 567
United States v. Branham, 426	United States v. Clemons, 271
United States v. Bray, 366	United States v. Clifford, 185
United States v. Brewer, 2002 WL 596365 (N.D.Ill.2002), 209	United States v. Cohen, 461
United States v. Brewer, 630 F.2d 795 (10th Cir.1980), 55	United States v. Collicott, 34
United States v. Bridges, 65	United States v. Collins, 178, 261
United States v. Brink, 411	United States v. Connolly, 157
United States v. Brito-Hernandez, 693	United States v. Cook, 686
United States v. Brodie, 503	United States v. Cordoba, 104 F.3d 225 (9th Cir.1997), 215, 217
United States v. Brooke, 678	United States v. Cordoba, 991 F.Supp. 1199 (C.D.Cal.1998), 215
United States v. Brown, 2000 WL 876382 (6th Cir. 2000), 741	United States v. Cox, 434
United States v. Brown, 490 F.2d 758, 762-63 (D.C. Cir. 1974), 461	United States v. Crisp, 206
United States v. Browne, 686	United States v. Cromer, 607
United States v. Bruguier, 91	United States v. Cropp, 257
United States v. Bryan, 302, 313	United States v. Cruz, 325 F.3d 392 (3d Cir. 2003), 33
United States v. Bumpass, 556	United States v. Cruz, 358 F.3d 623 (9th Cir. 2004), 247
United States v. Burch, 139	United States v. Curry, 90
United States v. Bush, 91	United States v. Curtis, 90, 681
United States v. Butts, 703	
United States v. Bynum, 677	
United States v. Byrd, 309	
United States v. Cabaccang, 358	
United States v. Campbell, 438	

United States v. Daniels, 770 F.2d 1111 (D.C. Cir. 1985), 33	United States v. Finley, 934 F.2d 837 (7th Cir. 1991), 92
United States v. Daniels, 957 F.2d 162 (5th Cir. 1992), 692	United States v. Fleming, 30
United States v. Day, 830 F.2d 1099 (10th Cir. 1987), 155	United States v. Foley, 693
United States v. Day, 789 F.2d 1217 (6th Cir.1986), 399	United States v. Fowler, 160
United States v. Dean, 30	United States v. Franks, 474
United States v. Deckard, 616	United States v. Friedman, 719–720
United States v. Deeb, 565	United States v. Fuentes, 71
United States v. Dees, 700	United States v. Fulk, 680
United States v. Defazio, 273	United States v. Furst, 476
United States v. Dennis, 843 F.2d 652 (2d Cir. 1988), 273	United States v. Gabe, 450
United States v. Dennis, 625 F.2d 782 (8th Cir.1980), 410	United States v. Gainey, 661
United States v. Dent, 566	United States v. Garner, 513
United States v. Desena, 433	United States v. Gentry, 477
United States v. Dhinsa, 563	United States v. George, 449
United States v. Diaz, 84	United States v. Gibson, 102
United States v. DiDomenico, 413, 435	United States v. Gil, 413–414
United States v. Dietrich, 398	United States v. Gillock, 309, 314–315, 326, 339
United States v. Dillon, 9	United States v. Glass, 321
United States v. DiNapoli, 522	United States v. Glenn, 184
United States v. Dioguardi, 152	United States v. Godwin, 180
United States v. DiPaolo, 702	United States v. Goins, 177
United States v. Distler, 410	United States v. Gomez-Norena, 735
United States v. Donahue, 100	United States v. Gonzales-Benitez, 356
United States v. Dotson, 676	United States v. Gould, 619, 627
United States v. Dovico, 546	United States v. Grandmont, 12
United States v. Drew, 99	United States v. Gray, 876 F.2d 1411 (9th Cir. 1989), 271
United States v. Dring, 713	United States v. Gray, 852 F.2d 136 (4th Cir. 1988), 692
United States v. Duffy, 349	United States v. Greatwalker, 30
United States v. Duke, 89	United States v. Green, 410
United States v. Dunford, 335	United States v. Greene, 137
United States v. Duran, 53	United States v. Gricco, 496
United States v. Durham, 163	United States v. Guardia, 112
United States v. Earles, 565–566	United States v. Guerrero, 100
United States v. Ebner, 33	United States v. Guinan, 565
United States v. Elliott, 681	United States v. Haddock, 361
United States v. Ellis, 717	United States v. Hale, 418
United States v. Emery, 563	United States v. Hall, 165 F.3d 1095 (7th Cir. 1999), 173, 569
United States v. Enjady, 111	United States v. Hall, 346 F.2d 875 (2d Cir. 1965), 271
United States v. Entrekin, 304	United States v. Hall, 854 F.2d 1036 (7th Cir. 1988), 46
United States v. Estes, 310	United States v. Hankins, 364
United States v. Etheridge, 537	United States v. Hanson, 378
United States v. Evans, 271	United States v. Harrington, 77
United States v. Fawaz, 565	United States v. Harrison, 420
United States v. Ferber, 445	United States v. Harvey, 414
United States v. Filani, 179	United States v. Hathaway, 565, 568
United States v. Finley, 301 F.3d 1000 (9th Cir. 2002), 243	United States v. Hayward, 245

TABLE OF CASES

xxxiii

United States v. Haywood, 101, 102	United States v. King, 73 F.R.D. 103 (E.D.N.Y.1976), 340
United States v. Henley, 156	United States v. Kovel, 273
United States v. Hensel, 396	United States v. Krapp, 89
United States v. Herder, 84	United States v. Kuku, 305
United States v. Hernandez, 330 F.3d 964 (7th Cir.2003), 416	United States v. Ladd, 56
United States v. Hernandez, 333 F.3d 1168 (10th Cir. 2003), 465	United States v. Lang, 364 F.3d 1210 (10th Cir. 2004), 414
United States v. Hernandez-Fundora, 615, 626	United States v. Lang, 589 F.2d 92 (2d Cir.1978), 176, 517, 519
United States v. Hewitt, 84	United States v. Lara, 172
United States v. Hickerson, 728	United States v. Laster, 563
United States v. Hicks, 203	United States v. Laughlin, 727
United States v. Higa, 705	United States v. Lawson, 139
United States v. Hines, 210, 228	United States v. Layton, 539
United States v. Holmquist, 71	United States v. Lea, 217
United States v. Horn, 628	United States v. Lechoco, 450
United States v. Houlihan, 457, 462	United States v. LeCompte, 98–101
United States v. Hsia, 548	United States v. LeFevour, 34
United States v. Hudson, 711	United States v. Lemire, 480
United States v. Inadi, 586, 590, 603	United States v. Lemonakis, 537
United States v. Ince, 708	United States v. Lentz, 563
United States v. Ingraham, 96	United States v. Lester, 224
United States v. Iron Shell, 447	United States v. Lewis, 220 F.Supp.2d 548 (S.D.W.Va.2002), 209
United States v. Ismoila, 565	United States v. Lewis, 482 F.2d 632 (D.C.Cir.1973), 675, 681
United States v. Jackson, 261	United States v. Lewis, 833 F.2d 1380 (9th Cir. 1987), 617
United States v. Jean-Baptiste, 500	United States v. Li, 34
United States v. Jenkins, 345 F.3d 928 (6th Cir. 2003), 480	United States v. Lieberman, 474
United States v. Jenkins, 579 F.2d 840 (4th Cir. 1978), 458	United States v. Lin, 678
United States v. Joe, 449, 462	United States v. Lindemann, 713
United States v. John, 83	United States v. Livingston, 399–400
United States v. Johnson, 27 F.3d 1186 (6th Cir. 1994), 101	United States v. Looper, 160
United States v. Johnson, 575 F.2d 1347 (5th Cir. 1978), 190	United States v. Lopez, 677
United States v. Johnson, 594 F.2d 1253, 1256 (9th Cir.1979), 368	United States v. Lucas, 102
United States v. Johnson, 200 F.3d 529 (7th Cir. 2000), 431	United States v. Luna, 100
United States v. Jones, 61	United States v. Lundy, 237
United States v. Jorgensen, 137	United States v. Lyon, 175
United States v. Kairys, 64	United States v. Mackey, 493
United States v. Kaiser, 29	United States v. Macomb, 571
United States v. Kehm, 515	United States v. Madera, 359
United States v. Khan, 72	United States v. Maguire, 100
United States v. Kiendra, 691	United States v. Mandel, 676
United States v. Kimball, 519	United States v. Mann, 515
United States v. King, 356 F.3d 774 (7th Cir. 2004), 57	United States v. Manning, 514
United States v. King, 613 F.2d 670 (7th Cir. 1980), 492	United States v. Manos, 87
	United States v. Manske, 678
	United States v. Marashi, 297
	United States v. Maravilla, 8
	United States v. Marcantoni, 362
	United States v. Marchini, 565–566

- United States v. Marin, 413
- United States v. Marino, 419–420
- United States v. Martin, 189 F.3d 547 (7th Cir. 1999), 177
- United States v. Martin, 278 F.3d 988 (9th Cir. 2002), 266
- United States v. Martin Linen Supply Co., 665
- United States v. Marvin P. Jones, 611
- United States v. Matt, 179
- United States v. McGaughey, 365
- United States v. McGee, 412
- United States v. McGuire, 514
- United States v. McLennan, 392
- United States v. McMahon, 259, 261
- United States v. McQuiston, 99
- United States v. Medical Therapy Sciences, Inc., 714
- United States v. Medico, 437
- United States v. Medina, 728
- United States v. Mejia-Velez, 437
- United States v. Mendoza, 304
- United States v. Meserve, 725, 735
- United States v. Messina, 179, 215, 220
- United States v. Mezzanatto, 139
- United States v. Miller, 520
- United States v. Mitchell, 234
- United States v. Mojica, 704
- United States v. Molina, 435
- United States v. Montague, 410, 716
- United States v. Montana, 381
- United States v. Monteleone, 87
- United States v. Moore, 970 F.2d 48 (5th Cir. 1992), 322
- United States v. Moore, 115 F.3d 1348 (7th Cir. 1997), 100
- United States v. Morales, 244–246
- United States v. Morales-Madera, 360
- United States v. Morlang, 709
- United States v. Morris, 29
- United States v. Morrison, 677
- United States v. Mothershed, 101
- United States v. Munoz-Franco, 158
- United States v. Murphy, 696 F.2d 282 (4th Cir. 1982), 513
- United States v. Murphy, 193 F.3d 1 (1st Cir. 1999), 434
- United States v. Murzyn, 85
- United States v. Mussaleen, 34
- United States v. Myers, 10
- United States v. Narciso, 447
- United States v. Neff, 501
- United States v. Nersesian, 458
- United States v. Newton, 62
- United States v. Nielsen, 744
- United States v. Nivica, 163
- United States v. Nixon, 290, 302, 305, 313–314, 330, 339, 429
- United States v. Norwood, 229
- United States v. Oates, 483
- United States v. Oaxaca, 687
- United States v. Obayagbona, 438
- United States v. Olano, 741, 744
- United States v. Oliver, 499
- United States v. Orlandez-Gamboa, 138
- United States v. Orlando-Figueroa, 693
- United States v. Orellana-Blanco, 741
- United States v. Ospina, 419
- United States v. Owens, 404, 406, 532, 582
- United States v. Owens-El, 176
- United States v. Paguio, 556
- United States v. Parker, 438
- United States v. Parry, 382
- United States v. Patterson, 468–469
- United States v. Paulino, 935 F.2d 739 (6th Cir. 1991), 369
- United States v. Paulino, 13 F.3d 20 (1st Cir. 1994), 418
- United States v. Payton, 693
- United States v. Peppers, 542
- United States v. Peterson, 518
- United States v. Pheaster, 458, 462
- United States v. Philip Morris Inc., 265
- United States v. Phillips, 681
- United States v. Piccinonna, 217
- United States v. Piggie, 615
- United States v. Piper, 742
- United States v. Pitts, 60
- United States v. Pizarro, 520
- United States v. Platero, 108
- United States v. Pless, 151–152
- United States v. Posada-Rios, 258
- United States v. Posado, 215, 217, 220
- United States v. Powers, 432
- United States v. Premises Known As 281 Syossett Woodbury Road, 310
- United States v. Prince-Oyibo, 214
- United States v. Pryce, 701
- United States v. Pulley, 261
- United States v. Queen, 102
- United States v. Ragghianti, 400
- United States v. Ramirez, 215
- United States v. Ramsey, 517
- United States v. Rangel, 353
- United States v. Rappy, 167
- United States v. Ray, 735

TABLE OF CASES

xxxv

- United States v. Rea, 185
- United States v. Reed, 227 F.3d 763 (7th Cir. 2000), 412
- United States v. Reed, 700 F.2d 638 (11th Cir.1983), 90
- United States v. Register, 74
- United States v. Reilly, 64
- United States v. Rembert, 67
- United States v. Renville, 446, 449–450
- United States v. Reynolds, 285
- United States v. Rezaq, 30
- United States v. Rhynes, 252
- United States v. Riccardi, 165, 173, 468
- United States v. Richards, 107
- United States v. Rizzo, 71
- United States v. Roach, 156
- United States v. Roberson, 897 F.2d 1092, 1096 (11th Cir.1990), 56
- United States v. Robinson, 645 F.2d 616 (8th Cir. 1981), 155
- United States v. Robinson, 161 F.3d 463 (7th Cir.1998), 100
- United States v. Robinson, 389 F.3d 582 (6th Cir. 2004), 607
- United States v. Rodriquez, 156
- United States v. Rolett, 99
- United States v. Rollins, 415
- United States v. Romero, 245
- United States v. Rosa, 494
- United States v. Rose, 742
- United States v. Roulette, 712
- United States v. Ruggiero, 52, 71
- United States v. Ruiz, 445
- United States v. Russell, 559
- United States v. Russo, 92
- United States v. Rutherford, 157
- United States v. Saada, 718
- United States v. Saelee, 210
- United States v. Saget, 607
- United States v. Salerno, 524
- United States v. Sanchez, 217, 220
- United States v. Sawyer, 492
- United States v. Scales, 367
- United States v. Schatzle, 85
- United States v. Scheffer, 217–218, 239
- United States v. Schoenborn, 467
- United States v. Scholl, 92
- United States v. Schwab, 682
- United States v. Schweih, 101
- United States v. Scott, 284 F.3d 758 (7th Cir. 2002), 562
- United States v. Scott, 270 F.3d 30 (1st Cir. 2001), 58
- United States v. Sears, 420
- United States v. Seavoy, 569
- United States v. Seelig, 367
- United States v. Segal, 297
- United States v. Senak, 468–469
- United States v. Sepulveda, 261
- United States v. Sheffey, 241
- United States v. Shewfelt, 282
- United States v. Shomo, 8
- United States v. Shwayder, 92
- United States v. Siddiqui, 74
- United States v. Simonelli, 717
- United States v. Sims, 310
- United States v. Sindona, 517
- United States v. Singleton, 272, 303
- United States v. Sioux, 114
- United States v. Skeet, 183
- United States v. Sliker, 51
- United States v. Smith, 230 F.3d 300 (7th Cir. 2000), 98
- United States v. Smith, 103 F.3d 600 (7th Cir.1996), 99
- United States v. Smith, 197 F.3d 225 (6th Cir. 1999), 468
- United States v. Smith, 521 F.2d 957 (D.C. Cir. 1975), 484
- United States v. Smith, 792 F.2d 441 (4th Cir.1986), 681
- United States v. Smith, 80 F.3d 1188 (7th Cir.1996), 680
- United States v. Snow, 384, 395
- United States v. Sokolow, 492
- United States v. Sollars, 469
- United States v. Solomon, 191
- United States v. Solorio, 261
- United States v. Soulard, 78
- United States v. Sovie, 71
- United States v. Sriram, 306
- United States v. Standing Soldier, 61, 365
- United States v. Starzeczyzel, 208, 212
- United States v. Stearns, 69
- United States v. Stevens, 431
- United States v. Stiger, 744
- United States v. Stone, 235
- United States v. Stratton, 176–177
- United States v. Strother, 480
- United States v. Sutton, 34
- United States v. Tank, 76
- United States v. Tarantino, 705
- United States v. Taylor, 530 F.2d 639 (5th Cir.1976), 69
- United States v. Taylor, 54 F.3d 967 (1st Cir.1995), 726

United States v. Taylor, 800 F.2d 1012 (10th Cir.1986), 728	United States v. Williams, 661 F.2d 528 (5th Cir. 1981), 480
United States v. Tedder, 271	United States v. Williams, 545 F.2d 47 (8th Cir. 1976), 15
United States v. Thai, 161	United States v. Williams, 642 F.2d 136 (5th Cir. 1981), 691
United States v. Thomas, 85	United States v. Williams, 737 F.2d 594 (7th Cir. 1984), 410
United States v. Thompson, 286 F.3d 950 (7th Cir. 2002), 562	United States v. Williams, 809 F.2d 75, 89 (1st Cir.1986), 56
United States v. Thompson, 708 F.2d 1294 (8th Cir.1983), 410	United States v. Wilson, 307 F.3d 596 (7th Cir. 2002), 102
United States v. Thornbrugh, 100	United States v. Wilson, 355 F.3d 358 (5th Cir. 2003), 411
United States v. Tipton, 60	United States v. Wilson, 532 F.2d 641 (8th Cir. 1976), 62
United States v. Tome, 449	United States v. Wilson, 556 F.2d 1177 (4th Cir. 1977), 693
United States v. Toth, 216	United States v. Wilson, 985 F.2d 348 (7th Cir.1993), 680
United States v. Touchstone, 10	United States v. Winchenbach, 30
United States v. Tracy, 433	United States v. Withorn, 115
United States v. Tropeano, 70	United States v. Worker, 358
United States v. Turner, 104 F.3d 217 (8th Cir.1997), 567	United States v. Wright, 783 F.2d 1091 (D.C. Cir. 1986), 238
United States v. Turner, 475 F.Supp. 194 (E.D. Mich. 1978), 548	United States v. Wright, 343 F.3d 849 (6th Cir. 2003), 388
United States v. United Kingdom, 305	United States v. Wynn, 727
United States v. United Shoe Machinery Corp., 278	United States v. Yamin, 352
United States v. Valencia, 694	United States v. Yazzie, 117, 183
United States v. Van Dorn, 694	United States v. Yerardi, 308
United States v. Vest, 410	United States v. Yildiz, 426
United States v. Veysey, 46, 48	United States v. Young, 316 F.3d 649 (7th Cir. 2002), 231
United States v. Vigneau, 471	United States v. Young, 814 F.2d 392 (7th Cir. 1987), 415
United States v. Vigoa, 566	United States v. Zappola, 520
United States v. Viserto, 8, 496	United States v. Zenni, 391
United States v. Vuitch, 665	United States v. Zizzo, 680
United States v. Wallace, 692	United States v. Zolin, 281, 291
United States v. Ward, 989 F.2d 1015 (9th Cir. 1992), 158	University of Pennsylvania v. EEOC, 313, 329-330, 334
United States v. Ward, 377 F.3d 671 (7th Cir. 2004), 414	University of Rhode Island v. A.W. Chester-ton Co., 238
United States v. Watson, 675, 681	Upjohn Company v. United States, 273
United States v. Webster, 712	Vazquez v. National Car Rental System, Inc., 543
United States v. Weichert, 693	Victor v. Nebraska, 46
United States v. Weinstock, 511	W. Fire Ins. Co. v. Word, 726
United States v. Weise, 84	Waldorf v. Shuta, 187
United States v. Wells, 97	Walker v. Firestone Tire & Rubber Co., 677
United States v. West, 513	Washington v. Texas, 219
United States v. West, 513	Watson v. Fort Worth Bank & Trust, 647
United States v. Westerbrook, 735	
United States v. Westmoreland, 71, 310, 741	
United States v. White Ready-Mix Concrete Co., 90	
United States v. White, 720	
United States v. Whitmore, 673	
United States v. William Allen Jones, 622	
United States v. Williams, 927 F.2d 95 (2d Cir. 1991), 512	

TABLE OF CASES

xxxvii

Watson v. United States, 350	Wilson v. City of Chicago, 675
Webb v. Lane, 537	Wilson v. Clancy, 386
Weston-Smith v. Cooley Dickinson Hospital, 420	Wilson v. Volkswagen of America, Inc., 120
Whatley v. Merit Distribution Services, 296	Wisconsin v. Yoder, 159
Wheeler v. Sims, 480	Wm. T. Thompson Co. v. General Nutrition Corp., 322
White v. Illinois, 588, 593, 601, 603	Wolak v. Spucci, 107
Whitehurst v. Wright, 711	Wolfe v. United States, 299–300, 313–314, 332
Whiting v. United States, 501	Wong Sun v. United States, 10, 297
Wiedmann v. Galiano, 158	Woods v. LeCureux, 240
Williams v. United Dairy Farmers, 520	Wyatt v. United States, 300
Williams v. United States, 676	Young Ah Chor v. Dulles, 501
Williamson v. United States, 549, 596	Young v. James Green Management, Inc., 426
Willingham v. Mullin, 30	

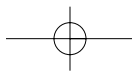
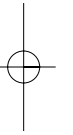
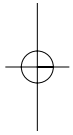


Table of Federal Rules of Evidence

FRE 102, 147, 507	FRE 402, 3–5, 19, 22, 29, 31, 82, 95–96, 98, 121, 192, 696
FRE 103, 723–724, 726–730, 734–737, 741–742	FRE 403, 10, 13, 19–24, 27–34, 43–45, 59, 81, 85, 91, 95–96, 98, 108, 112–113, 115, 119, 121, 128, 142, 148, 158, 181, 195, 199, 206, 215–216, 227–230, 234, 237, 241, 263, 405, 414, 424–425, 496, 560, 674, 676, 683, 685, 690–691, 697–698, 705, 710, 713, 740
FRE 103(a), 723–724, 726–728, 730, 734–737, 742	FRE 404, 23, 30, 81–85, 89, 92–105, 107–108, 110–111, 114–115, 117, 119, 121, 459, 500, 672, 674–675, 681–683, 690, 694, 727–728
FRE 103(b), 729	FRE 404(a), 82, 83–85, 89, 97–98, 104–105, 117, 119, 459, 500, 672, 681
FRE 103(c), 735	FRE 404(a)(1), 83, 85, 89, 104, 117
FRE 103(d), 741	FRE 404(a)(2), 83–85, 98, 104–105, 117, 119
FRE 104, 15–18, 31, 51, 71, 94–96, 107–108, 110–113, 134, 176, 190, 194, 236–237, 265, 284, 286, 370, 413–414, 420, 426, 428–430, 432–433, 440, 520, 542, 558	FRE 404(a)(3), 85, 672
FRE 104(a), 15–18, 51, 71, 94–96, 108, 110–113, 134, 190, 194, 236–237, 265, 284, 286, 370, 413–414, 420, 426, 428–430, 432–433, 440, 520, 558	FRE 404(b), 23, 30, 82, 92–105, 107, 110–111, 114–115, 117, 119, 121, 459, 674–675, 682, 694, 727–728
FRE 104(b), 17–18, 31, 51, 71, 96, 107–108, 110–112, 134, 176, 370, 413–414, 420, 428, 542	FRE 405, 86–89, 91–92, 98, 104, 108, 117, 119, 500, 716
FRE 104(c), 16	FRE 405(a), 87–89, 91–92, 117, 500, 716
FRE 104(e), 16	FRE 405(b), 87, 117
FRE 105, 32, 81, 96, 147, 238, 322, 414	FRE 406, 82, 84, 115, 117–120
FRE 106, 33–34	FRE 407, 121–128, 148, 459
FRE 201, 194, 609–610, 612–616, 618–623, 625–629	FRE 408, 129, 132–136, 139, 459
FRE 201(a), 609, 614, 620, 625, 627	FRE 409, 129, 135
FRE 201(b), 609, 612, 614–616, 619, 625–626	FRE 410, 136–139, 691
FRE 201(c), 609, 629	FRE 411, 129, 134–135, 459
FRE 201(d), 609	FRE 412, 105–108, 114, 548
FRE 201(e), 609, 628	FRE 413, 105, 110–111, 113–115
FRE 201(f), 609, 622–623	FRE 414, 110, 115
FRE 201(g), 609–610, 614–616, 620–621, 623, 627–629	FRE 415, 81, 105, 109–111, 113–115
FRE 301, 635–637, 639–641, 645, 647, 649–651	FRE 501, 146, 264–266, 275, 278, 283–284, 288, 290, 296–297, 300–301, 304, 309, 311–316, 322, 324–326, 330–331, 334–335, 337–341, 650, 740
FRE 302, 146, 650	
FRE 401, 6, 8, 13–15, 17, 19, 22, 24, 29, 31, 81–82, 95, 98, 104, 121, 129, 192, 199, 696	

FRE 601, 142–148, 158, 311, 650, 703	FRE 801(c), 373, 375, 378–379, 383, 391, 397, 424–425, 472, 480, 498
FRE 602, 148, 170, 175–177, 194, 234–235, 440, 498, 618	FRE 801(d)(1), 398–411, 469, 532, 581, 706, 711, 717
FRE 603, 148, 160–161	FRE 801(d)(1)(A), 398–400, 409–410, 469, 532, 581, 706, 711, 717
FRE 604, 161	FRE 801(d)(1)(B), 398, 401–406, 411, 717
FRE 605, 143, 148, 158, 180, 618	FRE 801(d)(1)(C), 398, 407–409, 411
FRE 606, 143, 148–158	FRE 801(d)(2), 177, 398, 408, 411–421, 423–435, 461, 473, 552, 562, 586, 711, 721, 741–742
FRE 606(a), 143, 155	FRE 801(d)(2)(A), 412–414, 418, 420, 461, 721
FRE 606(b), 143, 149–158	FRE 801(d)(2)(B), 415–417, 419–421, 435, 721
FRE 607, 377, 672, 696, 709, 711, 721	FRE 801(d)(2)(C), 424–425
FRE 608, 117, 672–679, 681–682, 691, 693–694, 696, 698, 705, 714–717, 719–720, 725–726	FRE 801(d)(2)(D), 424–426, 435
FRE 608(a), 672–673, 675, 681, 714–716	FRE 801(d)(2)(E), 177, 427–435, 552, 562, 586, 742
FRE 608(a)(1), 675	FRE 802, 373, 406–407, 498, 514, 536, 725
FRE 608(a)(2), 675, 714	FRE 803, 65–66, 91, 133, 173, 436–441, 443–451, 457–464, 466–471, 473, 476–482, 484–496, 498–511, 521, 532, 564–568, 588–589, 607, 629, 694, 718
FRE 608(b), 672, 674–679, 681–682, 691, 693–694, 698, 705, 716–717, 719–720	FRE 803(1), 437–438, 441, 443–446, 470
FRE 608(b)(1), 676, 716	FRE 803(2), 437, 439–441, 444–446, 588, 718
FRE 608(b)(2), 676, 716	FRE 803(3), 451, 457–462
FRE 609, 138, 672, 677, 679, 682–694, 696, 698, 719–720, 725–726, 731–733, 736	FRE 803(4), 446–450, 460, 588–589
FRE 609(a), 683, 685–686, 690–694, 726, 731–733	FRE 803(5), 173, 463–464, 466–470, 482, 492, 511
FRE 609(a)(1), 683, 685, 691, 693, 732–733	FRE 803(6), 471, 473, 476–481, 484, 486–489, 492–493, 564–566, 568
FRE 609(a)(2), 683, 685–686, 691–694	FRE 803(7), 477, 480, 492
FRE 609(b), 683, 688–690, 692–693, 725	FRE 803(8), 133, 481, 484–495, 629
FRE 609(c), 693	FRE 803(9), 494
FRE 609(d), 693	FRE 803(10), 492–493, 607
FRE 609(e), 694	FRE 803(11), 478–479
FRE 610, 696, 699–701	FRE 803(12), 494
FRE 611, 34, 163–165, 172, 369, 696, 703	FRE 803(13), 503
FRE 612, 168–173	FRE 803(14), 494
FRE 613, 706–707, 711–712, 720	FRE 803(15), 510–511
FRE 614, 177, 179–180	FRE 803(16), 65–66, 510
FRE 615, 252–262	FRE 803(17), 510, 566
FRE 701, 59–61, 180–187, 194, 241, 413, 492	FRE 803(18), 505–510, 567
FRE 702, 43, 59, 145–148, 180, 185–189, 192–200, 203, 215–216, 225–230, 234, 239, 241, 246	FRE 803(19), 498–504
FRE 703, 170, 174, 176, 194–195, 234–239, 261, 359, 447, 450, 493	FRE 803(20), 500, 504
FRE 704, 222, 239–241, 244–246	FRE 803(21), 91, 499–500, 504
FRE 705, 238	FRE 803(22), 495–496, 532, 694
FRE 706, 195, 247, 249–252	FRE 803(23), 495, 532
FRE 801, 177, 373, 375, 378–379, 383, 387, 391, 394–395, 397–421, 423–435, 461, 469, 472–473, 478, 480, 498, 505, 532, 544, 550, 552, 562, 581, 586, 608, 706, 711, 717, 721, 741–742	FRE 804, 408–409, 469, 478, 503, 511–533, 536–537, 539–546, 548–563, 565–568, 575, 587, 598, 724
FRE 801(a), 373, 387, 391, 394–395, 397, 550	
FRE 801(b), 373	

TABLE OF FEDERAL RULES OF EVIDENCE

FRE 804(a), 408–409, 469, 511–523, 532, 542, 545	FRE 901(b)(1), 68, 70, 355
FRE 804(a)(1), 512–514, 517,550	FRE 901(b)(2), 59–63
FRE 804(a)(2), 512–513, 519–520	FRE 901(b)(3), 60
FRE 804(a)(3), 408–409, 469, 513, 520, 532	FRE 901(b)(4), 62–63, 76
FRE 804(a)(4), 514–515, 520	FRE 901(b)(5), 51–53, 71
FRE 804(a)(5), 516, 520	FRE 901(b)(6), 72–74
FRE 804(b), 408, 503, 511–512, 514, 519–533, 536–537, 539–544, 546, 548–563, 566, 568, 587, 598, 724	FRE 901(b)(8), 53, 64–66, 78, 510
FRE 804(b)(1), 514, 519–533, 566, 587	FRE 901(b)(9), 68, 355
FRE 804(b)(2), 520, 536–537, 539–543, 724	FRE 902, 49, 79, 366, 471, 480–481, 483, 493
FRE 804(b)(3), 512, 520, 543–544, 546, 548–556, 598	FRE 1001, 351–355, 358–361, 364, 371
FRE 804(b)(4), 503, 520	FRE 1001(1), 351–354, 358–359
FRE 804(b)(6), 520, 557–563	FRE 1001(2), 358
FRE 805, 177, 424, 473, 475, 478, 498, 501	FRE 1001(3), 354–355, 358–359, 364
FRE 806, 719–721	FRE 1001(4), 360–361
FRE 807, 478, 500, 564–570, 593	FRE 1002, 347–348, 357–359, 480
FRE 901, 49–53, 55–57, 59–66, 68, 70–74, 76–79, 355, 368, 371, 510, 671	FRE 1003, 358, 360–362, 364–366, 372
FRE 901(a), 49–51, 55–57, 60, 62, 65, 68, 70, 72, 76–77, 368, 671	FRE 1004, 358, 363–365, 370–372
FRE 901(b), 49, 51–53, 59–66, 68, 70, 72–74, 76, 78, 355, 510	FRE 1005, 365–366, 371, 481
	FRE 1006, 367–371
	FRE 1007, 366
	FRE 1008, 370–372
	FRE 1101, 133, 145, 265, 284, 337, 341, 429

