

EVIDENCE: TEACHING  
MATERIALS FOR AN AGE  
OF SCIENCE AND  
STATUTES

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# EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES

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Seventh Edition

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**MATTHEW  BENDER**

# *PREFACE TO THE SEVENTH EDITION*

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This edition continues to emphasize the themes of expert testimony, scientific evidence, and statutory construction in the law of evidence. It also retains an interdisciplinary approach, referencing social science and psychology research where relevant to particular evidentiary doctrines. In addition, we hope that students and professors alike will appreciate a more concise, streamlined approach throughout the text.

The new edition comes on the heels of the publication of the critically important NAS Report, *STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD* (2009), available at [www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf](http://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf). The full impact of this report will not be apparent for some time, but the report raises crucial questions about the use of forensic evidence in criminal prosecutions and the application of *Daubert* in civil as well as criminal cases. The report comes at the same time that the Supreme Court has shown an intense interest in the application of the Sixth Amendment Confrontation Clause to forensic reports. Citing the report and the new Supreme Court decisions, this edition continues the project that it has taken on for many years, namely, examining the intersection of science, law, evidence, and the Constitution. We lay out the issues and consider possible future directions, and raise questions for students to consider. We shall continue to keep a close eye on these issues in future supplements and editions.

This edition also coincides with the 2011 “restyling” of the Federal Rules of Evidence. Given our long emphasis on close reading of the statutory text, this wholesale revision of the language of the Rules must be highlighted. Of course, every new rule is accompanied by an Advisory Committee Note asserting that “[t]here is no intent to change any result in any ruling on evidence admissibility.” Yet, given the textualist approach that many judges take to statutory interpretation, the law of unintended consequences may come into play; several commentators have already begun to weigh in on possible substantive effects of the restyling. As in the case of the 2009 NAS Report, it is too soon to tell how the courts will treat the new rules. We have quoted the restyled Rules throughout this text—often contrasting the previous wording of the Rule. Hence, this edition should give students an excellent foundation for understanding the issues posed by the restyling.

Finally, we have continued the project of streamlining and tightening the text, removing extraneous and cumulative material that found its way in over the course of the six prior editions and numerous supplements. There is always a tension between completeness and brevity. However, in an Internet age in which supplementary materials are but a click away, we are committed to making students engagement with the text as smooth and uninterrupted as pedagogically feasible.

This edition comes to press with two new authors and the departure of Edward (Ted) Kionka and Kristine Strachan. We owe Professors Kionka and Strachan a huge debt. Ted was one of the original coauthors, and he was the primary author of the excellent, comprehensive teachers’ manual that has accompanied this coursebook since its inception. For several editions, Kristine provided the impetus to shorten and simplify the coursebook. Kristine was the one who forced the rest of us to make the tough coverage

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*PREFACE TO THE SEVENTH EDITION*

choices. We hope that they both will be pleased with this new edition, since in large part it still reflects their major contributions.

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# *PROVENANCE: NOTES FROM EARLIER PREFACES*

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## **Sixth Edition:**

On the statutory front, this edition comes hot on the heels of the latest amendment to the Federal Rules of Evidence, effective December 1, 2006. Although the ink is barely dry on these amendments, more may be in the offing. We like to think that developments since the publication of our fifth edition in 2002 have again confirmed the wisdom of our earlier decision to stress both statutory construction and expert testimony in this coursebook.

There are also noteworthy developments regarding expert testimony. Recently, more than two-thirds of prosecutors' offices in the United States reported that they routinely resort to DNA evidence either at trial or in plea negotiations. Comment, *Testimonial or Nontestimonial? The Admissibility of Forensic Evidence after Crawford v. Washington*, 94 KY. L.J. 187 (2005/2006). One of the emerging issues is whether the *Crawford* decision bars introduction of crime laboratory reports against the accused. This and a host of other "hot button" issues generated by *Crawford* are examined in this new edition.

Further, the lower courts are struggling with the impact of the Court's post-*Daubert* decision, *Kumho*, on expert testimony. When the Court decided *Daubert*, we predicted that ultimately the thorniest issue would be development of admissibility standards for non-scientific expertise. That prediction has come to pass. Although *Daubert* listed several factors that trial judges should consider — for the most part those factors were derived from a scientific model. Unfortunately, *Kumho* gave the lower courts little guidance on how to evaluate the reliability of non-scientific expertise; and it has become painfully clear to courts that it is impossible to put round, non-scientific pegs into square, scientific holes. This edition explores the way lower courts are currently struggling to formulate sensible standards for the admissibility of non-scientific expert testimony. Given the fast pace of change on both the statutory and expert testimony fronts, we remain committed to issuing new supplements and editions on a regular basis. We hope that this edition and its supplements will help keep law students abreast of the state of contemporary evidence law.

## **Fifth Edition:**

The role of expert testimony, including scientific evidence, continues to grow — as does the controversy over this subject. The controversy swirls at two levels. At one level, the battle is between the proponents of *Daubert* and the advocates of *Frye*. Like the reports of Samuel Clemens' death, predictions of the demise of *Frye* have turned out to be "greatly exaggerated." Courts in many of the largest and most litigious states, including California, Florida, Illinois, and New York, have decided to adhere to some variation of the traditional general acceptance standard. At another level, in *Daubert* jurisdictions the battle is between the proponents of scientific testimony and the opponents. In some respects, *Daubert* appears to have toughened admissibility standards. In late 2000, the Federal Judicial Center released a study of the admissibility of expert testimony. In 1995, the center asked federal District Judges whether in their most recent trial, they had admitted all the proffered testimony. At that time, 75% of the judges answered in the affirmative. In the most recent study, that figure had fallen to 58%. In 1991, the center asked the judges whether they had ever excluded expert testimony. At that time, 25% of the judges answered yes. In the most recent study, that figure had risen to 41%.

## **Fourth Edition:**

The Devitt casefile has undergone major surgery. In the prior editions, the complainant was an alleged rape victim. In most chapters of the new edition, there is a male victim of a battery. In the

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## *PROVENANCE: NOTES FROM EARLIER PREFACES*

chapters discussing the evidentiary rules peculiar to sexual assault prosecutions, the facts are varied to include a rape charge.

The emphasis on scientific problems is evident at two levels. When the Court handed down *Daubert* in 1993, some commentators suggested that the Court had liberalized the standards for admitting purportedly scientific evidence. As the new edition explains, *Daubert* has proven to be a two-edged sword. Although the decision opens a window for admitting testimony about novel scientific theories, in other respects *Daubert* has toughened the standards. The lower courts are enforcing the new empirical validation standard with rigor. Secondly, there is increasing resort to scientific research to critique the underlying assumptions of evidence law. Although *Daubert* has garnered the headlines, perhaps the most significant innovation since the release of our third edition has been the enactment of Federal Rules 413-415. There was certainly a political impetus for that legislation. However, another contributing factor was the reassessment of the empirical research into the validity of character as a predictor of conduct. A number of commentators, including David Bryden, David Crump, Susan Davies, Miguel Mendez, and Roger Park, have contributed to that reassessment. The fourth edition references their contributions.

As in the prior editions, there is a heavy emphasis on statutory construction. If anything, that topic has heated up since the release of the third edition. At that time, the Justices of the Supreme Court seemed largely committed to a textualist approach to the interpretation of the Rules. Since that time, some Justices, notably Justices Breyer and Kennedy, have moved away from that approach. In addition, several scholars have endeavored to construct alternatives to textualism. Randolph Jonakait, Eileen Scallen, Andrew Taslitz, and Glen Weissenberger have been leaders in that endeavor.

### **Third and Second Editions:**

Two key reasons prompt the second and third editions: we wanted to place greater emphasis on developing students' statutory construction skills and we wanted to underscore the potential impact of science on evidence law. Since the release of the second edition, statutory interpretation has become a "hot topic." The conventional wisdom has been that in interpreting statutes, judges should freely consult extrinsic legislative history material such as committee reports to identify the rational purpose inspiring the statute. Conservative jurists, notably Justices Rehnquist and Scalia and Judges Easterbrook and Posner, are now challenging that wisdom. Eskridge, *The New Textualism*, 37 U.C.L.A. L. REV. 621, 624 (1990). Eskridge & Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691 (1987). Liberal jurists, including Judge Patricia Wald, have rushed to the defense of the conventional practice. The dispute over the proper approach to statutory interpretation has surfaced in evidence decisions. Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 TEX. L. REV. 745 (1990). Moreover, the influence of science on evidentiary doctrine is becoming more evident. In some cases, commentators are citing empirical research to support calls for the reform of evidentiary doctrine. *E.g.*, Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989). In other cases, the battle over the admissibility of a novel type of evidence such as DNA typing is being fought over the scientific merit of the technique. Thompson & Ford, *DNA Typing: Acceptance and Weight of the New Genetic Identification Tests*, 75 VA. L. REV. 45 (1989). The second edition acknowledged the contribution of Professors Richard Friedman and Dale Nance, whose perceptive criticisms and suggestions made that edition a better teaching tool.

### **First Edition:**

In the preface to the first edition, we explained our reasons for wanting to publish a new evidence coursebook: providing a better analytical approach to the study of evidence; teaching through the problem method based on a civil and criminal case file; emphasis on the procedural context of evidence law; and enhanced focus on logical and legal relevance doctrine. This emphasis reflected our belief that in the courtroom, relevance is by far the most important evidentiary doctrine. Our litigation experience persuaded us that, for better or worse, few trials present really novel or thorny



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*PROVENANCE: NOTES FROM EARLIER PREFACES*

hearsay or privilege problems. However, in every trial, every attorney must deal with the logical relevance doctrine in establishing the materiality of the evidence and the authenticity of any exhibits offered; and problems of legal relevance are most pervasive. Moreover, a sound grasp of logical relevance — the ability to develop an imaginative alternative theory of relevance — is often the key to overcoming an objection based on exclusionary rules such as hearsay or remedial measures. We also noted that the first edition was intended solely as a teaching device rather than a reference work. A relatively small number of cases and case extracts were used, based on our belief that evidence is not a good course in which to use the case method: it is simply too time-consuming. The all-important application of law to facts can best be learned through the use of problems and hypotheticals spun off the problems. Finally, we noted that some of our students commented that they could not understand evidence doctrine because they could not visualize applied use of the doctrine. Thus, we included sample foundations in order to meld concrete application with conceptual theory.



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