

EVIDENCE:
CASES, MATERIALS, AND
PROBLEMS

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EVIDENCE: CASES, MATERIALS, AND PROBLEMS

FOURTH EDITION

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MATTHEW  BENDER

DEDICATION

To my wife without whose love, help and support this book could never have been done.

—P.F.R.

To my husband who reminds me daily to follow my dreams, and whose love and support is essential in everything I do.

—M.S.R.

To Susanne.

—D.C.

PREFACE TO THE FOURTH EDITION

Using this Book, Particularly its New Edition

The materials in this book cover a wide range of perspectives, from intensely pragmatic concerns, through deeply philosophical policy issues, to new approaches to evidentiary analysis. Included are textual explanations, rules, cases, notes, questions, problems, jury instructions, articles, proposals, legislation, and excerpted testimony. Assignments may be tailored to suit the teacher's own preferences on how to best approach Evidence in an introductory course.

The first chapter contains background-and-overview material describing Evidence and the litigation process as a whole, and evidentiary procedures in particular, including the role of the various players. It is comprised of material that one of us has been assigning regularly as reading to be done prior to the first class session. Students consistently report that this initial orientation facilitated their grasp of concepts over the entire semester.

Throughout the book we have supplied explanatory text and new cases and materials while retaining old favorites. One area requiring extensive treatment was the area of constitutional confrontation, owing to continued development of the U.S. Supreme Court's decision in *Crawford*, covered in Chapter 11, *infra*.

Burgeoning developments in scientific evidence and in the admissibility of electronic and digital information are also included.

We made room for new material by careful selection, pruning, editing, deleting less instructive cases, and summarizing some opinions or portions thereof. Except where we deemed it important for understanding, we eliminated from opinions most internal citations, extraneous passages and headings, and the plethora of ellipses one sometimes sees marking such deletions.

The new edition incorporates all recent Federal Rules of Evidence amendments, including the across-the-board restyling that went into effect in Dec., 2011. In that restyling, changes were made to nearly every rule to simplify reading. The restyling Advisory Committee said they did not intend to change any meaning or any result of any rule or ruling.

So far, the bulk of federal evidence cases involve the unstyled rules and most of the states have not restyled their similar rules. But normally the restyling would make no difference. Therefore, except where needed for clarity, we have not changed unstyled rule references in opinions. In the very rare instances where the restyling might be consequential, we have so noted, with an explanation of the potential effect. Where we are writing our own material, the restyled rules are used.

The book is predicated on the notion that the Federal Rules of Evidence, their state progeny, and cases arising under them, are the major factors in teaching Evidence. We include, however, interesting or informative cases or materials from other jurisdictions or

PREFACE TO THE FOURTH EDITION

the common law, when we feel they shed light on an issue or impart perspective by showing other ways of doing things. In particular we have highlighted significant differences between the California and the Federal Rules. But we think the Federal Rules provide a good organizing principle.

We have sequenced the topics in the book roughly along the same lines as the sequence of topics in the Federal Rules, with the exception of privileges and the so-called evidentiary “shortcuts” (judicial notice and presumptions), which we defer to the end for pedagogical reasons. But the book is designed to allow the teacher to adopt whatever order he or she prefers.

In the privileges chapter, we set forth verbatim, at the front of each section, the *Uniform* (not the *Federal*) Rules of Evidence codifying the particular privilege being treated, because the Federal Rules do not contain particular privileges, so the student profits from an additional “rudder” here. The Uniform Rules respecting privileges are somewhat more thorough and recent than the only Federal Rules draft that had particular privileges, the so-called Supreme Court draft, upon which the Uniform Rules are basically modeled (but with improvements more reflective of current law).

The general plan of the book is this. Each section starts out with a directive to read a particular rule or portion thereof. This may be followed by a brief background explanation of the area, if needed. Then come some essential and teachable cases and other primary materials, each usually followed by a set of expository notes (including some questions) exploring permutations and implications, and finally, some problems testing whether students can apply or critique what they have learned and integrate it with other topics and rules where necessary. Each note, question, or problem has a heading indicating what it treats, so that professors are able to identify the subjects they wish to cover, while students receive direction about the intended focus of each inquiry. All decisions cited by us in textual passages, notes, questions, and problems are followed by at least a few words describing the holding, so the student is not left to wonder or look the case up in order to get our point.

Most sections of the book bear a footnote to the relevant portion of ROTHSTEIN, RAEDER & CRUMP’S EVIDENCE IN A NUTSHELL that succinctly summarizes the principal points of the matter under study. The references are to portions of the *Nutshell* by their chapter number (Arabic numeral), chapter subdivision number (capital Roman numeral), and title (in words in quotes) of the portion within that nutshell subdivision. Thus, a citation might read: *Evidence in a Nutshell*, Chapter 1:II at “Curative and Cautionary Instructions.” The reader should find the location of this entry in the Table of Contents of the *Nutshell* and go to the relevant pages of the *Nutshell*. Any future editions of the *Nutshell* will have all the same designations.

The *Nutshell* referred to is more substantive than some other concise text offerings and is entirely compatible with the present book, being written by the same authors. Any use of the *Nutshell* is completely optional, however — the present book is entirely self-sufficient. But at least one of us makes regular assignments to the *Nutshell* along with readings in the present book. Some professors leave it to the students as to whether or not to consult the *Nutshell* as a study guide during the course or before finals. Some professors assign as *Nutshell* reading, those subjects, basics, or background areas, that they do not wish to spend much class time on, thereby freeing up class time for other issues they want to treat more extensively. Or they may wish to assign foundational reading they will expand upon in class without having to lay out fundamentals.

PREFACE TO THE FOURTH EDITION

Each of us is indebted to people too numerous to mention who have provided wise counsel in the preparation of this book. They include fellow teachers and, most of all, our students who, over the years, have made valuable suggestions that we have incorporated. Any errors, however, are our own.

Our aim, as always, is to help students navigate the sometimes treacherous but always fun waters of Evidence.

P.F.R.

M.S.R.

D.C.

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