

# SKILLS & VALUES: EVIDENCE

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# SKILLS & VALUES: EVIDENCE

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SECOND EDITION

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MATTHEW  BENDER

# *Introduction*

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These materials were created to assist you in incorporating lawyering skills into your substantive evidence class. They will give you the experience of thinking about and applying evidence doctrine as you would in real practice. At the same time, it will likely further your understanding of the underlying doctrine: most of our students have found that they have a much better grasp of the doctrine when they can see it in a practice context.

Each chapter offers a stand-alone assignment which focuses on a particular rule under the Federal Rules of Evidence. (We envision chapters will be assigned to correlate with the particular rule you are studying in class.) The assignments — which often include documents, diagrams, photographs and trial transcripts — will require you to put doctrine into action. Sometimes you will make an argument to the trial court; other times, you will conduct discovery, interview witnesses, examine witnesses on the stand to lay evidentiary foundations, or *voir dire* those witnesses to weaken the foundation.

Each chapter includes a self assessment component. Here, we provide our approach to the assignment. They are not *the answers*, because the lawyering activities involved are not in the nature of true-false questions. Different lawyers will approach the same problem differently. The assignments involve doctrinal interpretation, judgment, strategy, argumentation, and often ethics.

[While it would be easy to peek at the self study before working on the assignment, to do so defeats the whole purpose of this book, which is to teach and encourage you to think creatively like a lawyer in practice — there are no look ahead sections in real life.]

## *Webcourse*

This book also has an online component, which can be accessed on the **LexisNexis Webcourse**. Here, you will find the assessments, as well as other materials. These materials include a video demonstrating the impeachment of a witness with an inconsistent statement and an omission using the witness's written statement, adversarial video arguments to which you will be asked to respond, a 911 recording, and links to select United States Supreme Court Cases.

## *Organization of Each Chapter*

Each Chapter contains —

- An introduction that puts the chapter within the context of actual, day-to-day practice.
- A listing of skills involved in carrying out the assignment
- The relevant Federal Rules of Evidence

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## ***Introduction***

- This estimated time for completing is indicated by the icon below, each representing 15 minutes



- The difficulty of the assignment is represented by 1–5 “diamonds”



- Your role in the assignment, whether counsel for plaintiff or defendant, and the particular case. [Most of the assignments are based upon one of two hypothetical cases — the “Robbery case” (criminal) or the “Swingset Case” (civil) — the factual summaries of which are on pages iv-vi.]
- The assignment. [Note: your Instructor may in addition provide you with a question based upon the assignment and the self-study section to which a short, written response is required.]
- Jurisdiction  
State: Wasa  
County: Dusan  
City: Santa Magnolia
- Dates  
20XX = the current year  
20XX-1 = last year; 20XX-6 = 6 years ago

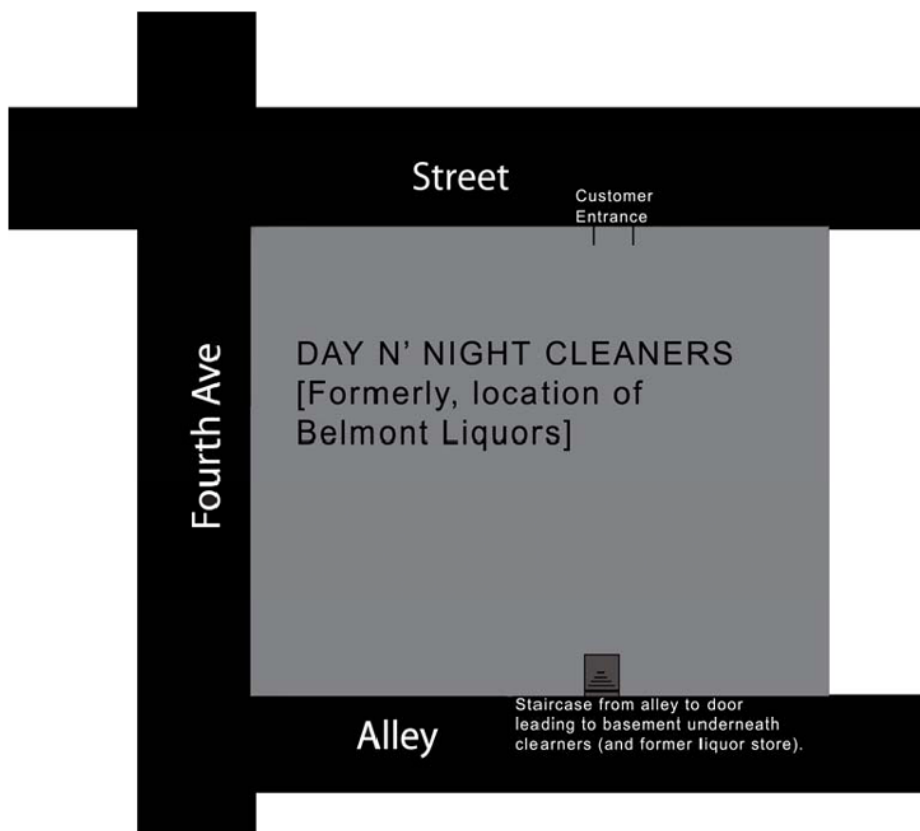
One last thing. Have fun; otherwise, what’s the point?

### **Criminal: The Robbery Case**

Ed Sam has been charged with robbing at gunpoint the attendant at Day ‘n Night Cleaners on August 15, 20XX-1 at 9:15 p.m. According to the police investigation, the robber entered through a door in the alley behind the store, escaping the same way.

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## *Introduction*



The sole eye-witness was the victim, Edward Miles, an employee of the cleaners. While Miles was “very shaken” when talking to police that night, he was able to give the police a description of the robber [5'9", 185 lbs, early 20's, Caucasian, male, short brown hair, red jacket.] Defendant was selected by the victim in a line-up in which the eye-witness told police, “#3 [the defendant] looks like the guy who robbed me”. Ed Sam is 27 years old, Caucasian, 5'11", 185 lbs, short brown hair, a small “soul patch” goatee and, when arrested was wearing a red jacket with a thin white stripe along each sleeve. Other than the jacket, the government does not have any physical or forensic evidence.

Ed has told his attorney the following: As a kid, he grew up in a rough neighborhood and was always getting in trouble. He dropped out of school at 16, amassing a juvenile record including petty thefts, fights, and a car theft, for which he spent a year in jail. A drunken fight on his 21st birthday led to a month in county jail, and to a decision to get his life on track. Ed first got his GED, went on to community college where he graduated with honors, and is currently the manager of a very successful grocery shopping service. He is engaged to a woman he met in community college (who is the administrative assistant to the head of a small software company), and plans to be married in the fall.

A the time of the robbery, Ed was playing cards with four friends. All claim that, but for “about fifteen minutes” when Ed went to get beer, he was with them all night. Two of Ed's friends, Nate Leste and Joaquin Moore have criminal convictions for theft crimes.

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## ***Introduction***

### **Civil: The Swing Set Case**

Bill Hunter is suing the City on behalf of his 4 year old son, Kenny. Kenny was seriously injured when the swing on which Bill was pushing him, completely collapsed when the chains suddenly dislodged from the wooden frame to which they had been attached.

Bill's theory is negligence, based on the fact that bent nails, rather than bolts, were used to attach the chains holding the seat of the swing to the wooden frame of the swingset. As it turns out, that morning the Park Crew discovered that the bolts holding the swing on which Kenny was injured were cracked. The crew did not have any replacement bolts with them, so initially they removed the chains and swing from the frame. Because they did not know where to leave the swing, however, they nailed it back and twisted it around the frame, planning to return with a new bolt the next day. The crew then left. Apparently, someone climbed up the frame and unwound the swing and chain before Kenny and his dad arrived at the park.

Kenny was rushed by ambulance to the hospital ER unconscious, and then sent to surgery. He had a ruptured spleen and severe head injuries, the latter resulting in permanent cognitive impairment.



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# *Learning Objectives*

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## Skills Covered in this Volume

- Planning an interview to obtain information to fulfill an evidentiary foundation; understanding relationship between doctrine and fact collection.
- Exclusion of Relevant Evidence on grounds of prejudice, confusion, or waste of time. [FRE 403].
- Analyzing a complex case; locating core rationales of case and precise case reasoning; writing persuasively.
- Understanding an evidence rule, including finding ways in the text of the rule to counter assertions by an adversary; meeting objections based upon multiple rules [FRE 404 (b), FRE 403]; using demonstrative evidence to support evidence argument; planning responses to anticipated questions by court (or opposing counsel).
- Translating a concept in a Rule (i.e., “Routine Practice”) to correlate with a factual pattern; seeking information both to fulfill the evidence foundation and to make evidence persuasive for the fact finder.
- Anticipate evidentiary objections to piece of evidence attorney intends to proffer; Interpret rule and assess whether legal arguments(s) against application of rule can plausibly be put forth; Develop strategies to maximize position in the event that opposing counsel’s objection to your proffered evidence is sustained by court; assessing ethical lines in attempting to skirt impact of adverse evidentiary ruling.
- Developing argument opposing a claim of privilege; explore ethical responsibilities in discovery; examine waiver of attorney-client privilege by accidentally providing confidential information in document production during discovery.
- Mastering evidence doctrine; planning for use of doctrine in a case; assessing doctrine within facts of case; deriving case information from records.
- Culling a document for impeachment material; picking up inconsistencies with, or omission from, a statement while “listening” to direct examination; planning impeachment with a prior statement; conducting impeachment with a document — both prior inconsistent statements and omissions.
- Qualifying an expert; planning voir dire of opposing expert by analyzing curriculum vitae; strategic perspectives on voir dire.
- Assessing the record from a transcript; utilizing a complex body of doctrine to evaluate the record; using record to create legal arguments under complex body of law.
- Mastering evidence doctrine; assessing evidence doctrine within case theory; responding to objections in trial context.
- Analyzing an adversary argument; planning to meet adversary argument; doing investigation for information regarding an evidentiary foundation; developing basic “points” in counterargument; planning cross-examination to weaken persuasiveness of evidence admitted over your objection.
- Understanding the interrelationship between doctrine and fact collection and characterization; gleaning information from documents, planning a voir dire (cross examination-like inquiry of a witness framing questions designed only to elicit information desired to support your position on the element(s) of an evidentiary objection.)
- Analyzing a document for evidentiary issues; drafting a declaration based on two, interrelated rules; analyzing a rule and making a persuasive argument based on that analysis.
- Analyzing opposing party’s argument; creating a counter-argument; performing a counter-argument; characterizing a factual record contained in an existing transcript to fulfill foundational requirements of evidentiary Rule.

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## *Learning Objectives*

- Culling a transcript for information to satisfy an evidentiary foundation; envisioning other information which would be helpful in satisfying a foundation; applying a Rule which consists of creating a story with circumstantial evidence [FRE 901(b)(1)](“Distinctive Characteristics”); applying a Rule with clear, black-letter exceptions [FRE 1004].