

Evidence and the Advocate

Evidence and the Advocate

A Contextual Approach to Learning Evidence

SECOND EDITION

Christopher W. Behan

SOUTHERN ILLINOIS UNIVERSITY SCHOOL OF LAW

Antony B. Kolenc

FLORIDA COASTAL SCHOOL OF LAW



CAROLINA ACADEMIC PRESS

Durham, North Carolina

Copyright © 2018
Carolina Academic Press
All Rights Reserved

ISBN 978-1-5310-0804-8
e-ISBN 978-1-53100-805-5
LCCN 2017960380

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 parents, R. Wayne and Sharla K. Behan.
Thank you for always believing in me.
—Chris Behan*

*To my wife, Alisa. Thank you for supporting me in wherever
my dreams have led our family.
—Tony Kolenc*

Contents

Table of Cases	xxv
Preface to the Second Edition	xxix
Preface to the First Edition	xxxi
Using This Book	xxxiii
Acknowledgments	xxxv

UNIT ONE · INTRODUCTION TO THE ADVERSARY TRIAL SYSTEM

Chapter 1 · The Adversary Trial and the Role of Evidence Codes	3
I. Conceptual Background	3
A. Historical Development of Evidentiary Doctrines	4
B. The Adversary Trial System	5
1) Setting	5
2) Judge	6
3) Advocates	6
4) Witnesses	7
5) Jurors	7
C. Codification of the Federal Rules of Evidence	8
II. Rules, Cases, and Problems	10
A. Scope and Applicability of Federal Rules of Evidence	10
Rule 101	10
Rule 1101	11
How the Rules Work	11
<i>United States v. Callahan</i>	12
Problem 1-1	14
B. Purposes of the Federal Rules of Evidence	14
Rule 102	14
How the Rule Works	15
<i>Costantino v. Herzog</i>	15
Problem 1-2	19
C. Mode and Order of Examining Witnesses and Presenting Evidence	19
Rule 611	20
Rule 614	20
How the Rules Work	21
(a) Control by the Court	21

(b) The Court's Ability to Question and Call Witnesses	23
(c) The Manner of Presenting Evidence	24
<i>United States v. Sasso</i>	26
Problems 1-3 and 1-4	29
III. Chapter Summary and References	29
IV. In-Class Activity	30
Exercise Option 1: Drafting and Defending a One-Rule Evidence Code	30
Exercise Option 2: Conducting Witness Examinations Using Both Non-Leading & Leading Questions	31
Chapter 2 · Basic Evidentiary Procedural Framework	33
I. Conceptual Background	33
A. Evidentiary Error and the Role of Counsel	33
B. Judicial Rulings on Challenged Evidentiary Matters	34
C. Limiting Instructions and the Proper Use of Evidence at Trial	35
D. The Rule of Completeness	36
E. Appellate Review of Evidentiary Rulings	36
II. Rules, Cases, and Problems	37
A. Rulings on Evidence	37
Rule 103	37
How the Rule Works	38
(a) Objection	38
(b) Motion to Strike	38
(c) Response	38
(d) Offer of Proof	39
(e) Motion in limine	39
(f) Ruling	39
(g) Definitive Ruling	40
<i>Reagan v. Brock</i>	41
<i>United States v. Gomez-Norena</i>	42
Problems 2-1 and 2-2	46
B. Preliminary Questions of Admissibility and Limiting Instructions	46
Rule 104	47
Rule 105	47
How the Rules Work	47
(a) Legal Admissibility	48
(b) Conditional Relevance	49
(c) Other Rule 104 Issues	50
(d) Limiting Instructions	51
<i>Huddleston v. United States</i>	51
Problems 2-3, 2-4, and 2-5	55
C. The Rule of Completeness	56
Rule 106	56

How the Rule Works	56
<i>United States v. Glover</i>	57
Problem 2-6	60
III. Chapter Summary and References	61
IV. In-Class Activity	62
Offer of Proof Exercise	62
Chapter 3 · Establishing Facts at Trial	63
I. Conceptual Background	63
A. Direct and Circumstantial Evidence	63
B. Judicial Notice	65
C. Burdens of Pleading, Production, and Persuasion	66
D. Presumptions	67
II. Rules, Cases, and Problems	68
A. Judicial Notice	68
Rule 201	68
How the Rule Works	69
<i>Dippin’ Dots, Inc. v. Frosty Bites Distribution, LLC</i>	70
Problems 3-1 and 3-2	73
B. Presumptions	74
Rule 301	74
Rule 302	74
How the Rule Works	74
(a) Effect on the Party against Whom the Presumption Is Directed	74
(b) Counterproof and Its Effect on the Presumption	75
(c) How the Fact-Finder Uses the Presumption	77
(d) The Effect of Presumptions in Federal Court	79
<i>St. Mary’s Honor Center v. Hicks</i>	80
Problem 3-3	84
III. Chapter Summary and References	84
IV. In-Class Activity	85
Classroom Court # 1	85
Unit One Application Exercise	89

UNIT TWO · RELEVANCE

Chapter 4 · Introduction to Relevance	93
I. Conceptual Background	93
II. Rules, Cases, and Problems	95
Rule 401	95
Rule 402	95
How the Rules Work	95
<i>United States v. Dean</i>	98
<i>Blinzler v. Marriott Int’l, Inc.</i>	100
<i>Magayanes v. Terrance</i>	102

Problems 4-1 to 4-6	104
III. Chapter Summary and References	106
IV. In-Class Activity	106
Classroom Court #2	106
Chapter 5 · Excluding Relevant Evidence under Rule 403	111
I. Conceptual Background	111
A. The Purposes of Rule 403	111
1) Integrity of the Process	112
2) Efficiency and Judicial Economy	113
B. The Role of the Judge in Rule 403 Balancing	113
II. Rules, Cases, and Problems	114
Rule 403	114
How the Rule Works	115
<i>Old Chief v. United States</i>	118
<i>Leopold v. Baccarat, Inc.</i>	123
Problems 5-1 to 5-4	125
III. Chapter Summary and References	126
IV. In-Class Activity	127
Objecting and Responding to Evidence on 403	
Grounds	128
Chapter 6 · Extrinsic Social Policies and the Exclusion of Relevant Evidence	131
I. Conceptual Background	131
A. Social Policy and the Exclusion of Evidence	131
B. Template for Analyzing Evidentiary Issues under Rules 407–411	133
1) Identify the Social Policy or Value Underlying the Rule	133
2) Determine Why the Evidence Is Being Offered	133
3) Determine Whether an Exception Applies	134
4) Conduct an Independent Rule 403 Analysis	134
II. Rules, Cases, and Problems	134
A. Subsequent Remedial Measures	134
Rule 407	135
How the Rule Works	135
<i>Wood v. Morbark Industries</i>	139
Problems 6-1 and 6-2	141
B. Compromise Offers and Negotiations	142
Rule 408	142
How the Rule Works	143
<i>Orr v. City of Albuquerque</i>	145
Problems 6-3 and 6-4	147
C. Offers to Pay Medical and Similar Expenses	147
Rule 409	147
How the Rule Works	147

D. Pleas, Plea Discussions, and Related Statements	148
Rule 410	149
How the Rule Works	149
<i>United States v. Olson</i>	151
Problem 6-5	154
E. Evidence of Liability Insurance	154
Rule 411	154
How the Rule Works	154
<i>Palmer v. Krueger</i>	155
Problem 6-6	157
III. Chapter Summary and References	158
IV. In-Class Activity	159
Limiting Instructions to Ensure Proper Use of Evidence at Trial	159
Chapter 7 · The Rape Shield Rule	161
I. Conceptual Background	161
A. Common-Law Evidentiary Doctrines in Rape and Sexual Assault Cases	161
B. Theories of Relevance Related to Past Sexual Activity	162
C. Historical Background of Rule 412: The Rape Shield Rule	164
II. Rules, Cases, and Problems	165
How the Rule Works	165
(a) General Prohibitions of Rule 412	165
Rule 412	166
(b) Exceptions to the General Rule of Exclusion in Criminal Cases	167
(c) Exceptions in Civil Cases	170
(d) Procedural Aspects of Rule 412	171
<i>United States v. Pumpkin Seed</i>	172
<i>Rodriguez-Hernandez v. Miranda-Velez</i>	176
Problems 7-1, 7-2, and 7-3	178
III. Chapter Summary and References	179
IV. In-Class Activity	179
Small-Group Policy Discussion	180
Chapter 8 · Privileges	183
I. Conceptual Background	183
A. Introduction to the Concept of Evidentiary Privileges	183
B. Essential Privilege Terms and Concepts	184
C. Privileges and the Federal Rules of Evidence	187
II. Rules, Cases, and Problems	188
A. The General Rule on Privileges	188
Rule 501	188
How the Rule Works	188
<i>University Of Pennsylvania v. EEOC</i>	189

B. The Attorney-Client Privilege	191
How the Rule Works	191
(a) Key Definitions	191
Proposed Rule 503 (a)	191
(b) Recognizing and Claiming the Privilege	192
Proposed Rule 503 (b) and (c)	193
(c) Waiver of and Exceptions to the Privilege	193
Proposed Rule 503 (d)	194
<i>Swidler & Berlin v. United States</i>	195
Problem 8-1	198
C. Disclosure of Attorney-Client and Work Product Information	199
Rule 502	199
D. The Marital Privileges	201
How the Rules Work	202
(a) The Spousal Privilege	202
(b) Confidential Marital Communications	202
<i>Trammel v. United States</i>	203
Problem 8-2	206
E. Other Common-Law Privileges Recognized in Federal Courts	206
III. Chapter Summary and References	207
IV. In-Class Activity	208
Other Common-Law and Statutory Privileges	208
Unit Two Application Exercise	209

UNIT THREE • CHARACTER

Chapter 9 • Introduction to Character Evidence	215
I. Conceptual Background	215
A. Introduction to Character Evidence	215
B. The Three Forms of Character Evidence	216
C. Introduction to Habit and Routine Practice	217
II. Rules, Cases, and Problems	218
A. Character Evidence in Criminal Cases	219
Rule 404	219
Rule 405	220
How the Rules Work	220
(a) Reputation Evidence Foundation	224
(b) Opinion Evidence Foundation	226
(c) Specific Acts Evidence Foundation	227
<i>United States v. Gullett</i>	227
Problems 9-1 and 9-2	230
B. Character Evidence in Civil Cases	231
How the Rule Works	231
<i>Hall v. SSF, Inc.</i>	233

Problem 9-3	235
C. Evidence of Habit and Routine Practice of an Organization	235
Rule 406	236
How the Rule Works	236
<i>Perrin v. Anderson</i>	238
Problem 9-4	240
III. Chapter Summary and References	240
IV. In-Class Activity	241
Presenting Character Testimony	241
Chapter 10 · Evidence of Other Crimes, Wrongs, or Acts	243
I. Conceptual Background	243
A. Introduction to Rule 404(b) and Other-Acts Evidence at Trial	243
B. Rules 413–415 and the Use of Other-Acts Evidence to Prove Propensity	244
II. Rules, Cases, and Problems	246
A. Crimes, Wrongs, or Other Acts — Rule 404(b)	246
Rule 404(b)	246
How the Rule Works	247
(a) The Forbidden Inference	247
(b) Permissible Uses of Other-Acts Evidence	247
(1) Intrinsic Uncharged Acts	248
(2) Motive	248
(3) Opportunity	248
(4) Intent	249
(5) Preparation	249
(6) Common Plan or Scheme	249
(7) Knowledge or Absence of Mistake or Accident	250
(8) Identity	250
(9) The Doctrine of Chances	250
(c) Procedural Protections	252
(1) Notice	252
(2) Balancing Test	253
(3) Quantum of Proof	254
(4) Limiting Instruction	254
<i>United States v. Gomez</i>	255
<i>United States v. Forcelle</i>	258
Problems 10-1 to 10-4	261
B. Evidence of Similar Crimes in Sexual Assault & Child Molestation	
Cases	262
Rule 413	263
Rule 414	263
Rule 415	263
How the Rules Work	264

<i>Blind-Doan v. Sanders</i>	266
Problems 10-5 and 10-6	269
III. Chapter Summary and References	270
IV. In-Class Activity	271
Classroom Court # 3	271
Unit Three Application Exercise	274

UNIT FOUR · THE LAW OF WITNESSES AND IMPEACHMENT

Chapter 11 · Witness Competency	279
I. Conceptual Background	279
II. Rules, Cases, and Problems	280
A. Witness Competency, Qualification, and the Oath	280
Rule 601	280
Rule 602	280
Rule 603	280
How the Rules Work	280
(a) Competency	280
(b) Personal Knowledge	282
(c) The Oath	283
<i>United States v. Ramirez</i>	285
<i>United States v. IMM</i>	287
Problems 11-1 and 11-2	288
B. Interpreters	288
Rule 604	288
How the Rule Works	289
<i>United States v. Bell</i>	289
Problem 11-3	291
C. Presumptive Incompetence of Judges and Jurors	292
Rule 605	292
Rule 606	292
How the Rules Work	292
(a) Testimony of Judges — Rule 605	292
(b) Testimony of Jurors — Rule 606	293
<i>Pena-Rodriguez v. Colorado</i>	294
Discussion Questions	300
Problem 11-4	300
III. Chapter Summary and References	301
IV. In-Class Activity	302
Witness Competency	302
Chapter 12 · Refreshing Recollection and Past Recollection Recorded	305
I. Conceptual Background	305
II. Rules, Cases, and Problems	306

A. Refreshing Recollection (a.k.a., “Present Recollection Revived”)	306
Rule 612	306
How the Rule Works	307
(a) Gently Leading Questions	310
(b) Formal Foundation	311
<i>Baker v. State</i>	312
Problems 12-1 and 12-2	314
B. Past Recollection Recorded	314
Rule 803(5)	315
How the Rule Works	315
<i>United States v. Williams</i>	319
Problem 12-3	323
III. Chapter Summary and References	323
IV. In-Class Activity	324
Refreshing Recollection	324
Chapter 13 · Introduction to Impeachment	325
I. Conceptual Background	325
A. Introduction to Impeachment	325
B. Common-Law Impeachment Doctrines	326
1) Impeachment for Bias or Improper Motive	326
2) Impeachment for Defective Capacity	327
3) Impeachment by Specific Contradiction	327
II. Rules, Cases, and Problems	328
A. Who May Impeach a Witness: Rule 607	328
Rule 607	328
How the Rule Works	328
<i>United States v. Ince</i>	330
Problem 13-1	335
B. Character-Based Impeachment for Truthfulness: Rule 608	335
Rule 608	336
How the Rule Works	336
<i>United States v. McMillon</i>	340
Problems 13-2 and 13-3	342
C. Impeaching for Criminal Convictions: Rule 609	342
Rule 609(a)	342
How the Rule Works	343
(a) General Discussion	343
(b) Time Limits on Use of Convictions	344
Rule 609(b)	345
(c) Miscellaneous Provisions	345
Rule 609 (c), (d), and (e)	346
<i>United States v. Brackeen</i>	347
Problem 13-4	350

III. Chapter Summary and References	350
IV. In-Class Activity	351
Impeaching a Witness	351
Chapter 14 · Impeachment by Prior Inconsistent Statements	353
I. Conceptual Background	353
II. Rules, Cases, and Problems	355
Rule 613	355
How the Rule Works	355
(a) Intrinsic Impeachment	355
(b) Impeachment by Omission	359
(c) Extrinsic Proof of Prior Inconsistent Statements	361
<i>United States v. Mitchell</i>	361
<i>Jenkins v. Anderson</i>	363
Problems 14-1, 14-2, and 14-3	369
III. Chapter Summary and References	369
IV. In-Class Activity	370
Red Light/Yellow Light Impeachment	370
Unit Four Application Exercise	371

UNIT FIVE · EXHIBITS: AUTHENTICATION AND THE BEST EVIDENCE RULE

Chapter 15 · Authentication	377
I. Conceptual Background	377
A. Real Evidence	377
B. Writings	378
C. Illustrative Evidence	378
D. Silent Witness Exhibits	378
II. Rules, Cases, and Problems	378
A. The General Authentication Rule and Witness Testimony	379
Rule 901(a) and (b)(1)	379
How the Rules Work	379
<i>United States v. Mitchell</i>	382
Problems 15-1 and 15-2	384
B. Authentication Rules in Specialized Cases	384
1) Identification of Writings by Opinion, Comparison, or Distinctiveness	385
Rule 901 (b)(2), (3), and (4)	385
How the Rules Work	385
(a) Nonexpert Opinion	385
(b) Comparison by Trier of Fact or Expert	386
(c) Distinctive Characteristics and the Like	387
Problem 15-3	388
2) Voice Identification and Telephone Calls	388

Rule 901 (b)(5) and (6)	388
How the Rules Work	389
Problem 15-4	390
3) Public Records and Ancient Documents	390
Rule 901 (b)(7) and (8)	390
How the Rules Work	391
Problem 15-5	392
4) Processes or Systems	392
Rule 901(b)(9)	392
How the Rule Works	393
Problem 15-6	394
C. Self-Authenticating Evidence	395
Rule 902	395
How the Rule Works	396
Problem 15-7	398
D. Authenticating Electronic Evidence	398
<i>United States v. Browne</i>	399
Problem 15-8	401
III. Chapter Summary and References	402
IV. In-Class Activity	403
Chain-of-Custody	403
Chapter 16 · The “Best Evidence” (Original Documents) Rule	405
I. Conceptual Background	405
II. Rules, Cases, and Problems	406
A. The General Requirement for an Original or Duplicates	406
Rule 1002	406
Rule 1003	406
Rule 1001	407
How the Rules Work	407
(a) Rule 1002’s Requirement for an Original	407
(b) Rule 1003’s Acceptance of Duplicates	409
<i>Heinsohn v. Carabin & Shaw, P.C.</i>	411
Problems 16-1 and 16-2	412
B. The Use of Secondary Evidence in Limited Circumstances	413
Rule 1004	413
How the Rule Works	413
<i>United States v. Bennett</i>	416
Problems 16-3 and 16-4	419
C. Other Methods to Prove Contents	419
How the Rules Work	419
(a) Public Records	419
Rule 1005	419
(b) Voluminous Documents	421

Rule 1006	421
(c) Statements of a Party-Opponent	421
Rule 1007	421
(d) Role of the Judge and Jury in Best Evidence Rule Decisions	422
Rule 1008	422
Problems 16-5 and 16-6	423
III. Chapter Summary and References	424
IV. In-Class Activity	425
Classroom Court # 4	425
Unit Five Application Exercise	428

UNIT SIX · HEARSAY

Chapter 17 · Introduction to Hearsay	433
I. Conceptual Background	433
II. Rules, Cases, and Problems	434
Rule 802	434
A. Hearsay’s Foundational Definitions	435
Rule 801(a), (b), and (c)	435
How the Rule Works	435
(a) The “Who” of Hearsay — Rule 801(b): Declarants and Witnesses	435
(b) The “What” of Hearsay — Rule 801(a): Assertive Statements and Conduct	436
(c) The “When” of Hearsay — Rule 801(c): The Truth of the Matter Asserted	438
(d) The “Why” of Hearsay	438
Problems 17-1 and 17-2	440
B. Rule 801(d): Non-Hearsay Statements Admitted for Their Truth	441
1) Prior Statements from a Declarant-Witness	441
Rule 801(d)(1)(A), (B), and (C)	441
How the Rule Works	442
(a) Rule 801(d)(1)(A)—Prior Inconsistent Statements	442
(b) Rule 801(d)(1)(B)—Prior Consistent Statements	443
(c) Rule 801(d)(1)(C)—Prior Out-of-Court Identifications	444
Problems 17-3, 17-4, and 17-5	445
2) Out-of-Court Statements Made by an Opposing Party	446
Rule 801(d)(2)	447
How the Rule Works	447
(a) Rule 801(d)(2)(A)—Statements Personally Made by an Opposing Party	448
(b) Rule 801(d)(2)(B)—Statements Adopted by an Opposing Party	449

(c) Rule 801(d)(2)(C) and (D)— Statements by Authorized Persons or Agents	450
(d) Rule 801(d)(2)(E)— Statements by Criminal Co-Conspirators	452
<i>Simple v. Walgreen Co.</i>	454
<i>United States Of America v. Garcia</i>	455
Problems 17-6 to 17-9	458
III. Chapter Summary and References	459
IV. In-Class Activity	459
Identifying Hearsay	460
Chapter 18 · Hearsay within Hearsay and the <i>Res Gestae</i> Exceptions	465
I. Conceptual Background	465
II. Rules, Cases, and Problems	467
A. Rule 805: Hearsay within Hearsay	467
Rule 805	467
How the Rule Works	467
Problem 18-1	470
B. Rule 803(1)–(4): The “ <i>Res Gestae</i> ” Hearsay Exceptions	470
1) Rule 803(1) — Present Sense Impression	471
Rule 803(1)	471
How the Rule Works	471
<i>United States v. Blakey</i>	473
Problem 18-2	475
2) Rule 803(2) — Excited Utterance	475
Rule 803(2)	476
How the Rule Works	476
<i>United States v. Golden</i>	478
Problem 18-3	479
3) Rule 803(3) — Then-Existing Mental, Emotional, or Physical Condition	480
Rule 803(3)	480
How the Rule Works	480
<i>Mutual Life Insurance Company v. Hillmon</i>	482
Problem 18-4	485
4) Rule 803(4) — Medical Diagnosis and Treatment	486
Rule 803(4)	486
How the Rule Works	486
<i>United States v. George</i>	488
Problem 18-5	489
III. Chapter Summary and References	490
IV. In-Class Activity	491
Identifying Hearsay Exceptions	491

Chapter 19 · Business and Public Records, and Other Rule 803 Exceptions	495
I. Conceptual Background	495
II. Rules, Cases, and Problems	496
A. Rule 803(6) — Regularly Conducted Activity Records (i.e., “Business Records”)	497
Rule 803(6)	497
How the Rule Works	498
(a) Contemporaneous Recording from Someone with Knowledge	499
(b) Kept in the Course of a Regularly Conducted Activity	500
(c) Made as Part of a Regular Practice	501
(d) Custodian Testimony or Certification Requirement	503
(e) Trustworthiness Requirement	503
<i>United States v. Hedman</i>	505
Problems 19-1, 19-2, and 19-3	507
B. Rules 803(8) and (9) — Public Records	508
Rules 803(8) and (9)	509
How the Rules Work	509
(a) Activities of the Office	510
(b) Matters Observed while under a Legal Duty	511
(c) Evaluative Records and Investigative Reports	512
<i>Beech Aircraft v. Rainey</i>	514
Problems 19-4 and 19-5	517
C. Rules 803(7) and (10) — The Absence of a Business or Public Record	517
Rules 803(7) and (10)	518
How the Rules Work	518
Problem 19-6	520
D. Rules 803(11) through (23) — Other Hearsay Exceptions	521
1) Regular Religious and Family Records — Rules 803(11)–(13)	521
Rules 803(11), (12), and (13)	521
2) Property Records — Rules 803(14)–(15)	522
Rules 803(14) and (15)	522
3) Specialized Records — Rules 803(16)–(18)	523
Rules 803(16), (17), and (18)	523
4) Evidence of Reputation — Rules 803(19)–(21)	524
Rules 803(19), (20), and (21)	524
5) Evidence of Judgments — Rules 803(22)–(23)	525
Rules 803(22) and (23)	525
III. Chapter Summary and References	526
IV. In-Class Activity	527
Business and Public Records Foundations	527
Unit Six · Mid-Unit Application Exercise	528

Chapter 20 · Rule 804 and the Hearsay Exceptions Requiring Unavailability	533
I. Conceptual Background	533
II. Rules, Cases, and Problems	534
A. Rule 804's Requirement of Unavailability	534
Rule 804(a)	535
How the Rule Works	535
(a) Privilege — Rule 804(a)(1)	535
(b) Refusal to Testify — Rule 804(a)(2)	536
(c) Lack of Memory — Rule 804(a)(3)	536
(d) Death or Illness — Rule 804(a)(4)	536
(e) Unreachable by Process — Rule 804(a)(5)	537
(f) Excluding or Admitting Where a Party Wrongfully Causes Absence	537
(1) Exclusion: Unavailability Procured by Proposing Party	537
(2) Exception: Unavailability Procured by Opposing Party	538
Rule 804 (b)(6)	538
Problems 20-1 and 20-2	539
B. Rule 804's Hearsay Exceptions for Unavailable Declarants	540
1) Rule 804(b)(1) — Former Testimony	540
Rule 804(b)(1)	540
How the Rule Works	541
(a) Element Four: Identity of the Parties	543
(b) Element Five: Opportunity and Similar Motive	543
<i>United States v. Vartanian</i>	545
Problem 20-3	547
2) Rule 804(b)(2) — Dying Declarations	547
Rule 804(b)(2)	548
How the Rule Works	548
<i>United States v. Lawrence</i>	551
Problem 20-4	553
3) Rule 804(b)(3) — Statements against Interest	553
Rule 804(b)(3)	553
How the Rule Works	554
(a) Statements Unrelated to Criminal Liability	555
(b) Statements Against Penal Interest	555
In re September 11 Litigation	557
Problems 20-5 and 20-6	559
4) Rule 804(b)(4) — Statements of Personal or Family History	560
Rule 804(b)(4)	560
How the Rule Works	560
III. Chapter Summary and References	561
IV. In-Class Activity	562
Classroom Court # 5	562

Chapter 21 · Hearsay Finale: Rules 806 and 807	567
I. Conceptual Background	567
II. Rules, Cases, and Problems	568
A. Rule 806: Impeaching a Declarant	568
Rule 806	568
How the Rule Works	568
<i>United States v. Rodríguez-Berrios</i>	570
<i>United States v. Goldwire</i>	572
Problems 21-1 and 21-2	575
B. Rule 807: The Residual Hearsay Exception	575
Rule 807 (a) and (b)	576
How the Rule Works	576
<i>United States v. Sanchez-Lima</i>	581
Problems 21-3 and 21-4	583
III. Chapter Summary and References	584
IV. In-Class Activity	585
Rule 806 Impeachment	585
Chapter 22 · The Confrontation Clause	587
I. Conceptual Background	587
II. Rules, Cases, and Problems	589
Amendment VI, U.S. Constitution	589
A. The <i>Crawford</i> Rule and the Birth of Modern Confrontation Clause Analysis	590
How the Rule Works	590
<i>Crawford v. Washington</i>	591
Problems 22-1 and 22-2	597
B. The Emergency Exception Rule in Confrontation Cases	598
How the Rule Works	599
<i>Davis v. Washington</i>	600
Problem 22-3	604
C. The Expansion of the Emergency Exception Rule	604
How the Rules Work	605
(a) Understanding the Crawford-Davis Rules Analysis	605
(b) The Emergency Exception Expands	606
Problems 22-4 and 22-5	608
D. Business & Public Records and the Modern Confrontation Clause Rule	609
How the Rule Works	609
(a) The General Rule after Crawford	609
(b) Testimonial Business and Public Records	610
<i>Melendez-Diaz v. Massachusetts</i>	610
E. The Continuing Confrontation Clause Controversy	616
Problem 22-6	618

III. Chapter Summary and References	618
IV. In-Class Activity	619
Defending Confrontation Clause Objections at a Motion in Limine Hearing	619
Unit Six End-of-Unit Application Exercise	623

UNIT SEVEN • OPINION TESTIMONY

Chapter 23 • Introduction to Lay and Expert Opinion Testimony	633
I. Conceptual Background	633
A. Introduction to Opinion Testimony	633
B. Lay Opinion Testimony	635
C. Expert Opinion Testimony	636
II. Rules, Cases, and Problems	637
A. Admitting Lay Opinions	637
Rule 701	637
How the Rule Works	637
<i>United States v. Peoples</i>	639
<i>Plyler v. Whirlpool Corp.</i>	642
Problems 23-1 and 23-2	644
B. Qualifying Expert Witnesses	645
Rule 702	645
How the Rule Works	645
<i>Scott v. Sears, Roebuck & Co.</i>	647
<i>Jones v. Lincoln Electric</i>	649
Problems 23-3 and 23-4	652
III. Chapter Summary and References	653
IV. In-Class Exercise	653
Qualifying an Expert Witness	654
Chapter 24 • Expert Opinion Testimony and Its Limits	655
I. Conceptual Background	655
II. Rules, Cases, and Problems	657
A. Reliability under Rule 702 and the <i>Daubert</i> Line of Cases	657
Rule 702	657
How the Rule Works	657
<i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i>	659
Problem 24-1	665
B. Permissible Bases for Expert Opinion Testimony and Disclosure Requirements	665
Rule 703	666
Rule 705	666
How the Rules Work	666
<i>Hutchinson v. Groskin</i>	669

Problem 24-2	672
C. Learned Treatises and Authoritative Publications in Expert Testimony	672
Rule 803(17) and (18)	673
How the Rules Work	673
(a) Rule 803(17)	673
(b) Rule 803(18)	674
<i>Meschino v. North Am. Drager</i>	675
Problem 24-3	677
D. Ultimate Opinion Testimony	677
Rule 704(a) and (b)	677
How the Rule Works	678
(a) General Admissibility	678
(b) Exception for Criminal Cases	679
<i>United States v. Eff</i>	681
Problem 24-4	684
E. Judicial Appointment of Experts	684
Rule 706 (a)–(e)	685
III. Chapter Summary and References	686
IV. In-Class Activity	686
Conducting a <i>Daubert</i> Hearing	686
Unit Seven Application Exercise	687
Final Class Capstone Application Exercise	695
<i>Calamity v. Jane</i> Criminal Trial	695
Appendix · The Federal Rules of Evidence	697
Index	729

Table of Cases

A

Air Land Forwarders, Inc. v. United States, 502
Alford v. United States, 23, 341

B

Baker v. State, 307, 308, 312
Beck v. Dye, 472
Beech Aircraft v. Rainey, 514
Berger v. United States, 112
Blind-Doan v. Sanders, 266
Blinzler v. Marriott Int'l, Inc., 100
Bourjaily v. United States, 35, 54, 451, 453
Bruton v. United States, 448, 556
Bullcoming v. New Mexico, 616, 617

C

Chicago City Ry. Co. v. Carroll, 414
Costantino v. Herzog, 15
Crawford v. Washington, 588, 590, 591, 598–617

D

Daubert v. Merrell Dow Pharmaceuticals, Inc., 641, 656–658, 659
Davis v. Washington, 599, 600, 604–606, 611–612
Degelos v. Fidelity and Casualty Co., 25
Dippin' Dots, Inc. v. Frosty Bites Distribution, LLC, 70
Donnelly v. United States, 556

E

Erie Railroad Co. v. Tompkins, 79
Evans v. Commonwealth, 386

F

Fanelli v. United States Gypsum Co., 307–308
Foster-Holcomb Investment Co. v. Little Rock Publishing Co., 414
Franklin v. Skelly Oil Co, 513

G

Garrett v. Howden, 472
Giles v. California, 598–599
Ginter v. Northwestern Mut. Life Ins. Co., 231

H

Hall v. SSF, Inc., 233
Hart v. Lancashire and Yorkshire Railway Co, 135
Heinsohn v. Carabin & Shaw, P.C., 411
Huddleston v. United States, 51, 112, 254
Hutchinson v. Groskin, 669

I

In re September 11 Litigation, 557

J

Jaffee v. Redmond, 206
Jenkins v. Anderson, 363
Jones v. Lincoln Electric, 649

K

Kercheval v. United States, 150
Kumho Tire Co. v. Carmichael, 641

L

Leopold v. Baccarat, Inc., 123

M

Magayanes v. Terrance, 102
Maryland Casualty Co. v. Kador, 25
Maryland v. Craig, 598
Melendez-Diaz v. Massachusetts, 520,
609, 610, 616
Meschino v. North Am. Drager, 675
Michelson v. United States, 220
Michigan v. Bryant, 607
Miranda v. Arizona, 366, 448
Morgan v. Foretich, 478
Mutual Life Insurance Company v.
Hillmon, 481, 482

O

Ohio v. Clark, 607–608
Ohio v. Roberts, 590, 591–597, 607,
608
Old Chief v. United States, 36, 118
Olden v. Kentucky, 169, 175
Orr v. City of Albuquerque, 145

P

Packineau v. United States, 179
Palmer v. Hoffman, 501–502, 513
Palmer v. Krueger, 155
Pena-Rodriguez v. Colorado, 294
People v. Love, 519
Perrin v. Anderson, 238
Plyler v. Whirlpool Corp., 642

R

Reagan v. Brock, 41
Reilly v. Pinkus, 675
Rex v. Woodcock, 548
Rodriguez-Hernandez v. Miranda-
Velez, 176
Roviaro v. United States, 206

S

Scott v. Sears, Roebuck & Co., 647
Simple v. Walgreen Co., 454
St. Mary's Honor Center v. Hicks, 80
State v. Carmichael, 167

State v. Moutray, 329
State v. Sibley, 163
State v. Wood, 163
Swidler & Berlin v. United States, 195

T

Totten v. United States, 206
Trammel v. United States, 189, 203

U

United States v. Abel, 326
United States v. Barile, 354
United States v. Bell, 289
United States v. Bennett, 416
United States v. Blakey, 473
United States v. Brackeen, 347
United States v. Browne, 399
United States v. Buffalo, 330
United States v. Callahan, 12
United States v. Davis, 337
United States v. Dean, 98
United States v. Eff, 681
United States v. Forcelle, 258
United States v. Galloway, 167
United States v. Garcia (8th Cir.), 455
United States v. Garcia (D.C. Cir.), 382
United States v. George, 488
United States v. Glover, 57
United States v. Golden, 478
United States v. Goldwire, 572
United States v. Gomez, 255
United States v. Gomez-Norena, 42
United States v. Grant, 502
United States v. Gulley, 227
United States v. Hedman, 505
United States v. IMM, 287
United States v. Inadi, 541
United States v. Ince, 330
United States v. Johnson (C.A.A.F.),
572
United States v. Johnson (D.C. Cir.),
330
United States v. Lawrence, 551
United States v. Mastrangelo, 539

- United States v. McMillon, 340
United States v. Merrill, 150
United States v. Mezzanatto, 151
United States v. Mitchell (10th Cir.),
361
United States v. Mitchell (D.C. Cir.),
382
United States v. Nixon, 198, 206
United States v. Oates, 513
United States v. Olson, 151
United States v. One Feather, 167
United States v. Peoples, 639
United States v. Pumpkin Seed, 172
United States v. Ramirez, 285
United States v. Rappy, 307
United States v. Reynolds, 206
United States v. Rodríguez–Berríos,
570
United States v. Sanchez-Lima, 581
United States v. Sasso, 26
- United States v. Scarpa, 478
United States v. Skeet, 635, 638
United States v. Vartanian, 545
United States v. Williams (2nd Cir.),
663
United States v. Williams (5th Cir.),
248
United States v. Williams (6th Cir.),
319
United States v. Woods, 251
United States v. Yazzie, 635
United States v. Jenkins, 36
University of Pennsylvania v. EEOC,
189
- W**
Walker v. Johnston, 12
Whorton v. Bockting, 598
Williams v. Illinois, 617
Wood v. Morbark Industries, 139

Preface to the Second Edition

Although it was fun to conceptualize and write the first edition on my own, I approached writing the second edition with some trepidation. Having used the first edition in class for several years, I was painfully aware of its shortcomings. I knew much work would be needed to transform the second edition into a more effective textbook and resource for students.

Professor Antony Kolenc, an early adopter of the first edition, had shared a number of his creative ideas for teaching evidence with me. He offered to help out with a subsequent edition if I ever decided to add a co-author. I took him up on the offer, and the collaboration exceeded all my expectations. His creativity, enthusiasm, and attention to detail had a transformative impact on the book; the second edition is much stronger than the first because of this collaboration.

The second edition contains a number of improvements and innovations. Based on our experiences teaching from the book, we changed the overall organization, reducing it from 31 to 24 chapters. Recognizing that the application exercises demanded considerable out-of-class preparation from students, we reduced their number and moved them to the end of units, where they serve as a comprehensive review of the rules and concepts in the chapter. We replaced the in-chapter application exercises with shorter in-class exercises, including courtroom objection-and-response exercises, for which students can more easily prepare. We edited all of the problems for content and clarity, deleted weak problems, and added additional problems throughout the book. We went through a similar process with cases, editing, deleting, and adding new cases throughout the book.

We believe the second edition better accomplishes the first edition's goal of helping students bring theory and practice together and preparing them for a lifetime of solving real problems of proof in the demanding environment of the courtroom.

Preface to the First Edition

Nowhere is the gulf between law school theory and practice wider than in the law of evidence. I have taught evidence and trial advocacy for several years, for a variety of audiences and in diverse environments: law students at Southern Illinois University, newly licensed attorneys, supervisory attorneys and military judges at the United States Army Judge Advocate General's Legal Center and School, trial advocacy students at several law schools, experienced lawyers in advocacy training courses, and judges at the National Judicial College.

In all of those environments, I have been struck by the extent to which law students and new attorneys struggle to apply what they learned about evidence in the classroom to the much different environment of the courtroom. Judges and supervisory attorneys lament the extra time they must spend to walk new counsel through relatively simple evidentiary applications in the courtroom.

I wrote *Evidence and the Advocate* with a specific outcome in mind: a student who knows black-letter evidence law well enough to pass a bar exam, understands evidence theory sufficiently to make creative evidentiary arguments at trial and on appeal, and possesses a sound practical ability to apply the rules in the courtroom. The text also has the secondary goal of developing in students an appreciation for the rich tapestry of evidence law formed by the interweaving of social policy, scholarship and case law.

To accomplish these goals, *Evidence and the Advocate* teaches each rule of evidence using a three pronged approach: (1) a treatise-like explanation of the rule, its purposes, exceptions and foundations; (2) cases, discussion questions and hypothetical problems related to the rule; and (3) an application section in which the students must prepare a courtroom exercise putting the rule into action. This approach forms a teaching template for each rule of evidence.

Each application exercise stands alone and has been designed to illuminate the rule being taught. The application exercises range from simple form-of-question drills to full-fledged evidentiary hearings. Some require minimal preparation, and others require significant out-of-class research and preparation. In the exercises, students serve as attorneys, witnesses, judges, and, in the more involved exercises, as a court of appeals. The exercises build on each other. The initial exercises focus on fundamental advocacy skills such as conducting a direct examination or laying the foundation for an exhibit. Later exercises incorporate these foundational skills for more complicated tasks such as writing a motion, impeaching a witness, or conducting a *Daubert* hearing on the reliability of expert testimony.

The law of evidence is a rich, fascinating and rewarding field of study. But it is more than that: it represents centuries of experience in solving practical problems of proof. This book is designed to help students bring theory and practice together and

prepare them for a lifetime of solving real problems of proof in the demanding environment of the courtroom.

—*Chris Behan*
Carbondale, Illinois

Using This Book

All incidents in *Evidence and the Advocate* take place in the State of Calamity. The State of Calamity has adopted the Federal Rules of Evidence in their entirety. Other than Supreme Court case law, there is no binding precedential case law in Calamity.

Each chapter contains the following basic elements:

1. A list of chapter objectives.
2. Background and explanatory material. This includes the rule itself, as well as a treatise-like explanation of the rule, its historical development, and how it is used and interpreted in the courtroom.
3. Cases pertaining to the rule.
4. Discussion questions.
5. Hypothetical problems.
6. A “Quick Hits” summary of the rule.
7. References to major treatises that discuss the rule.
8. In-class exercises.

Finally, the appendix contains the rules of evidence in their entirety.

Acknowledgments

I would like to thank the following individuals and institutions: My research assistants for the first edition: Steve Boling, Andrew Flynn, David Aubrey and Stephanie Black. My research assistants for the second edition: Ruthi Brooks, Michael Hines, and Martin Parsons. My secretary, Carol Manis. My evidence students at the Southern Illinois University School of Law, who endured multiple drafts of this book as I was writing it. My good friends and evidence colleagues Peter Alexander, Hugh Selby, Charlie Rose and Bill Schroeder. Southern Illinois University School of Law, for providing the institutional support and encouragement to write this book. The United States Army Judge Advocate General's Legal Center and School—and in particular, the Criminal Law Department—where I got my start in evidence teaching and scholarship. I will always be a Criminal at heart. Professor Edward Kimball, my evidence professor at Brigham Young University's J. Reuben Clark Law School, who inspired me with a love for the law of evidence. The Honorable Patrick J. Robb, Missouri 5th Judicial Circuit Court, for teaching me the importance of combining practice and theory in the courtroom. And last but not least, for their patience and unwavering support, my wife Valery and our children: Cara, Jake, Joe, Megan, Bonnie, Sam and James.

From Tony Kolenc: I would like to thank the students at Florida Coastal School of Law, who helped cement and bring to life the problems and exercises in this book. I especially thank my research assistant, George L. Arut, who assisted in developing several of the in-class exercises and the end-of-course capstone exercise. I also acknowledge the enormous positive impact of the Air Force Judge Advocate General's Corps, which helped instill in me the practical skills needed to succeed as a litigator, especially with the rules of evidence. I thank my co-author, Christopher Behan, for creating the perfect evidence casebook for teaching the rules of evidence from both a practical and theoretical approach, and for giving me a chance as a co-author. Finally, I thank my wife, Alisa, and my children (Beauty, Mercy, A.J., Talia, and Amina) and grandchildren (Chloe, Noah, and Samwise).

