Evidence: The Objection Method
Fifth Edition

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Fifth Edition

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Preface to the Fifth Edition

This Fifth Edition plays to what we feel were the strengths of the first four editions. Most importantly, the book is stocked with transcript style problems in which lawyers present evidence and argue evidentiary points, and a trial judge is called on to rule. We hope that these problems will be useful to readers both in and out of class. In this Edition, we have made a special effort to update and amplify the problems in order to provide a real challenge for students seeking to master the rules of evidence as well as the art of objection and argument over evidentiary points in a real trial.

This new edition was necessitated by a number of developments in the law of evidence. Changes include interesting innovations by courts on questions of character evidence and expert testimony; amendments to the Federal Rules of Evidence; issues involving the admissibility of electronic evidence; and Supreme Court development on the right to confrontation.

Of course the casebook focuses on the Federal Rules of Evidence, as they were restyled in 2011. One of the authors of this book, Professor Daniel Capra, serves as Reporter to the Judicial Advisory Committee on Evidence Rules and so had front-line responsibility for the restyled rules. Another co-author, Professor Saltzburg, served as a consultant on the Restyling project. Where possible, the drafters' perspective on the Restyling amendments has been emphasized.

Many of the principal cases in the book were decided before the Restyled Rules of Evidence went into effect. Where those cases quote the language of the rule, we have tried to indicate that the quotation is from the rule before it was restyled. Editorial comments concerning restyling are contained in brackets in the cases. It is important to note that none of the results in any of the cases would be changed by applying the Restyled Rule — because the very premise of the Restyling is that no substantive changes have been made.

A few words on the format of the book. Citations included in cases are usually omitted without so specifying. Footnotes that are included in the cases are numbered as they were in the original case. Footnotes that are ours in the text are numbered sequentially from the beginning of each chapter. If we have deleted material from a case, it is noted with three asterisks. If the court has deleted material — for example from a quote taken from another case — it is noted with three periods.

This Edition continues the practice of the previous edition by including extensive excerpts from the *Federal Rules of Evidence Manual*, coauthored by Professors Stephen Saltzburg, Michael Martin, and Daniel Capra. We hope that these excerpts will help students master the important concepts of evidence that do not arise in the principal cases. We thank Lexis-Nexis for the permission to use this material. Extensive original note material is also included.

The co-authors owe a special debt of thanks to Professors Capra and Saltzburg, who spent countless hours in preparing new problems, finding new cases, and reworking and modernizing the material for this new edition.

Dedication

The authors dedicate this book to all our families and loved ones. Their patience, endurance, and endearments provide us monumental support.

D.D.P. to Burns, Vivian, Derek, and Scott

D.J.C. to Anne, Emily, and David

S.A.S. to Susan, David, Diane, Lisa, and Mark

C.M.A. to Ron, Ronnie, Tiffany, Jennifer, and Kenny

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Introduction: The Restyled Rules of Evidence

This edition of the casebook highlights the Restyled Rules of Evidence. The Judicial Conference Standing Committee on Rules of Practice and Procedure has led a decades-long effort to adopt clear and consistent style conventions for all of the national rules of procedure. The rules had been enacted without consistent style conventions, so there were differences from one set of rules to another, and even from one rule to another within the same set. Different rules expressed the same thought in different ways, leading to a risk that they would be interpreted differently. Different rules sometimes used the same word or phrase to mean different things, again leading to a risk of misinterpretation. Drafters made no effort to write the rules in plain English.

Despite some initial opposition, each of the restyling projects has proved enormously successful — substantially assisting lawyers, judges and law students in understanding and applying the rules. The Restyled Evidence Rules have won legal writing awards, including a Clear Mark award for plain language and the Burton Award for Legal Reform.

The Process for Restyling the Evidence Rules

With the approval of the Chief Justice of the United States — the Chair of the Judicial Conference — the Advisory Committee on Evidence Rules undertook its restyling project beginning in the Fall of 2007. The Committee established a step-by-step process for restyling in compliance with previous restyling projects and with the Rules Enabling Act. Those steps involved multiple levels of drafting and review by the Evidence Rules Committee, the Style Subcommittee of the Standing Committee, as well as substantial input from judges, lawyers and academics.

Professor Capra, a co-author of this Casebook, served as the Reporter for the restyling. Professor Saltzburg, another co-author of this Casebook, served as a consultant to the Advisory Committee. Professor Joseph Kimble, a legal writing professor, served as the principal restylist.

The most challenging part of the restyling process was to improve the style of the Evidence Rules *without changing the substance*. The Advisory Committee established a working definition of a substantive change — a proposed change is "substantive" if:

- under the existing practice in any circuit, it could lead to a different result on a question of admissibility;
- under the existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made; or
- it changes the structure of a rule or method of analysis in a manner that would fundamentally alter how courts and litigants have thought about, or argued about, the rule; or
- it changes what Professor Kimble has referred to as a "sacred phrase" — phrases

that have become "so familiar as to be fixed in cement."

Goals of Restyling

The restyling effort provides consistent terminology, plain language, and generally makes the Evidence Rules more user-friendly. That end-product results from many specific techniques applied consistently throughout the rules.

First, the restyled Evidence Rules use a special format to achieve clearer presentations. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. "Hanging indents" are used throughout. These formatting changes make the structure of the rules graphic and make the restyled rules easier to read and understand even when the words are not changed.

Second, the Restyled Rules reduce the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistencies by using the same words to express the same meaning. For example, consistent expression is achieved by not switching between "accused" and "defendant" or between "party opponent" and "opposing party" or between the various formulations of civil and criminal action/case/proceeding.

Third, the Restyled Rules minimize the use of inherently ambiguous words. For example, the word "shall" can mean "must," "may," or something else, depending on context. The potential for confusion is exacerbated by the fact the word "shall" is no longer generally used in spoken or clearly written English. The restyled rules replace "shall" with "must," "may," or "should," depending on which one the context and established interpretation make correct in each rule.

Fourth, the Restyled Rules minimize the use of redundant "intensifiers." These are expressions that attempt to add emphasis, but instead state the obvious and create negative implications for other rules.

Fifth, the Restyled Rules improve the drafting of the Evidence Rules by changing passive to active voice whenever possible; eliminating unnecessary, vague, or reduntant language; and correcting inadvertent errors in the original rules.

Sixth, the Restyled Rules seek to accommodate technological advances in the presentation of evidence by including, in a new definitions section, language that defines written material to include material stored in electronic form.

Seventh, the Restyled Rules streamline the rules by placing recurring terms in the definition section so that those terms do not have to be fully stated in each rule.

Status of the Restyled Rules of Evidence

The Restyled Rules of Evidence took effect on December 1, 2011.

Introduction: The Restyled Rules of Evidence

The Restyled Rules and This Casebook

Most of the cases included in this book were decided before the Restyled Rules were enacted. When these cases quote a rule, they are of course quoting a pre-restyled rule. We have added bracketed material within the cases to remind the reader that the language used by the court is not the same as it is today. ***It must be remembered that even though the language used is often different, the result of the case will, by definition, not change — because the Restyled Rules change style only.***