Evidence
Problems and Materials

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SIXTH EDITION

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In loving memory of my uncle, Bernard Friedland.

For my parents, Geraldine and George, my wife, Joann, and our children, Mandakini and Anish—for making every day special!

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Preface

This new edition of *Evidence Problems and Materials* builds on the editions that preceded it. While at one time using problems in Evidence Law courses was a novel idea, it is fairly common today. What this book does that is different than other books in the field is to use numerous short problems that illustrate and isolate elements of rules, offer real-world examples to promote its relevance, and combine evidence issues with ethics.

From the start, assigning a label to this book was difficult primarily because it has not been a traditional law school text. To call it a "casebook," one that revolves around evidentiary judicial decisions, would be in error. In fact, appellate case reports comprise only a small fraction of the book's contents. Yet, the book is not entirely a "problem" book either. While the "problem" label is accurate, such a label is unduly narrow. The book uses problems and illustrations for different purposes: to connect students with the practice of Evidence Law, meaning how evidence issues might arise in the real world; to trigger the processes required to work one's way through an evidence question; and to provide the opportunity to consider pertinent federal and state rules of evidence and their associated legislative history. Thus, the problems are central to the students' understanding of what the rules mean and how they work.

The conceptualization of the book as an evidence text is derived from one of the book's premises: understanding the rules of evidence can occur effectively and directly through cognitive learning methods. The book is predicated on the belief that an understanding of evidence law will be promoted if the reader is actively engaged in the learning process, particularly through solving problems. The delivery of information to the learner is only a small part of that process.

Thus, in light of the book's premises, case reports are not the "text" of this textbook. Rather than presenting an orderly recitation of cases followed by questions, this book inverts, and then expands on, a traditional casebook ordering. The book is structured so that each section commences with brief explanatory comments about a particular area of evidence law, including an illustration of the subject matter. It then proceeds with a wide variety of problems intended to test the reader's understanding of the evidentiary rules and their intended meaning. (The problems are primarily designed to be answered using the Federal Rules of Evidence and the associated Advisory Committee's Notes. The text is sufficiently generic, however, to allow the use of applicable state evidentiary rules as well.) Immediately prior to the conclusion of each section, cases and other statutes are presented for comparative purposes. Since "muscle mem-

ory" requires that knowledge be imprinted, each section concludes with a summary and review.

To further promote the learning process, an attempt is made to "thicken" the problems with real world contexts that often confront trial lawyers. These contexts include: (1) the courtroom (some problems are presented in transcript form); (2) lawyering skills (some areas of the book include a discussion of skills, such as qualifying an expert, distinguishing and comparing statutes, and conducting a cross-examination of a witness); and (3) the inclusion of identifying characteristics that may significantly affect evidentiary rulings, such as race, gender, sexual preference, and ethnicity (some problems seek to discern the relevance of these characteristics by probing the values and ideology underlying the evidentiary analysis).

The inclusion of these contexts is intended not only to make the book more useful to integrating the rules with lawyering skills, but also to place legal analysis where many commentators argue that it belongs—within the social sciences. By recognizing the significance of social science contexts, readers may observe a closer connection between the application of the evidence rules and the experiences of everyday life.

We also broke with tradition by melding Evidence and Ethics—adding the ethical implications of evidentiary issues that often arise in every chapter. While the legal education agenda is stocked with concerns about incorporating skills into the curriculum in addition to legal analysis, the discussion of professionalism remains an important and primary topic. By weaving evidence and ethics together, we offer a more realistic approach—the two often arise together in the real world, after all—and allow students to better understand the larger picture of practice, where legal issues are often a mosaic. This approach reflects some of the recommendations contained in two major reports examining legal education—Educating Lawyers by the Carnegie Foundation and Best Practices for Legal Education by the Clinical Legal Education Association.

Of course, the ethics components are such that they can be treated as supplemental issues or bypassed completely, if desired. The primary focal points of this book remain evidence law and its application, and we took care not to let the ethics problems overshadow or obscure the evidence questions.

This edition also includes new "practical tips" and "background boxes" material that help students apply the rules. Another feature is the outline at the beginning of each chapter to help students organize and synthesize the rules and related material.

If the primary learning mechanism used in the book is problem solving, the primary context within which the problem solving occurs is the courtroom. A courtroom orientation offers several pedagogical advantages. The courtroom setting facilitates role playing and encourages simulations and active participation. Role playing, in turn, allows students to consider different perspectives and to focus on how to persuade others to adopt those perspectives. In reenacting the courtroom "drama," the students also engage in a narrative discourse. Studies have found that the narrative is an effective learning tool. Additionally, the courtroom context elevates the significance of issues

relating to fact determination. The determination of fact, so important to the resolution of trials and cases, is all too often minimized in the legal education process. By using the courtroom setting, fact determination issues can be studied directly.

In addition, the courtroom backdrop allows lawyering skills to be woven into the basic fabric of the evidence course. The inclusion of lawyering skills provides a view of the "big picture" of evidence law as it is applied. Skills training also permits instructors to provide a broader critique of students, including feedback on courtroom performance as well as on the students' understanding of the evidence rules.

By incorporating identifying characteristics in the problems such as race, ethnicity, gender, religion, sexual preference, and socio-economic factors, the book seeks to highlight the potential relevance of these factors to evidentiary determinations. In particular, these factors suggest that evidentiary determinations often depend on interpretive theories of human behavior. These theories may be sufficiently important to consider and discuss in class.

The book breaks with tradition in one other way. There are occasional visual illustrations accompanying the problems. The reason for this inclusion is simple—people learn differently, and visual imagery can be as important as a multiplicity of words. As many trial attorneys who regularly use photographs, charts, and diagrams will attest, a single picture can greatly promote and enhance the audience's attention.

We hope that you have as much fun in puzzling over the problems and in sorting out the values and ideology upon which the conclusions rest as we have had in putting the book together. We further hope you find that the book facilitates a deep understanding of the evidence rules and their constitutive frameworks, as well as synthesizes a broader perspective of how the rules relate to lawyering, legal theory, and human nature.

As with most books, this one was the product of the diligent work of people too numerous to mention. We would, however, like to acknowledge and thank our families and close friends for their unconditional support, as well as Ragan Riddle, Paige Vankooten, Susan Altmeyer, Natalie Rothenbuecher, Lindsay Casile, Alarra S. Jordan, Seth Marcum and Garth Woodson, for their research assistance.

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