

Evidence

Evidence

Cases, Materials, and Problems

FIFTH EDITION

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Dedication

To my wife, Thelma Anne McDermott, without whose love,
help and support this book could never have been done.

—P.F.R.

To Susanne.

—D.C.

To my Mom, Barbara Lawson.

—T.F.L.

From both Professor Rothstein and Professor Crump:
To our beloved co-author Myrna Raeder, who passed away much too young.
She did not see the publication of this volume, but her work runs through all
of it. Her insight, wisdom and good humor will ever grace everyone whose
lives she touched.

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Preface to the Fifth Edition

Using This Book, Particularly Its New Edition

Our aim in this book is to help students navigate the sometimes treacherous but always fascinating terrain of Evidence Law. The materials included cover a wide range of perspectives, from intensely pragmatic concerns, through deeply philosophical policy issues, to new approaches to evidentiary analysis. Assignments may be tailored to suit the teacher's own preferences on how to best approach Evidence in an introductory course. We make available here a variety of realistic materials: textual explanations, rules, cases, notes, questions, problems, jury instructions, articles, proposals, legislation, excerpted testimony—whatever we have deemed most effective for teaching the particular evidentiary sub-topic under discussion.

The first chapter describes generally the various kinds of evidence there are, the nature of the legal regulation of evidence, and the role of rules of evidence within the litigation process as a whole, including the functions of the various players—judge, jury, and lawyers. We find this initial background orientation stands students in good stead during the whole semester, providing a framework for their grasp of all that follows.

Throughout the book we have supplied new cases, explanatory text, and other materials, while retaining old favorites. We aim to help students keep up with rapidly evolving areas (such as expert and scientific testimony, electronic and digital evidence, and the Confrontation Clause) without neglecting more static but also important topics. While we recognize that not all of the students will be trial lawyers, we think Evidence is important whatever the nature of their future careers.

The book is predicated on the notion that the Federal Rules of Evidence, their state progeny, and cases arising under them, are the major factors in teaching Evidence. We occasionally include interesting or informative cases or materials from other jurisdictions or the common law, when we feel they shed light on an issue, illuminate what the Federal Rules are trying to codify or change, or impart perspective by showing other ways of doing things. But we think the Federal Rules provide a good organizing principle. We sequence the topics in the book roughly along the same lines as the sequence in the Federal Rules, with the exception of privileges and the so-called evidentiary “shortcuts” (judicial notice and presumptions), which we defer to the end for pedagogical reasons. But the book is designed to allow teachers to adopt whatever order they prefer.

In the new edition, we made room for new material by careful selection, pruning, editing, deleting less instructive cases, and summarizing some opinions or portions thereof. Except where we deemed it important for understanding, we eliminated from opinions most internal citations, extraneous passages and headings, and the plethora of ellipses one sometimes sees marking such deletions. We also deleted “cert. denied” from case citations unless necessary for context.

In the privileges chapter, we set forth verbatim, at the front of each section, the *Uniform* (not the *Federal*) Rules of Evidence codifying the particular privilege being treated. We thought the students could use this additional “rudder” because the Federal Rules do not contain particular privileges. The Uniform Rules respecting privileges are more thorough and recent than the unenacted Federal Rules draft that had particular privileges, the so-called Supreme Court draft, upon which the Uniform Rules are basically modeled (but with improvements more reflective of current law).

The general plan of the book is this. Each section starts out with a directive to read a particular rule or portion thereof. This may be followed by a brief background explanation of the area, if needed. Then come some essential and teachable cases and other primary materials, each usually followed by a set of expository notes and questions exploring important permutations and implications. Throughout are problems testing whether students can apply or critique what they have learned. Each note, question, or problem has a heading indicating what it treats, so that professors are able to identify the subjects they wish to cover, while students receive direction about the intended focus of each inquiry. All decisions cited by us in textual passages, notes, questions, and problems are followed by at least a few words describing the holding, so the student is not left to wonder or look the case up in order to get our point.

Most sections of the book bear an initial footnote to the relevant portion of ROTHSTEIN, RAEDER & CRUMP’S *EVIDENCE IN A NUTSHELL* that succinctly summarizes the principal points of the matter under study. The references are to portions of the *Nutshell* by their chapter number (Arabic numeral), chapter subdivision number (capital Roman numeral), and title (in words in quotes) of the portion within that nutshell subdivision. Thus, a citation might read: *Evidence in a Nutshell*, Chapter 1:II at “Curative and Cautionary Instructions.” The reader should find the location of this entry in the Table of Contents of the *Nutshell* and go to the relevant pages of the *Nutshell*. Any future editions of the *Nutshell* will have all the same designations.

The *Nutshell* referred to is more substantive than some other concise text offerings and is entirely compatible with the present book. Any use of the *Nutshell* is completely optional, however—the present book is entirely self-sufficient. But at least one of us makes regular assignments to the *Nutshell* along with readings in the present book. Some professors leave it to the students as to whether or not to consult the *Nutshell* as a study guide during the course or before finals. Some professors assign as *Nutshell* reading, those subjects, basics, or background areas, that they do not wish to spend much class time on, thereby freeing up class time for other issues they want to treat more extensively. Or they may wish to assign foundational reading they will expand upon in class without having to lay out fundamentals.

Each of us is indebted to people too numerous to mention who have provided wise counsel in the preparation of this book. They include fellow teachers and, most of all, our students who, over the years, have made valuable suggestions that we have incorporated. Any errors, however, are our own. We want to particularly note our enormous debt to Prof. Myrna Raeder, who was our co-author on previous editions, and whose untimely death, at such a young age, is a great loss to the entire legal and academic community—indeed to the world, which she constantly strove to better, with her extensive, sensitive, and perceptive writings. We miss her.

P.F.R.

D.C.

T.F.L.