

PROBLEMS  
AND SIMULATIONS  
IN EVIDENCE  
Fourth Edition

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# PROBLEMS AND SIMULATIONS IN EVIDENCE

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Fourth Edition

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MATTHEW  BENDER

# DEDICATION

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For Kathe, Alison and Adam.



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# INTRODUCTION

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The publications **Best Practices for Legal Education: A Vision and a Road Map** (CLEA 2007) and the Carnegie Foundation for the Advancement of Teaching's **Educating Lawyers: Preparation for the Profession** (Jossey-Bass 2007) have now joined the ranks of the McCrate Report and Crampton Report in calling for fundamental change in the way legal education is delivered. Evidence teachers have consistently been in the forefront in advancing the goals of these reports by teaching skills and values, integrating practice with the theoretical, and providing multiple formative as well as summative assessments. While the First Edition of this book was written well before either Carnegie or Best Practices, many of the themes are seen throughout the book.

To integrate skills and values, each chapter includes realistic examples of how the evidentiary rule is used in practice. For example, many problems are put in the context of witness examinations (often word for word from transcripts). While evidence obviously is primarily concerned with the admissibility in court, it is misleading to assume that the courtroom is the only place where evidence issues are addressed, and that only trial attorneys need to be concerned with such issues. Many of the problems and simulations, therefore, involve interviewing, counseling, negotiation, fact investigation, office policies and the like.

Using both problems and simulations, these materials are designed to teach you to approach evidence in a systematic manner; to analyze both legal doctrine and the factual setting in which that doctrine works. Perhaps the most unique aspect of these materials is the use of simulations. Even in a course like evidence in which faculty have used simulation for many years, most of the simulations used have been set in the courtroom. These traditional simulations usually involve direct and cross-examinations. In addition, most traditional simulations are done in the classroom.

While many of the simulations contained in this book are done in the classroom and involve direct and cross-examination, many others involve non-courtroom situations and are designed to be performed outside the classroom. Many of the simulations performed outside the classroom are followed by questionnaires. When these questionnaires are answered after the exercise, they should provide immediate feedback on your understanding of the evidentiary principles involved. Your answers also allow your instructor to judge if the class is having difficulty with the material.

Many of the problems and simulations involve one of the basic fact patterns found in Appendices A–C. Problems beginning *State v. Duffy* refer to Appendix A; *Donato v. Donato* refers to Appendix B; and *Paula v. David and PDG* refers to Appendix C. Where dates involve multiple years, the convention of “Yr —” is used. For example, Yr-0 is the present year and Yr-1 is last year.

This edition of Problems and Simulations also contains two Performance Tests. The majority of bar applicants in the United States now take at least one performance test on the bar examination. It seems appropriate where possible, therefore, to expose to students the type of examination that they most likely will take. I originally wrote these Performance Tests for the California bar examination as a member of its

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## *INTRODUCTION*

Performance Test Editing Team. The team then edited and pretested the items prior to their administration. I want to express my appreciation to the Committee of Bar Examiners of the State of California for allowing me to reproduce these items.

Finally, I would like to thank several people for help in developing these materials. First, my wife, Kathe Klare, provided me with the special expertise of a nurse-lawyer familiar with both malpractice and laws affecting people with disabilities. Her influence will be seen throughout. Barbara Britzke and I many years ago created the broad outline of the Donato family. The Donato family difficulties, in several different contexts, have engaged students at several law schools for the past ten years. Finally, I would like to renew my thanks to Tony Bocchino and Joe Harbaugh. Tony taught me evidence and how to be a trial lawyer. Joe taught me how to be a teacher.