

Evidence

Evidence

A Problem-Based and Comparative Approach

FOURTH EDITION

Peter Nicolas

WILLIAM L. DWYER CHAIR IN LAW
UNIVERSITY OF WASHINGTON SCHOOL OF LAW



CAROLINA ACADEMIC PRESS

Durham, North Carolina

Copyright © 2018
Peter Nicolas
All Rights Reserved

ISBN 978-1-5310-0403-3
eISBN 978-1-53100-404-0
LCCN 2017957041

Carolina Academic Press, LLC
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

To my family

Contents

Table of Principal Cases	xxi
Preface to the Fourth Edition	xxv
Preface to the Third Edition	xxix
Preface to the Second Edition	xxxi
Preface to the First Edition	xxxiii
Acknowledgments	xxxvii
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	7
Problem 1-2: Statutory Rape	8
<i>Haywood v. State</i>	8
Problem 1-3: One Too Many for the Road	9
Notes and Questions	9
C. Inferential Relevance	11
Problem 1-4: Tampering with Evidence	11
<i>United States v. Dillon</i>	12
<i>State v. Wisdom</i>	14
Notes and Questions	16
D. Determining Relevance	17
Problem 1-5: Same-Sex Sexual Assault and Child Molestation	18
<i>People v. Garcia</i>	19
Notes and Questions	20
E. Conditional Relevance	22
Problem 1-6: Green Baseball Cap	23
<i>United States v. Evans</i>	23
Notes and Questions	26
F. Pragmatic Relevance: Rule 403	26
Problem 1-7: I Killed Sally	27
Problem 1-8: Sexual Assault, Child Molestation, and Grand Theft Auto	28
Problem 1-9: Pornographic Photographs	28
Problem 1-10: Videotape	29
Problem 1-11: He's Not From Around Here ...	29

Problem 1-12: Hate Crime	29
Problem 1-13: Employment Discrimination	29
<i>Old Chief v. United States</i>	30
<i>Campbell v. Keystone Aerial Surveys, Inc.</i>	37
<i>United States v. Caldwell</i>	39
<i>Kalispell v. Miller</i>	41
Notes and Questions	44
G. Rule 105: An Alternative to Exclusion	48
Notes and Questions	49
H. Rule of Completeness	50
<i>United States v. Lopez-Medina</i>	50
Notes and Questions	53
I. Relevance of Probabilistic Evidence	54
<i>People v. Collins</i>	54
<i>United States v. Chischilly</i>	62
Notes and Questions	65
Chapter 2 · Authentication	69
A. Introduction	69
<i>Ricketts v. City of Hartford</i>	70
Notes and Questions	72
B. Authentication of Physical Objects	74
Problem 2-1: Coke and Guns	74
<i>United States v. Cardenas</i>	75
<i>United States v. Abreu</i>	77
Notes and Questions	78
C. Authentication of Written Documents	79
Problem 2-2: The Threatening Note	79
<i>United States v. Scott</i>	79
<i>United States v. Jones</i>	82
Notes and Questions	84
<i>United States v. Kairys</i>	86
Notes and Questions	87
D. Authentication of Audio Recordings, Photographs, and Video Recordings	89
Problem 2-3: A Picture Is Worth a Thousand Words ...	89
Problem 2-4: The Secret Recording	89
<i>United States v. Rembert</i>	89
<i>United States v. Tropeano</i>	93
Notes and Questions	94
E. Authentication of Telephone Conversations	95
Problem 2-5: The Threatening Call	95
<i>United States v. Khan</i>	95
<i>First State Bank of Denton v. Maryland Casualty Co.</i>	96

Notes and Questions	98
F. Authentication of Electronic Communications	98
Problem 2-6: The Threatening E-Mail	99
Problem 2-7: The Chat Room	99
<i>Parker v. State</i>	100
Notes and Questions	104
G. Shortcuts for Authenticating Evidence	106
Chapter 3 · Relevance and Prejudice Refined	109
A. Evidence of Character	109
1. Character of Accused and Victim	110
Problem 3-1: Violent or Non-Violent?	111
Problem 3-2: Violent or Non-Violent Revisited	112
Notes and Questions	112
2. Character as an Element of a Crime, Claim, or Defense	115
Notes and Questions	115
3. Proving Character and Challenging Such Proof	116
Problem 3-3: Violent or Non-Violent Revisited (Again!)	117
<i>United States v. Hewitt</i>	118
<i>United States v. Krapp</i>	118
Notes and Questions	120
4. Evidence of Other Crimes, Wrongs, or Acts Used for “Other Purposes”	122
Problem 3-4: Drugs, Not Hugs	122
Problem 3-5: Clowning Around	123
Problem 3-6: What Are the Odds?	123
Problem 3-7: I Was Scared of Her	123
<i>Huddleston v. United States</i>	124
<i>State v. Terrazas</i>	128
<i>United States v. Smalls</i>	130
<i>United States v. Miller</i>	132
<i>United States v. Curtin</i>	136
<i>United States v. Saenz</i>	145
Notes and Questions	146
5. Character Evidence in Sexual Assault and Child Molestation Cases	151
Problem 3-8: He Said, She Said	151
Problem 3-9: He Said, She Said Redux	154
Notes and Questions	154
Problem 3-10: He Said, She Said Redux II	157
<i>Johnson v. Elk Lake School District</i>	158
Notes and Questions	164
B. Evidence of Habit	165
Problem 3-11: Who Ran the Light?	167
Problem 3-12: Seat Belt Snafu	167

<i>United States v. Yazzie</i>	167
Notes and Questions	170
C. Subsequent Remedial Measures	172
Problem 3-13: Road Work	174
Problem 3-14: Slip and Fall	174
<i>Diehl v. Blaw-Knox</i>	175
<i>Anderson v. Malloy</i>	176
<i>Sims v. Great American Life Ins. Co.</i>	180
Notes and Questions	184
D. Compromises, Payment of Medical Expenses, and Liability Insurance	185
Problem 3-15: NASDAQ Attack	187
Problem 3-16: Distracting Cell Phone	187
Problem 3-17: Car Accident	187
Problem 3-18: Arson	187
<i>Weems v. Tyson Foods, Inc.</i>	188
<i>United States v. Roti</i>	189
Notes and Questions	190
E. Pleas and Plea Discussions	193
<i>United States v. Green</i>	194
Notes and Questions	196
Chapter 4 · Witness Qualification, Competency, and Examination	199
A. Competency of Witnesses	199
Problem 4-1: Interstate Bicycle Accident	201
<i>Equitable Life Assur. Soc. of U.S. v. McKay</i>	202
<i>Legg v. Chopra</i>	203
Notes and Questions	204
Problem 4-2: How Sausage Is Made	206
Problem 4-3: An Honest Misunderstanding	207
<i>Tanner v. United States</i>	208
<i>Peña-Rodriguez v. Colorado</i>	214
Indiana Rule of Evidence 606	220
Minnesota Rule of Evidence 606	220
Montana Rule of Evidence 606	221
<i>United States v. Berber-Tinoco</i>	221
Notes and Questions	223
B. Oath Requirement	227
<i>United States v. Ward</i>	227
Notes and Questions	230
C. Direct and Cross-Examination of Witnesses	230
<i>United States v. Riccardi</i>	235
<i>Nutramax Laboratories, Inc. v. Twin Laboratories, Inc.</i>	238
<i>State ex. rel. Polytech, Inc. v. Voorhees</i>	242
Illinois Rule of Evidence 612	242
Notes and Questions	243

D. Personal Knowledge Requirement	245
<i>Kemp v. Balboa</i>	245
Notes and Questions	247
E. Calling and Interrogation of Witnesses by the Trial Judge	249
<i>United States v. Martin</i>	249
Notes and Questions	252
F. Opinion Testimony by Lay Witnesses	252
Problem 4-4: Funny Lookin' and Funny Smellin'	253
Problem 4-5: "He Sounded Like a Black Man"	253
<i>Asplundh Manufacturing Division v. Benton Harbor Engineering</i>	253
<i>Clifford v. Commonwealth</i>	256
Notes and Questions	259
G. Expert Witnesses	260
1. Qualification of Expert Witnesses	261
Problem 4-6: Pot-Smoking Expert Witness	261
<i>Waldorf v. Shuta</i>	261
Notes and Questions	264
2. Reliability of Expert Witness Testimony	266
<i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i>	266
<i>Goeb v. Tharaldson</i>	272
Notes and Questions	273
3. A Closer Look at <i>Daubert</i> and the Helpfulness Requirement	277
a. Fingerprint and Handwriting Analysis	277
<i>United States v. Crisp</i>	277
b. Eyewitness Reliability	286
<i>United States v. Lester</i>	286
c. Battered Woman Syndrome	294
<i>United States v. Young</i>	294
Notes and Questions	297
4. Bases for Expert Witness Testimony	299
<i>United States v. Stone</i>	300
Notes and Questions	302
5. Opinion on the "Ultimate Issue"	304
<i>Woods v. Lecureux</i>	305
Problem 4-7: Gay Panic Defense	307
<i>United States v. Finley</i>	308
<i>United States v. Hayward</i>	310
Notes and Questions	311
6. Court-Appointed Experts	312
H. Exclusion and Sequestration of Witnesses	313
<i>United States v. Rhynes</i>	313
Notes and Questions	322
Chapter 5 • Privileges	325
A. Introduction	325

Notes and Questions	327
B. Attorney-Client Privilege	329
1. Scope of the Privilege	330
Problem 5-1: Drinking & Driving	330
Problem 5-2: A Guilty Conscience	330
In re <i>Grand Jury Subpoena</i>	331
Notes and Questions	334
<i>Upjohn Company v. United States</i>	337
Notes and Questions	341
2. Exceptions to the Privilege	344
Problem 5-3: Monica-Gate	344
<i>United States v. Zolin</i>	344
<i>Swidler & Berlin v. United States</i>	349
Notes and Questions	354
3. Waiver of the Privilege	356
Problem 5-4: The Misdirected E-Mail	356
Notes and Questions	359
C. Spousal Privileges	360
Problem 5-5: Love & Loyalty, Federal Style	360
Problem 5-6: Love & Loyalty, Minnesota Style	361
<i>Trammel v. United States</i>	362
<i>United States v. Singleton</i>	366
<i>United States v. Sriram</i>	369
<i>United States v. Etkin</i>	371
Notes and Questions	374
D. Psychotherapist Privilege	376
<i>Jaffee v. Redmond</i>	376
Notes and Questions	388
E. Other Privileges	391
Problem 5-7: The Bond between Mother and Child	391
Problem 5-8: Forgive Me, Father ...	391
Problem 5-9: Love & Loyalty, Hawaii Style	392
Problem 5-10: Employment Discrimination Revisited	392
In re <i>Grand Jury Investigation</i>	393
In re <i>Grand Jury</i>	398
Notes and Questions	404
Chapter 6 · The “Best Evidence” Rule	407
A. Introduction	407
Notes and Questions	408
B. What Qualifies as a “Writing, Recording, or Photograph”?	408
Problem 6-1: The Libelous Billboard	408
Problem 6-2: The Beer Bottle	409
<i>United States v. Buchanan</i>	409

<i>Jennings v. Commonwealth</i>	412
<i>Seiler v. Lucasfilm, Ltd.</i>	414
Notes and Questions	416
C. What Qualifies as an Original?	417
Problem 6-3: Dangerous	417
Problem 6-4: The Threatening E-Mail Revisited	417
<i>United States v. Rangel</i>	418
Notes and Questions	418
D. What Constitutes Proving Contents of a Writing, Recording, or Photograph?	420
Problem 6-5: The Libelous Billboard Revisited	420
Problem 6-6: A Picture Is Worth a Thousand Words Revisited	420
Problem 6-7: The Alibi	420
<i>United States v. Gonzales-Benitez</i>	421
<i>United States v. Bennett</i>	421
<i>United States v. Diaz-Lopez</i>	423
In re <i>Jayshawn B.</i>	426
Notes and Questions	428
E. Duplicates	430
<i>United States v. Haddock</i>	430
Notes and Questions	431
F. Production of Original Excused	432
Problem 6-8: The Chat Room Revisited	432
<i>United States v. Marcantoni</i>	433
<i>State v. Espiritu</i>	435
Notes and Questions	438
G. Summaries	441
<i>United States v. Bray</i>	441
H. Role of Judge and Jury	443
Notes and Questions	445
Chapter 7 · The Rule against Hearsay	447
A. Introduction	447
Notes and Questions	449
B. Who Qualifies as a “Declarant”?	451
Problem 7-1: “She Barked”	451
<i>Terrell v. State</i>	452
<i>United States v. Washington</i>	453
<i>United States v. Lizarraga-Tirado</i>	456
Notes and Questions	458
C. What Does It Mean to Be Offered to Prove the Truth of the Matter Asserted?	461
Problem 7-2: Blowing Hot and Cold	461
<i>Elmer v. State</i>	462

Problem 7-3: The Elm Street Garage	463
<i>Kenyon v. State</i>	463
Problem 7-4: The Slanderous Statement	465
Problem 7-5: I'm Alive!	465
<i>Schindler v. Seiler</i>	465
Problem 7-6: I'm the Queen of England	466
<i>State v. Losson</i>	467
Problem 7-7: The Bumper Sticker	469
<i>United States v. Snow</i>	469
Notes and Questions	471
D. What Is an "Assertion"?	473
Problem 7-8: "He Barked"	474
Problem 7-9: If You're Old Enough to Vote ...	474
<i>Miller v. Dillard's, Inc.</i>	475
<i>United States v. Zenni</i>	475
<i>Stoddard v. State</i>	480
<i>Estes v. Carpenter Co.</i>	485
<i>United States v. Serrano</i>	488
<i>United States v. Snow</i>	491
<i>United States v. Pina</i>	492
Problem 7-10: Nobody Else Complained	494
Problem 7-11: Say Something If It Hurts ...	494
Problem 7-12: Did You Know?	495
<i>Wilson v. Clancy</i>	495
<i>United States v. Torres</i>	495
Notes and Questions	497
E. Statements That Are "Not Hearsay"	499
1. A Declarant-Witness's Prior Statement	499
Problem 7-13: Blowing Hot and Cold Revisited	500
<i>United States v. Dietrich</i>	500
Montana Rule of Evidence 801	502
Problem 7-14: The Improper Motive	503
<i>Tome v. United States</i>	503
<i>Berry v. Beauvais</i>	507
Problem 7-15: "Everyone Barked"	509
Problem 7-16: The Purloined Stamp Collection	509
<i>United States v. Owens</i>	510
<i>State v. Canady</i>	513
Notes and Questions	515
2. Statements of an Opposing Party	518
a. Individual Statements	519
Problem 7-17: Anything You Say Can and Will Be Used against You ...	519
<i>United States v. Reed</i>	519

<i>Pau v. Yosemite Park and Curry Co.</i>	520
Notes and Questions	520
b. Adoptive Statements	522
<i>United States v. Ward</i>	522
<i>United States v. Paulino</i>	525
Notes and Questions	526
c. Statements of Agents and Employees	527
Problem 7-18: The Slip-and-Fall	527
<i>Mahlandt v. Wild Canid Survival & Research Center, Inc.</i>	528
Notes and Questions	531
d. Statements by Coconspirators	533
Problem 7-19: The Drug Cartel	533
<i>Bourjaily v. United States</i>	534
<i>Romani v. State</i>	539
Notes and Questions	539
F. Unrestricted Hearsay Exceptions	544
1. Present Sense Impressions and Excited Utterances	545
Problem 7-20: The Instant Message	545
Problem 7-21: The Cottage Cheese	546
Problem 7-22: The Crushed Collection	546
<i>United States v. Mejia-Velez</i>	547
<i>Miller v. Keating</i>	548
<i>Miller v. Crown Amusements, Inc.</i>	551
<i>United States v. Boyce</i>	553
Colorado Rule of Evidence 803	555
Notes and Questions	555
2. Statements Made for Medical Diagnosis or Treatment	558
Problem 7-23: The Hit & Run Accident	559
<i>United States v. Renville</i>	559
<i>State v. Lawrence</i>	562
Notes and Questions	564
3. Then-Existing Mental, Emotional, or Physical Condition	565
Problem 7-24: The Reverberating Clang	565
Problem 7-25: The Last Meeting	566
<i>Mutual Life Ins. Co. of New York v. Hillmon</i>	566
<i>Shepard v. United States</i>	569
<i>United States v. Houlihan</i>	571
Notes and Questions	574
4. Recorded Recollection	578
Problem 7-26: The License Plate	579
<i>United States v. Hernandez</i>	579
Colorado Rule of Evidence 803	582
Delaware Rule of Evidence 803	583
Notes and Questions	583

5. Records of a Regularly Conducted Activity	585
<i>United States v. Vigneau</i>	587
<i>Ebenhoech v. Koppers Industries, Inc.</i>	590
<i>United States v. Muñoz-Franco</i>	592
Notes and Questions	594
6. Public Records	597
Problem 7-27: The Police Report	598
Problem 7-28: Cocaine and Cartography	598
Problem 7-29: The Unregistered Firearm	599
<i>United States v. Oates</i>	600
Notes and Questions	606
7. Prior Court Judgments	609
Problem 7-30: Don't Judge Me!	610
<i>United States v. Adedoyin</i>	610
Notes and Questions	612
8. Reputation and Personal or Family History	613
Problem 7-31: They Say It's Your Birthday ...	614
<i>Blackburn v. United Parcel Service, Inc.</i>	615
<i>Moore v. Goode</i>	621
<i>Porter v. Quarantillo</i>	622
Notes and Questions	625
9. Treatises and Other Documents	628
<i>Compton v. Davis Oil Co.</i>	629
<i>Langbord v. United States Department of Treasury</i>	630
Problem 7-32: The Crushed Collection Revisited	632
<i>United States v. Woods</i>	632
<i>Costantino v. David M. Herzog, M.D., P.C.</i>	634
Colorado Rule of Evidence 803	638
Michigan Rule of Evidence 707	638
Notes and Questions	638
G. Restricted Hearsay Exceptions	640
1. Unavailability	641
<i>United States v. Williams</i>	641
<i>United States v. Carson</i>	642
<i>United States v. McGuire</i>	643
<i>United States v. Kehm</i>	644
<i>United States v. Peterson</i>	647
Notes and Questions	648
2. Former Testimony	649
Problem 7-33: The Absent-Minded Witness	650
Problem 7-34: The Maple Syrup	650
Problem 7-35: The Car Accident	651
Problem 7-36: Arson	651
<i>United States v. DiNapoli</i>	651

Problem 7-37: The Antitrust Action	657
<i>Lloyd v. American Export Lines, Inc.</i>	657
Notes and Questions	661
3. Dying Declarations	663
Problem 7-38: The Last Breath	664
<i>Shepard v. United States</i>	664
<i>United States v. Angleton</i>	666
Connecticut Code of Evidence § 8-6 (2)	672
Pennsylvania Rule of Evidence 804(b)(2)	673
Utah Rule of Evidence 804(b)(2)	673
Notes and Questions	673
4. Statements against Interest	675
Problem 7-39: The Injured Passenger	676
Problem 7-40: Herpes	676
<i>Heddings v. Steele</i>	677
Notes and Questions	679
Problem 7-41: “I Killed That S.O.B.”	682
<i>Williamson v. United States</i>	682
Notes and Questions	688
5. Forfeiture by Misconduct	691
Problem 7-42: The Grand Jury Witness	691
<i>United States v. Cherry</i>	691
<i>People v. Geraci</i>	696
Notes and Questions	698
H. The Residual Exception	700
Problem 7-43: The Grand Jury Witness II	701
<i>United States v. Laster</i>	701
New Jersey Rule of Evidence 803	706
Washington Evidence Rule 803	706
Notes and Questions	706
I. Hearsay and the Confrontation Clause	708
1. Background	708
<i>Ohio v. Roberts</i>	709
2. A New Approach: <i>Crawford v. Washington</i>	712
Problem 7-44: Confronting the Confrontation Clause	713
<i>Crawford v. Washington</i>	714
Notes and Questions	724
3. Refining the Doctrine: The Meaning of “Testimonial” and Possible Exceptions to <i>Crawford</i>	726
Problem 7-45: Confront This!	726
<i>Davis v. Washington</i>	727
<i>Giles v. California</i>	740
<i>Michigan v. Bryant</i>	745
<i>Ohio v. Clark</i>	760

Notes and Questions	764
4. A Fragile Majority and the Future of <i>Crawford</i>	766
<i>Melendez-Diaz v. Massachusetts</i>	767
<i>Bullcoming v. New Mexico</i>	779
Notes and Questions	784
<i>Williams v. Illinois</i>	785
Chapter 8 • Judicial Notice	803
Problem 8-1: The Alibi	804
Problem 8-2: The Sweltering Heat	804
In re <i>Thirtyacre</i>	805
<i>United States v. Marvin P. Jones</i>	807
Notes and Questions	808
Problem 8-3: Currency Exchange	809
<i>United States v. William Allen Jones</i>	810
<i>United States v. Gould</i>	811
<i>United States v. Hernandez-Fundora</i>	813
<i>United States v. Dior</i>	816
Notes and Questions	818
<i>United States v. Amado-Núñez</i>	821
<i>United States v. Lewis</i>	824
Notes and Questions	826
Chapter 9 • Burdens of Proof and Presumptions	829
A. Burdens of Proof in Civil Cases	829
B. Presumptions in Civil Cases	832
Problem 9-1: Proving Discrimination	835
In re <i>Yoder Company</i>	836
<i>St. Mary's Honor Center v. Hicks</i>	838
<i>Alabama By-Products Corporation v. Killingsworth</i>	841
Notes and Questions	842
C. Burdens of Proof and Presumptions in Criminal Cases	845
Problem 9-2: Proving Hate	845
<i>Patterson v. New York</i>	847
Notes and Questions	854
<i>County Court of Ulster v. Allen</i>	858
<i>Sandstrom v. Montana</i>	862
Notes and Questions	866
Chapter 10 • Impeachment and Rehabilitation of Witnesses	869
A. Introduction	869
B. Character for Untruthfulness	870
1. Untruthful Character and Conduct	870
Problem 10-1: Lying for Beer, Lying for Jobs	870

<i>United States v. Whitmore</i>	871
<i>United States v. Manske</i>	875
Pennsylvania Rule of Evidence 608	878
Texas Rule of Evidence 608	879
Notes and Questions	879
2. Prior Convictions	882
Problem 10-2: The Criminal Résumé	882
<i>United States v. Jefferson</i>	883
<i>United States v. Browne</i>	885
<i>United States v. Cathey</i>	887
Illinois Rule of Evidence 609	890
Michigan Rule of Evidence 609	890
Montana Rule of Evidence 609	891
Notes and Questions	891
C. Impeachment for Bias or Motivation	897
<i>United States v. Abel</i>	897
Problem 10-3: Crosses and Crescents	901
<i>Firemen's Fund Ins. Co. v. Thien</i>	902
<i>United States v. Davis</i>	903
Notes and Questions	906
D. Sensory Perception	907
<i>United States v. Pryce</i>	907
<i>United States v. DiPaolo</i>	908
Notes and Questions	909
E. Impeachment by Contradiction	910
<i>United States v. Boswell</i>	910
<i>United States v. Beauchamp</i>	912
Notes and Questions	914
F. Impeachment by Prior Inconsistent Statement	915
Problem 10-4: The Turn-Coat Witness	916
<i>United States v. Ince</i>	917
Ohio Rule of Evidence 607	920
Notes and Questions	921
G. Rehabilitation of Witnesses	924
<i>United States v. Dring</i>	924
Notes and Questions	927
H. Impeachment and Rehabilitation of Hearsay Declarants	928
Problem 10-5: The Dead Witness	928
<i>United States v. Saada</i>	929
Notes and Questions	931
Chapter 11 · Appellate Review of Evidentiary Rulings	933
A. Introduction	933
Problem 11-1: A Second Bite at the Apple	934

B. Preserving Claims of Error for Appellate Review and the Timing of Appellate Review	935
<i>United States v. Meserve</i>	935
<i>United States v. Wynn</i>	938
<i>United States v. Adams</i>	939
<i>Crowe v. Bolduc</i>	941
<i>Luce v. United States</i>	942
<i>Ohler v. United States</i>	944
<i>Cure v. State</i>	945
<i>Mohawk Industries, Inc. v. Carpenter</i>	947
<i>Commonwealth v. Harris</i>	950
Notes and Questions	952
C. Standards of Review of Claimed Errors in Interpreting and Applying Rules of Evidence	956
<i>De Novo Review in Deferential Robes? A Deconstruction of the Standard of Review of Evidentiary Errors in the Federal System</i>	957
Notes and Questions	960
D. Harmless Error Doctrine	961
<i>United States v. Piper</i>	961
Notes and Questions	964
Index	965

Table of Principal Cases

- Alabama By-Products Corporation v. Killingsworth, 841
- Anderson v. Malloy, 176
- Asplundh Manufacturing Division v. Benton Harbor Engineering, 253
- Berry v. Beauvais, 507
- Blackburn v. United Parcel Service, Inc., 615
- Bourjaily v. United States, 534
- Bullcoming v. New Mexico, 779
- Campbell v. Keystone Aerial Surveys, Inc., 37
- Clifford v. Commonwealth, 256
- Commonwealth v. Harris, 950
- Compton v. Davis Oil Co., 629
- Costantino v. David M. Herzog, M.D., P.C., 634
- County Court of Ulster v. Allen, 858
- Crawford v. Washington, 714
- Crowe v. Bolduc, 941
- Cure v. State, 945
- Daubert v. Merrell Dow Pharmaceuticals, Inc., 266
- Davis v. Washington, 727
- Diehl v. Blaw-Knox, 175
- Ebenhoech v. Koppers Industries, Inc., 590
- Elmer v. State, 462
- Equitable Life Assur. Soc. of U.S. v. McKay, 202
- Estes v. Carpenter Co., 485
- Firemen's Fund Ins. Co. v. Thien, 902
- First State Bank of Denton v. Maryland Casualty Co., 96
- Giles v. California, 740
- Goeb v. Tharaldson, 272
- Haywood v. State, 8
- Heddings v. Steele, 677
- Huddleston v. United States, 124
- In re Grand Jury Investigation, 393
- In re Grand Jury Subpoena, 331
- In re Grand Jury, 398
- In re Jayshawn B., 426
- In re Thirtyacre, 805
- In re Yoder Company, 836
- Jaffee v. Redmond, 376
- Jennings v. Commonwealth, 412
- Johnson v. Elk Lake School District, 158
- Kalispell v. Miller, 41
- Kemp v. Balboa, 245
- Kenyon v. State, 463
- Langbord v. United States Department of Treasury, 630
- Legg v. Chopra, 203
- Lloyd v. American Export Lines, Inc., 657
- Luce v. United States, 942
- Mahlandt v. Wild Canid Survival & Research Center, Inc., 528
- Melendez-Diaz v. Massachusetts, 767
- Michigan v. Bryant, 745
- Miller v. Crown Amusements, Inc., 551
- Miller v. Dillard's, Inc., 475
- Miller v. Keating, 548
- Mohawk Industries, Inc. v. Carpenter, 947
- Moore v. Goode, 621
- Mutual Life Ins. Co. of New York v. Hillmon, 566
- Nutramax Laboratories, Inc. v. Twin Laboratories, Inc., 238
- Ohio v. Clark, 760

- Ohio v. Roberts, 709
 Ohler v. United States, 944
 Old Chief v. United States, 30
 Parker v. State, 100
 Patterson v. New York, 847
 Pau v. Yosemite Park and Curry Co.,
 520
 Peña-Rodriguez v. Colorado, 214
 People v. Collins, 54
 People v. Garcia, 19
 People v. Geraci, 696
 Porter v. Quarantillo, 622
 Ricketts v. City of Hartford, 70
 Romani v. State, 539
 Sandstrom v. Montana, 862
 Schindler v. Seiler, 465
 Seiler v. Lucasfilm, Ltd., 414
 Shepard v. United States, 569
 Shepard v. United States, 664
 Sims v. Great American Life Ins. Co.,
 180
 St. Mary's Honor Center v. Hicks, 838
 State ex. rel. Polytech, Inc. v.
 Voorhees, 242
 State v. Canady, 513
 State v. Espiritu, 435
 State v. Lawrence, 562
 State v. Losson, 467
 State v. Terrazas, 128
 State v. Wisdom, 14
 Stoddard v. State, 480
 Swidler & Berlin v. United States, 349
 Tanner v. United States, 208
 Terrell v. State, 452
 Tome v. United States, 503
 Trammel v. United States, 362
 United States v. Abel, 897
 United States v. Abreu, 77
 United States v. Adams, 939
 United States v. Adedoyin, 610
 United States v. Amado-Núñez, 821
 United States v. Angleton, 666
 United States v. Beauchamp, 912
 United States v. Bennett, 421
 United States v. Berber-Tinoco, 221
 United States v. Boswell, 910
 United States v. Boyce, 553
 United States v. Bray, 441
 United States v. Browne, 885
 United States v. Buchanan, 409
 United States v. Caldwell, 39
 United States v. Cardenas, 75
 United States v. Carson, 642
 United States v. Cathey, 887
 United States v. Cherry, 691
 United States v. Chischilly, 62
 United States v. Crisp, 277
 United States v. Curtin, 136
 United States v. Davis, 903
 United States v. Diaz-Lopez, 423
 United States v. Dietrich, 500
 United States v. Dillon, 12
 United States v. DiNapoli, 651
 United States v. Dior, 816
 United States v. DiPaolo, 908
 United States v. Dring, 924
 United States v. Etkin, 371
 United States v. Evans, 23
 United States v. Finley, 308
 United States v. Gonzales-Benitez, 421
 United States v. Gould, 811
 United States v. Green, 194
 United States v. Haddock, 430
 United States v. Hayward, 310
 United States v. Hernandez-Fundora,
 813
 United States v. Hernandez, 579
 United States v. Hewitt, 118
 United States v. Houlihan, 571
 United States v. Ince, 917
 United States v. Jefferson, 883
 United States v. Jones, 82
 United States v. Kairys, 86
 United States v. Kehm, 644
 United States v. Khan, 95
 United States v. Krapp, 118
 United States v. Laster, 701
 United States v. Lester, 286
 United States v. Lewis, 824
 United States v. Lizarraga-Tirado, 456

- United States v. Lopez-Medina, 50
United States v. Manske, 875
United States v. Marcantoni, 433
United States v. Martin, 249
United States v. Marvin P. Jones, 807
United States v. McGuire, 643
United States v. Mejia-Velez, 547
United States v. Meserve, 935
United States v. Miller, 132
United States v. Muñoz-Franco, 592
United States v. Oates, 600
United States v. Owens, 510
United States v. Paulino, 525
United States v. Peterson, 647
United States v. Pina, 492
United States v. Piper, 961
United States v. Pryce, 907
United States v. Rangel, 418
United States v. Reed, 519
United States v. Rembert, 89
United States v. Renville, 559
United States v. Rhynes, 313
United States v. Riccardi, 235
United States v. Roti, 189
United States v. Saada, 929
United States v. Saenz, 145
United States v. Scott, 79
United States v. Serrano, 488
United States v. Singleton, 366
United States v. Smalls, 130
United States v. Snow, 469
United States v. Snow, 491
United States v. Sriram, 369
United States v. Stone, 300
United States v. Torres, 495
United States v. Tropeano, 93
United States v. Vigneau, 587
United States v. Ward, 227
United States v. Ward, 522
United States v. Washington, 453
United States v. Whitmore, 871
United States v. William Allen Jones,
810
United States v. Williams, 641
United States v. Woods, 632
United States v. Wynn, 938
United States v. Yazzie, 167
United States v. Young, 294
United States v. Zenni, 475
United States v. Zolin, 344
Upjohn Company v. United States, 337
Waldorf v. Shuta, 261
Weems v. Tyson Foods, Inc., 188
Williams v. Illinois, 785
Williamson v. United States, 682
Wilson v. Clancy, 495
Woods v. Lecureux, 305

Preface to the Fourth Edition

In the six years since the third edition of this textbook went to press, a number of important doctrinal developments have taken place in the field of evidence that made it appropriate for me to produce a new edition of the textbook. In the course of making those necessary updates, I decided to give the entire textbook a fresh, cover-to-cover overhaul, informed by my eighteen years of experience teaching evidence, my thirteen years of teaching using this textbook, as well as valuable feedback from my own students and professors who use this textbook in their courses.

The fourth edition has been revised to include the following key doctrinal developments:

- *Amendments to the Federal Rules of Evidence*—The text has been revised to take into account all substantive amendments to the Federal Rules of Evidence through December 2017, including—when available—edited cases examining the same;
- *Hearsay and the Confrontation Clause*—The text incorporates the latest doctrinal developments regarding the Confrontation Clause, including edited versions of the U.S. Supreme Court’s decisions in *Williams v. Illinois* and *Ohio v. Clark*;
- *Jurors as Witnesses*—The text contains a revised discussion of the admissibility of juror testimony regarding a fellow juror’s racial bias to impeach a verdict, including an edited version of the U.S. Supreme Court’s 2017 decision in *Peña-Rodriguez v. Colorado*;
- *Electronic Evidence*—Given that an ever-increasing percentage of our communications—and thus potential evidence—are in electronic form, the text has been revised to consider the application of the rules of evidence to e-mail and text messages as well as to information found on social networking websites.

In addition to revising the textbook to account for these doctrinal developments, I spent nearly a year revising the text to improve its utility as a teaching tool. In this regard, those familiar with earlier editions of this textbook will notice two general changes to the text. First, the textbook now includes explanatory text at the start of virtually every section and sub-section to help introduce students to the concepts explored in the cases and problems that follow. While most sections of the textbook included such explanatory text in earlier editions, some sections jumped directly into the cases and problems, making it difficult for students to orient themselves. Second, the textbook contains dozens of replacement cases that do not represent doctrinal changes but rather do a much better job of teaching students the doctrine than did the cases in earlier editions of the textbook, either because the opinions are better written or the fact patterns are more engaging.

Along with these general changes are several more focused changes designed to improve student learning, including the following:

- **Chapter 1: Relevance**—The addition of two cases deeming evidence to be irrelevant (one because of immateriality and the other because of a lack of probative worth), as well as a case that addresses the concept of conditional relevance;
- **Chapter 2: Authentication**—A particular focus on the authentication of electronic evidence, including a discussion of competing approaches in the states;
- **Chapter 3: Relevance and Prejudice Refined**—An overhaul of the discussion of Rule 404(b)(2) as well as several new edited cases addressing Rules 407, 408 and 410;
- **Chapter 4: Witness Qualification, Competency, and Examination**—The addition of two edited cases regarding the intersection of race and the rules of evidence, as well as a tightening up of the materials regarding expert witness testimony so as to make it feasible to teach in 2-3 class hours;
- **Chapter 5: Privileges**—The addition of problems and materials addressing two privileges, a privilege for couples in non-marital relationships as well as a privilege regarding the tenor of one's vote;
- **Chapter 6: Best Evidence Rule**—New cases addressing challenging aspects of the best evidence rule, including the inscribed chattel doctrine as well as the admissibility of testimony by a witness who observed a live video feed of an incident;
- **Chapter 7: Hearsay**—A complete overhaul of the sections discussing the definition of hearsay, with the majority of edited cases replaced by new ones that better explain challenging doctrinal principles, as well as the addition of several new edited cases addressing some of the less commonly invoked hearsay exceptions;
- **Chapter 8: Judicial Notice**—The addition of several new edited cases that better explain the doctrine of judicial notice, as well as consideration of judicial notice of information obtained from such internet-based websites as *Wikipedia* and *Google Maps*;
- **Chapter 9: Burdens of Proof and Presumptions**—The addition of several notes addressing significant lower court decisions regarding burdens of proof in criminal cases;
- **Chapter 10: Impeachment and Rehabilitation of Witnesses**—An enhanced discussion of Rule 610, including a new edited case as well as a problem that addresses the admissibility of evidence of religious beliefs;
- **Chapter 11: Appellate Review of Evidentiary Rulings**—The inclusion of several edited cases from state courts declining to adopt federal principles regarding appellate review of evidentiary rulings.

In putting this new edition of the textbook together, I am indebted to my student assistants, Marlana Kuper and Katrina Outland, as well as our law school's professional editor, Cindy Fester. I also wish to thank the students in my Autumn 2017 evidence course, who gave the page proofs of this new edition a trial run and provided me with valuable feedback as I prepared the materials for press.

Peter Nicolas

Seattle, Washington

January 2018

Preface to the Third Edition

In the three years since the second edition of this textbook went to press, two key developments—the restyling of the Federal Rules of Evidence and a series of U.S. Supreme Court decisions clarifying the relationship between the Confrontation Clause and the admission of hearsay evidence against criminal defendants—compelled me to produce a new edition of the textbook and its accompanying statutory supplement.

On December 1, 2011, a restyled version of the Federal Rules of Evidence went into effect. The purpose of the restyling of the rules was both to make them easier to understand and to ensure consistent style and terminology throughout. According to the Advisory Committee Notes, the changes are intended to be stylistic only, and are not intended to make any substantive changes.

In addition to revising the text of the rules in the statutory supplement to reflect these changes, all references to the rules have been updated throughout the textbook to be consistent with the new language. Pre-restyling cases have been annotated (with a combination of brackets and editorial footnotes), as have references to the pre-restyling rule numbers and sub-sections in cases in the textbook as well as in the Advisory Committee Notes and legislative history in the statutory supplement.

This new edition of the textbook contains a completely overhauled section on the Confrontation Clause that incorporates edited versions of the U.S. Supreme Court’s most recent decisions—*Melendez-Diaz v. Massachusetts*, *Michigan v. Bryant*, and *Bullcoming v. New Mexico*—as well as in-depth coverage of lower court decisions grappling with the many open questions that the Supreme Court has yet to answer.

This new edition also expands on the second edition’s inclusion of state rules of evidence (and cases interpreting the same) that differ significantly from the federal rules. The expansion is both in terms of the number of rules for which comparative materials are included, as well as the number of states whose rules are included. These materials greatly facilitate discussion of the policies underlying the rules of evidence, and also take on greater importance with the restyling of the federal rules, since virtually no state rule now tracks the language of the restyled federal rules.

In addition, this textbook has been updated throughout to include recent cases grappling with a number of modern social and technological issues that arise in applying the rules of evidence. Examples include edited cases addressing such questions as:

- The admissibility of evidence that the accused is in a same-sex relationship when challenged on Rule 403 grounds;

- The admissibility of electronic evidence—including evidence found on social networking websites—when challenged on authentication or best evidence grounds; and
- The admissibility of evidence that a juror made racially biased comments when challenged on Rule 606 grounds.

Finally, in an effort to lighten things up just a little bit, this new edition contains a series of cartoons by cartoonist-attorney Stu Rees that illustrate a number of the cases and doctrines. The cartoons are not only funny, but sufficiently memorable to help students commit certain doctrines to memory.

In making all of these changes, I was guided by one of the reasons that I decided to write an evidence textbook in the first place: the desire to have a textbook that was short enough to teach from cover-to-cover in a typical evidence course. Accordingly, rather than simply adding the new materials (which would have expanded the book by almost 200 pages in length), I generally followed a rule of “one in, one out.” In other words, for every new page of material added, a page of old material was removed. The result is not only a textbook that continues to be manageable in length, but also one in which all included materials have survived a “hard look” review.

In putting this new edition of the textbook and its accompanying statutory supplement together, I am indebted to my student assistants—Erin Adam, Amy Alexander, Chris Olah, and Walter Smith—who meticulously proofread them from cover-to-cover. I also wish to thank the many students and faculty that use the textbook at law schools throughout the country who have contacted me with helpful suggestions. Finally, I wish to thank the students to whom I teach evidence each year at the University of Washington, upon whom I rely to test out new materials before incorporating them into new editions of the textbook.

Peter Nicolas
Seattle, Washington
December 2011

Preface to the Second Edition

There have been a number of important developments in the law of evidence since the first edition of this textbook was published in 2005. This new edition incorporates these changes while at the same time adding several new features.

When the first edition of this book went to press, the United States Supreme Court had just issued its landmark decision in *Crawford v. Washington*, which completely re-theorized the relationship between hearsay evidence and the Confrontation Clause. This new edition incorporates key post-*Crawford* decisions, including the Supreme Court's 2006 decision in *Davis v. Washington* and its 2008 decision in *Giles v. California*, as well as several new problems designed to help students navigate the nuances of these decisions.

Since the first edition was published, Federal Rules of Evidence 404, 408, 606, and 609 have been amended, Federal Rule 502 (addressing waiver of the attorney-client privilege and the work-product doctrine) has been enacted into law, and an amendment to Federal Rule 804(b)(3) has been proposed. All of these changes have been incorporated into this new edition of the textbook.

This new edition of the textbook also explores in greater depth the application of the rules of evidence in the modern era in which much evidence is in an electronic form. Accordingly, many of the cases and problems involve the application of the rules of evidence to e-mail messages, chat room conversations, information contained on personal digital assistants (PDAs), and the like.

The problem-based approach of the first edition is not only maintained, but expanded, in this new edition. Twenty-four new in-depth problems have been added, bringing the total number of problems in the book to 114.

A key feature of this new edition is the inclusion of selected state rules of evidence and cases interpreting the same that differ significantly from the Federal Rules of Evidence. These comparative materials are focused on those Federal Rules of Evidence and decisions interpreting the same that are viewed by many commentators as resting on questionable rationales or policies, and are designed to facilitate class discussion about those underlying rationales and policies.

With these changes comes a new title designed to reflect them, with the new edition of the textbook being *Evidence: A Problem-Based and Comparative Approach*.

In putting this new edition of the textbook together, I am indebted to my student assistants, La Rond Baker, Alexander Casey, Blythe Chandler, Jason Voss, and Jennifer Heidt White, who meticulously proofread the new edition from cover-to-cover. I also

wish to thank the students in my Autumn 2008 evidence course, who gave these new materials a trial run and provided me with valuable feedback as I prepared the materials for press.

Peter Nicolas
Seattle, Washington
January 2009

Preface to the First Edition

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 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

Acknowledgments

- I am grateful to the following sources for permission to reprint excerpts of their work:
- American Law Institute, Restatement (Third) of the Law Governing Lawyers §69 cmt. e (2000). Copyright © 2000 by the American Law Institute. Reprinted with permission. All rights reserved.
- 1 Attorney-Client Privilege in the United States §5:2 (2d ed. 2004). Copyright © 2004 by West, a Thomson business. Reprinted with permission. All rights reserved.
- Here Publishing Inc., April 2002 cover of *Out Magazine*. © 2002 Here Publishing Inc. Used with permission.
- Here Publishing Inc., July 5, 2005 cover of *The Advocate*. © 2005 Here Publishing Inc. Used with permission.
- Mike Strong, Map of Sairey Gamp Elementary School Enhanced Drug Penalty Area. Copyright © 2005 by Mike Strong. Reprinted with permission. All rights reserved.
- 2 Wigmore on Evidence, §§282a, 302, 303 (Chadbourn rev. 1979). Copyright © 1979, by James H. Chadborn. Reprinted with permission from Aspen Publishers. All rights reserved.
- 3 Wigmore on Evidence, §§767, 773 (Chadbourn rev. 1970). Copyright © 1970, by James H. Chadborn. Reprinted with permission from Aspen Publishers. All rights reserved.
- 4 Wigmore on Evidence, §§1177, 1182 (Chadbourn rev. 1972). Copyright © 1972, by James H. Chadborn. Reprinted with permission from Aspen Publishers. All rights reserved.
- 5 Wigmore on Evidence, §1439 (Chadbourn rev. 1974). Copyright © 1974, by James H. Chadborn. Reprinted with permission from Aspen Publishers. All rights reserved.
- 6 Wigmore on Evidence, §1871 (Chadbourn rev. 1976). Copyright © 1976, by James H. Chadborn. Reprinted with permission from Aspen Publishers. All rights reserved.
- 7 Wigmore on Evidence, §2153 (Chadbourn rev. 1978). Copyright © 1978, by James H. Chadborn. Reprinted with permission from Aspen Publishers. All rights reserved.

8 Wigmore on Evidence, §§2292, 2327 (McNaughton rev. 1961). Copyright © 1961, by John T. McNaughton. Reprinted with permission from Aspen Publishers. All rights reserved.

9 Wigmore on Evidence, §§2569, 2570 (Chadbourn rev. 1981). Copyright © 1981, by James H. Chadbourn. Reprinted with permission from Aspen Publishers. All rights reserved.