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# PREFACE

In the fourth edition of this book, we focus the study of evidence law on the text of the Federal Rules of Evidence and the ideas and principles that underlie them. The book presents the rules in a systematic format that is used consistently throughout. This format provides students with the text of the rules, the basic interpretation and illustration of the rules' terms, an elaboration of principles and policies used to explain and interpret the rules, illustrations from recent case law, and a set of problems that calls for the application of each significant rule in its most basic as well as its most challenging contexts. New problems have been added to further our goal of offering problems within a wide range of difficulty. This edition also includes three on-going "saga" problems that build, in successive chapters, on a developing fact pattern. These unique problems demonstrate how the rules of evidence actually apply to individual items of evidence in "layers" as students' knowledge of those rules increases. And, throughout this edition, changes in the law and new cases have been added to update our presentation of the FRE.

We have not been content to present a mass of doctrines and cases. We have endeavored instead to show, through discursive text and problems, the relationship between the theories underlying the rules and the rules themselves. This emphasis on the underlying theories reflects our view that the study of any field of law should not consist primarily of ingesting enormous amounts of doctrinal "stew." Rather, the pursuit should be gaining an understanding of the conditions that give rise to the forms of regulation of decision making that are contained in the rules of evidence.

From its inception, another factor has heavily influenced this book. We believe that the field of evidence is in large measure a coherent whole rather than an amalgam of virtually unrelated parts. Unlike traditional works on evidence, we present an analytic theme in our text that attempts to show the underlying relationships between the various common law categories of evidence. This theme is relevancy and the assumptions about decision making that inhere in a system of proof based on relevancy. With this theme we explore all of the major Federal Rules of Evidence, requiring students to develop a systematic approach to the admission of evidence that begins with the relationship of evidentiary facts to the essential elements of the case.

Only with such a beginning can the exclusionary principles, and judicial interpretation and application of them, be understood.

Because evidence is primarily concerned with establishing facts for the purpose of resolving disputes, we are concerned that students have a sense of the nature of the process by which facts are established and of the roles played by each of the participants in the courtroom. Consequently, we begin in Chapter One with the study of a transcript from a real case. This introduces students to the process of analyzing evidence in terms of the essential elements of a legal dispute, as well as experiencing what is at stake in even run-of-the-mill trials. We believe that the transcript serves as an effective introduction to much of the course to follow. Although accurate fact finding is the dominant goal of trial, the rules of evidence also regulate with other variables in mind, such as efficiency and incentives to out-of-court behavior. Beginning with the transcript, which we return to throughout the text, allows these matters, to be highlighted. We have also based a series of problems on the transcript so that student investment in reading it pays off with a deeper understanding of the context within which isolated evidence issues arise and are resolved.

Chapter Two — The Process of Proof — provides additional background information on trial process and strategy that brings the evidence course alive. It describes how trials are structured, how witnesses are examined, and it begins our exploration of the relationship between inferential reasoning as used by the fact finder and the process of presenting proof at trial.

Chapter Three examines the single most important concept in the study of evidence — relevancy — and introduces students to the trial judge’s “discretion” to exclude even relevant, and probative, evidence. Some judicial opinions, including the U.S. Supreme Court’s majority opinion in *Old Chief v. United States*, give students a more concrete understanding of how the context of the whole “case” can influence the judge’s exercise of discretion. Chapter Four contains the rules that establish the required “foundation” for many different types of evidence, including a newly organized discussion of FRE 104 and the problem of conditional relevance. The “best evidence rule” is also included in Chapter Four, a change from the third edition. Chapter Five focuses on the character and propensity rules. We start by introducing the primary rule of exclusion, the policies that justify exclusion, and the policing of the borderline between forbidden “character” and permitted “non-character” uses of specific acts. We then turn to instances in which character is a permissible topic of proof. Chapter Six contains the remaining relevancy rules.

Chapter Seven presents the doctrines of impeaching and rehabilitating witnesses, prior to the study of the hearsay rule. The attention paid to examining witnesses, we believe, paves the way for Chapter Eight’s treatment of hearsay. Chapter Eight contains revised text on the problem of “implied assertions” that we think streamlines presentation without sacrificing complexity. The chapter concludes with a completely revised discussion of the confrontation clause, following the Supreme Court’s decision in *Crawford v. Washington*. Discussion of the application of *Crawford*, and important post-*Crawford* case law, concludes with reference back to the problems throughout the book that presented confrontation issues.

Chapter Nine, which focuses on the rules governing lay and expert witness opinion testimony, includes the principal Supreme Court cases and the amendments to the Federal Rules, effective in 2000. Chapter Ten presents a newly streamlined look at burdens of proof and the related doctrines of presumptions; Chapter Eleven adds the

study of judicial notice; and the book concludes, as before, with an examination of rules of privilege in Chapter Twelve.

Despite the substantial amount of text, this book is not a treatise on the law of evidence. We have not attempted to cover “everything.” Rather, we have put together materials that we believe will contribute to the effective teaching of the law of evidence. Our selection of materials has been driven by one criterion alone. We have selected materials that in our judgment are the most effective pedagogical tools.

We are indebted to many individuals who have assisted us in various ways in the creation of this book. Professor Allen would particularly like to thank his able research assistants Steven Bierly and Paul Whitten and his assistant, Joann Thompson. Professor Kuhns would like to thank Tara Zaffe. Professor Swift is very grateful to Will Pao, Jim Kerwin, Laura Trachtman, Michael Schaps, and Jennifer Dukart for their research assistance and enthusiasm for the law of evidence.

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