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Evidence

A Context and Practice Casebook

THIRD EDITION

Pavel Wonsowicz

UCLA School of Law



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To Eva and Charles,
Deep in their roots, all flowers keep the light.

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Series Editor's Preface

Welcome to a new type of law text. Designed by leading experts in law school teaching and learning, Context and Practice casebooks assist law professors and their students to work together to learn, minimize stress, and prepare for the rigors and joys of practicing law. **Student learning and preparation for law practice are the guiding ethics of these books.**

Why would we depart from the tried and true? Why have we abandoned the legal education model by which we were trained? Because legal education can and must improve.

In Spring 2007, the Carnegie Foundation published *Educating Lawyers: Preparation for the Practice of Law* and the Clinical Legal Education Association published *Best Practices for Legal Education*. Both works reflect in-depth efforts to assess the effectiveness of modern legal education, and both conclude that legal education, as presently practiced, falls quite short of what it can and should be. Both works criticize law professors' rigid adherence to a single teaching technique, the inadequacies of law school assessment mechanisms, and the dearth of law school instruction aimed at teaching law practice skills and inculcating professional values. Finally, the authors of both books express concern that legal education may be harming law students. Recent studies show that law students, in comparison to all other graduate students, have the highest levels of depression, anxiety and substance abuse.

The problems with traditional law school instruction begin with the textbooks law teachers use. Law professors cannot implement *Educating Lawyers* and *Best Practices* using texts designed for the traditional model of legal education. Moreover, even though our understanding of how people learn has grown exponentially in the past 100 years, no law school text to date even purports to have been designed with educational research in mind.

The Context and Practice Series is an effort to offer a genuine alternative. Grounded in learning theory and instructional design and written with *Educating Lawyers* and *Best Practices* in mind, Context and Practice casebooks make it easy for law professors to change.

I welcome reactions, criticisms, and suggestions; my e-mail address is mschwartz@pacific.edu. Knowing the author(s) of these books, I know they, too, would appreciate your input; we share a common commitment to student learning.

In fact, students, if your professor cares enough about your learning to have adopted this book, I bet s/he would welcome your input, too!

Michael Hunter Schwartz, Series Designer and Editor
Consultant, Institute for Law Teaching and Learning
Dean and Professor of Law, University of the Pacific, McGeorge School of Law

Preface and Acknowledgments

People learn best when they answer their own questions and receive feedback on their efforts. They achieve their best insights when they fight through confusion through thought, reflection, and problem solving. In this way, knowledge is constructed, not received.

In this book, most of our focus will be on the ambiguity and uncertainty in evidence law—what I often refer to as the “gray area.” In each section, the core tests and rules are presented right up front, as clearly as I could write them. The rest of the section explores uncertainty: What are the ambiguities in the rules? How do courts apply the test? Upon what does the court rely in making its determination? By recognizing these gray areas, grappling with them, rethinking our assumptions, and examining our mental models of reality, we can turn confusion into insight.

It is my hope that this book will help you construct knowledge through a natural, critical learning environment in your classroom. By “natural,” I mean that you will explore authentic, real-world application of evidence law. By “critical,” I mean that you will not only examine your understanding of the law, its application, and its synthesis, but also have the opportunity to provoke an imagination that leads to possibilities and solutions. I hope it will help you develop all the skills that a practitioner must possess, such as creativity, practical judgment, fact finding, persuasive advocacy, strategic planning, passion, and engagement.

Most of all, I hope that journey is a good one for you. Have fun with this book: actively engage in the motivations of the parties and lawyers in the cases, try to predict the outcome of the problems, and do not ignore the emotions that arise in you as you go through these materials. In other words, dive into the ambiguity and make the knowledge your own.

Acknowledgments

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