AN ANALYTICAL APPROACH TO EVIDENCE
EDITORIAL ADVISORS

Erwin Chemerinsky
Dean and Distinguished Professor of Law
Raymond Pryke Professor of First Amendment Law
University of California, Irvine, School of Law

Richard A. Epstein
Laurence A. Tisch Professor of Law
New York University School of Law
Peter and Kirsten Bedford Senior Fellow
The Hoover Institution
Senior Lecturer in Law
The University of Chicago

Ronald J. Gilson
Charles J. Meyers Professor of Law and Business
Stanford University
Marc and Eva Stern Professor of Law and Business
Columbia Law School

James E. Krier
Earl Warren DeLano Professor of Law
The University of Michigan Law School

Richard K. Neumann, Jr.
Professor of Law
Maurice A. Deane School of Law at Hofstra University

Robert H. Sitkoff
John L. Gray Professor of Law
Harvard Law School

David Alan Sklansky
Stanley Morrison Professor of Law
Stanford Law School
Faculty Co-Director
Stanford Criminal Justice Center
AN ANALYTICAL APPROACH TO EVIDENCE
TEXT, PROBLEMS, AND CASES

Sixth Edition

RONALD J. ALLEN
John Henry Wigmore Professor of Law
Northwestern University School of Law

ELEANOR SWIFT
Professor of Law Emerita
University of California at Berkeley School of Law

DAVID S. SCHWARTZ
Foley & Lardner-Bascom Professor of Law
University of Wisconsin Law School

MICHAEL S. PARDO
Henry Upson Sims Professor of Law
University of Alabama School of Law

ALEX STEIN
Professor of Law
Benjamin N. Cardozo School of Law

Wolters Kluwer
About Wolters Kluwer Legal & Regulatory Solutions U.S.

Wolters Kluwer Legal & Regulatory Solutions U.S. delivers expert content and solutions in the areas of law, corporate compliance, health compliance, reimbursement, and legal education. Its practical solutions help customers successfully navigate the demands of a changing environment to drive their daily activities, enhance decision quality and inspire confident outcomes.

Serving customers worldwide, its legal and regulatory solutions portfolio includes products under the Aspen Publishers, CCH Incorporated, Kluwer Law International, ftwilliam.com and MediRegs names. They are regarded as exceptional and trusted resources for general legal and practice-specific knowledge, compliance and risk management, dynamic workflow solutions, and expert commentary.
SUMMARY OF CONTENTS

Contents ix
Preface xxxv
Acknowledgments xxxix
Why Study Evidence? A Student’s Preface xli
Special Notice on Citations xliii

CHAPTER ONE The Case of People v. Johnson 1
CHAPTER TWO The Process of Proof: How Trials Are Structured 85
CHAPTER THREE Relevance, Probative Value, and the Rule 403 Dangers 133
CHAPTER FOUR Foundation 189
CHAPTER FIVE The Character, Propensity, and Specific Acts Rules 261
CHAPTER SIX The Other Relevance Rules 357
CHAPTER SEVEN The Impeachment and Rehabilitation of Witnesses 385
CHAPTER EIGHT The Hearsay Rule 441
CHAPTER NINE Lay Opinions and Expert Witnesses 699
CHAPTER TEN The Process of Proof in Civil and Criminal Cases: Burdens of Proof, Judicial Summary and Comment, and Presumptions 803
CHAPTER ELEVEN Judicial Notice 865
CHAPTER TWELVE Privileges 887

Table of Cases 1025
Table of Authorities 1037
Index 1047
## CONTENTS

*Preface*  
*Acknowledgments*  
*Why Study Evidence? A Student's Preface*  
*Special Notice on Citations*

### CHAPTER ONE

**THE CASE OF PEOPLE v. JOHNSON**

The People of the State of California v. James Johnson  
Notes and Questions

### CHAPTER TWO

**THE PROCESS OF PROOF: HOW TRIALS ARE STRUCTURED**

A. Introduction to the Study of Evidence  
B. The Adversary/Jury Trial System: An Overview  
   1. The Adversary System  
C. The Structure of a Trial  
   1. Pretrial Motions  
   2. Jury Selection  
   3. Preliminary Instructions  
   4. Opening Statements  
   5. Presentation of Evidence and the Burden of Production  
      a. *The Order of the Parties' Presentation of Cases*  
      b. *The Burden of Production*  
   6. Post-evidence Matters  
   7. Closing Arguments  
   8. Jury Instructions and the Burden of Persuasion  
   9. Jury Deliberations and Verdict  
  10. Post-trial Motions
D. Examination of Witnesses and FRE 611
   1. FRE 611
   2. Explanation of FRE 611(a) and (b)
   3. FRE 611(a) and (b) and the Examination of Witnesses: Practical Applications
      a. Direct Examination
      b. Cross-examination
      c. Direct Examination of "Adverse" and "Hostile" Witnesses
   4. Explanation of FRE 611(c): Leading Questions
   5. FRE 611(c) and Leading Questions: Practical Applications
      a. What Is a Leading Question?
      b. Leading Questions: Tactical Considerations
E. Objections and Preservation of Error for Appeal: FRE 103
   1. FRE 103
   2. Explanation of FRE 103(a) and (d): Objections, Offers of Proof, and Preservation of Evidentiary Issues for Appeal
   3. FRE 103(a)(1) and (2) and Objections: Practical Applications
      a. Two Types of Objections
      b. Timing of Objections
      c. Stating the Objection
      d. Tactical Considerations
   4. FRE 103(a) and (d): Preservation of Error for Appellate Review
      a. Making the Record—in General
      b. Making the Record for Appeal of Evidentiary Rulings
      c. Standards of Appellate Review of Evidentiary Errors
F. Reflections on Natural Reasoning and the Adversary System
   1. The Adversary System Reconsidered
   2. Why Have Rules of Evidence?
   3. Natural Reasoning and the Trial Process
   4. The Behavior of Factfinders

CHAPTER THREE
RELEVANCE, PROBATIVE VALUE, AND THE RULE 403 DANGERS
A. Relevance—the Basic Concept
   1. FRE 401 and 402
   2. Explanation of FRE 401 and 402
      a. Relevant Evidence Is Offered to Prove a Fact of Consequence
      b. Relevant Evidence Must Make a Fact of Consequence More Probable or Less
      c. Relevance Is Not Sufficiency
      d. Direct Versus Circumstantial Evidence
      e. Background Information
   3. Applications of FRE 401 and 402
      Knapp v. State
B. Probative Value and the Rule 403 Dangers

1. FRE 403
2. Explanation of FRE 403
   a. Probative Value
   b. Rule 403 Dangers
   c. Probative Value Substantially Outweighed by One of the FRE 403 Dangers
3. FRE 403: Specific Problems and Applications
   a. Gruesome Exhibits and Other Potentially Inflammatory Evidence
   b. Spoliation
   c. Curative Admissibility
      Key Points
      Problems
4. Appellate Review of Judicial Discretion Under FRE 403
   United States v. Hitt
   Old Chief v. United States
   Notes and Questions

C. Reflection on Relevance, Probative Value, and Judicial Discretion

1. Can Relevance and Probative Value Be Measured?
2. Are Juries Rational?
3. How to Regulate Judicial Discretion?

Assessments
a. Basic Procedure: Offering an Exhibit Through a Foundation Witness 199

b. Partial Foundations and Connecting Up 201

4. FRE 901—Practical Applications: Procedural Steps
   Key Points 207
   Problems 208

5. FRE 901—Practical Applications: Generic Foundation Questions for Various Exhibit Types 208
   a. Real Evidence Foundation Issues 209
   b. Depictive Evidence Foundation Issues 212
   c. Written Documents 217
   d. Authenticity and Genuineness of Exhibits 219
   e. Sum Up: The Flexibility of FRE 901 Foundations 220
      Key Points 220
      Problems 221

6. FRE 902 223

7. Explanation of FRE 902
   Key Points 226
   Problems 226

C. Preliminary Fact Questions Under FRE 104 226
   1. FRE 104 227
   2. Explanation of FRE 104(a) 227
      Key Points 230
   3. Explanation of FRE 104(b) 230
      a. Relevance Depending on “Whether a Fact Exists”:
         FRE 104(b) as a General Foundation Requirement 231
      b. Conditional Admissibility 233
   4. FRE 104(b) in Practice 234
   5. Theoretical Justifications for the FRE 104(a)/104(b) Distinction 237
      Key Points 238
      Problems 239
   6. Reflection on FRE 104(b): Is There a Conditional Relevance “Problem”? 240
      Problem 241

D. The Best Evidence Rule 241
   1. FRE 1001–1008 242
   2. Explanation of Best Evidence Rule 244
   3. When Is Evidence Offered to “Prove Content” of a Document? 245
   4. Best Evidence Rule: Definitions and Exceptions 247
      a. Definitions 247
      b. Exceptions 248
   5. Best Evidence Rule: Practical Applications 250
   6. Explanation of FRE 1008
      Key Points 252
CHAPTER FIVE

THE CHARACTER, PROPENSITY, AND SPECIFIC ACTS RULES

A. The Relevance of Character Evidence to Prove Conduct on a Particular Occasion

B. General Prohibition on Use of Character and “Crime, Wrong, or Other Act” Evidence
   1. FRE 404
   2. Explanation of FRE 404(a) and (b)
      a. The Rationale for Restricting Evidence of a Person’s Character
      b. Exceptions to the FRE 404(b) Prohibition Against the Use of Specific Acts
         Key Points
         Problems
   2. Difficulties Distinguishing FRE 404(b)(2) Evidence from Prohibited Character Evidence
      a. The Problem of “Res Gestae”
      b. The Problem of Specific Acts Evidence to Prove Intent or Knowledge
      c. The Problem of Specific Acts Evidence to Prove Mental States That Are Not Disputed
      d. Past “Accidents” or “Coincidences” and the Anticoincidence Theory
      e. Modus Operandi and the Character Inference
         Key Points
   D. An Application of FRE 404(B) and FRE 403
      United States v. Varoudakis
      Notes and Questions
      Problems
E. Habit and Routine Practice

1. FRE 406

2. Explanation of FRE 406
   a. The Importance of Habit and Routine Practice Evidence
   b. Methods of Proving Habit and Routine Practice
   c. The Distinction Between Habit and Character
   d. The Rationale for Permitting Habit and Routine Practice Evidence
   e. Strategies for Distinguishing Between Habit and Character
   f. Judicial Factfinding on the Question of Habit
   g. An Application of the Character/Habit Distinction: Drinking “Habits”
   h. Evidence of Custom or Routine Practice of an Organization

Key Points
Problems

F. Similar Happenings

1. No Specific Federal Rule for Similar Happenings
2. Similar Happenings, Character, and Habit Evidence Compared
3. The Admissibility of Similar Happenings Evidence Depends on FRE 403
4. Applications of FRE 403 to Similar Happenings Evidence in Practice
5. Similar Happenings Offered to Show an Institutional Policy or Practice
6. Evidence of Similar Nonhappenings

Key Points
Problems

G. Exceptions to the Prohibition on Use Of Character to Prove Conduct on a Particular Occasion

1. Explanation of FRE 404(a)(2), (3)
   a. FRE 404(a)(2)(A) and (B): A Criminal Defendant’s Right to Open the Door to Character Evidence
   b. FRE 404(a)(2)(A) and (B): The Prosecution’s Right to Respond to a Defendant’s Character Evidence
   c. FRE 404(a)(2)(C): The Prosecution’s Right to Use Character Evidence to Respond to Defense Attacks on a Homicide Victim’s Conduct
   d. The FRE 404(a)(2) Requirement of Pertinence
   e. The Rationales for the FRE 404(a)(2) Exceptions
   f. FRE 404(a)(3): The Character of Witnesses
   g. An Application of the Character Rules: People v. Johnson

Key Points

2. Explanation of 405(a): How Character Is Proven When the FRE 404(a)(2) and (3) Exceptions Apply
   a. The Prohibition Against Using Specific Acts to Prove Character
b. The Probative Value of Opinion and Reputation Evidence to Prove Character 317

c. Reputation Evidence versus Opinion Evidence 319
Key Points 319
Problems 320

3. The Cross-examination of Character Witnesses 321
a. The Relevance of the Specific Acts Inquiries 321
b. The Prejudicial Impact of Specific Acts Questions 321
c. The Relationship Between the Character Trait and the Specific Acts Inquiries 322
d. The Character Witness’s Likely Knowledge of the Specific Act 322
e. The Cross-examiner’s Reasonable Belief That the Act Occurred 323
f. Acts, Arrests, and Convictions 324
g. The Form of the Questions on Cross-examination 325

4. Limitations on the Use of Character Evidence in Practice 325
a. The Inherent Weakness of Good Character Evidence 325
b. The Potential Unfairness of FRE 405 326
Key Points 326
Problems 326

H. Evidence of A Person’s Character When Character Is an Essential Element of a claim or Defense 327
1. Explanation of FRE 405(b) 328
2. An Application: Reputation versus Character in Defamation Cases 329
   Key Point 329
   Problems 329

I. Evidence of Sexual Assault and Child Molestation 330
1. FRE 413-415 331
2. Explanation of FRE 413-415 332
   a. The Relationship Between FRE 413-415 and Other Rules of Evidence 332
   b. FRE 413-415 and Preliminary Factfinding 333
   c. The Broad Definition of “Offense of Sexual Assault” 334
   d. The Meaning of “Without Consent” in FRE 413(d)(2) and (3) 335
3. Elaboration of FRE 413-415 335
   a. The Application of FRE 403 to Previously Inadmissible Character Evidence 335
   b. The Underlying Rationale for Rules 413-415 336
   c. The Significance of FRE 413-415 to Federal Litigation 339
      Key Points 339
      Problems 340

J. Evidence of an Alleged Victim’s Past Sexual Behavior or Disposition in Sex Offense Cases 341
1. FRE 412 342
2. Explanation of FRE 412 342
   a. The Relevance of an Alleged Victim’s Sexual Behavior or Disposition 342
b. The Underlying Propensity Theory 343
c. The Scope of FRE 412 344
3. Elaboration of FRE 412 348
   a. The Rationale for a Rule Excluding Evidence of Prior Sexual Behavior and Sexual Predisposition 348
   b. Two Approaches to the Exclusion of Other Sexual Behavior and Sexual Predisposition Evidence 349
   c. Rape Shield Rules and the Defendant's Right to Testify 350
   d. FRE 412 and Discovery in Civil Cases 350
      Key Points 351
      Problems 351
      Assessments 353

CHAPTER SIX
THE OTHER RELEVANCE RULES 357
A. Inadmissible to Prove "Negligence," "Culpable Conduct," or "Liability" 357
   1. FRE 407 358
      a. The Exclusionary Mandate 358
      b. Permissible Uses of Subsequent Remedial Measure Evidence 362
      c. The "If Disputed" Requirement 362
      d. The Relationship Between FRE 407 and FRE 403 363
   2. Elaboration of FRE 407 363
      a. The Rationales for FRE 407 363
      b. Subsequent Remedial Measures by Third Persons 365
         Key Points 365
         Problems 365
   3. FRE 408 366
   4. Explanation of FRE 408 367
      a. The Exclusionary Mandate; Permissible Uses; FRE 403 367
      b. Conduct or Statements Made During Negotiations 368
      c. The "Disputed Claim" Requirement 368
      d. The Applicability of FRE 408 to Criminal Cases 369
      e. A Party's Own Offer of Compromise 370
      f. Compromises and Offers of Compromises by Third Persons 370
   5. FRE 409 371
   6. Explanation of FRE 409 371
      a. The Exclusionary Mandate 371
      b. The Admissibility of Statements Made in Conjunction with Medical and Similar Payments 371
      c. FRE 409 Permits Evidence of Payment for Purposes Other Than to Show Liability 372
      d. What Constitutes a "Similar" Expense? 372
   7. FRE 411 372
8. Explanation of FRE 411  
   a. The Exclusionary Mandate  
   b. The Permissible Uses of Evidence of Liability Insurance  

B. Reflection on Rules 407-409, 411  
C. Withdrawn Guilty Pleas, Pleas of No Contest, and Statements Made During Plea Discussions  
   1. FRE 410  
      a. Withdrawn Guilty Pleas  
      b. Pleas of No Contest  
      c. Statements Made in Conjunction with the Process of Making and Negotiating Pleas  
      d. The Scope of FRE 410(a)(4)  
      e. The FRE 410(b) Exceptions  
      f. Waiver of FRE 410's Exclusionary Mandate  

CHAPTER SEVEN  
THE IMPEACHMENT AND REHABILITATION OF WITNESSES  

A. Basic Concepts  
   1. Impeachment: The Inferential Process  
      a. The Testimonial Inferences  
      b. Types of Impeachment Evidence  
      c. Impeachment Evidence versus Substantive Evidence  
   2. “Extrinsic Evidence” and Impeachment  
   3. “Rehabilitating” versus “Bolstering” Evidence  

B. Impeachment and Rehabilitation with Character Evidence  
   1. FRE 608  
   2. Explanation of FRE 608(a)  
      a. Reputation and Opinion Evidence to Prove Character for Untruthfulness  
      b. The FRE 608(a) Limitation on Evidence of Good Character for Truthfulness  
      c. The FRE 608(a) Limitation on Evidence of Good Character for Truthfulness  
      d. Key Points  
      e. Problems  

   3. Explanation of FRE 608(b)  
      a. The Prohibition Against the Use of Extrinsic Evidence  
      b. The Limited Scope of Permissible Inquiry  
      c. No Fifth Amendment Waiver
d. The Scope of FRE 608(b)(1): Questioning Witnesses About Their Own Specific Acts 396

e. Questions About Specific Acts and FRE 403 397

f. Good-Faith Requirement; Practical Considerations 398

g. Specific Acts Showing Good Character for Truthfulness 399

h. “Cross-Examination” 399

i. The Scope of FRE 608(b)(2): Questioning Character Witnesses Regarding Specific Acts of the Witnesses They Testify About 399

Key Points

Problems 400

4. FRE 609 401

5. Explanation of FRE 609(a) and (b) 402

a. The Two FRE 609(a)(1) Balancing Tests 403

b. The Automatic Admissibility of FRE 609(a)(2) “Dishonest Act or False Statement” Convictions 406

c. The FRE 609(b) Reverse Balancing Test 407

6. Elaboration of FRE 609(a) Impeachment: Policy and Practical Consideration 408

a. The Rationale for FRE 609(a)(1) 408

b. Prior Convictions and Prejudice 409

c. Extrinsic Evidence 409

d. The Factual Details of the Conviction 410

e. The Relationship Between FRE 609(a) and FRE 608(b) 410

f. Hearsay 411

g. Practical Considerations 411

Key Points 413

Problems 414

C. Impeachment and Rehabilitation with a Witness’s Prior Statements 415

1. FRE 613 416

2. Explanation of FRE 613 416

a. FRE 613(a) 417

b. FRE 613(b) 417

c. FRE 613(b)’s Departure from the Common Law 418

d. Extrinsic Evidence in Practice: Practical Considerations 418

e. Probative Value and FRE 403 Concerns 419

3. Prior Consistent Statements 421

Key Points 421

Problems 422

D. Other Impeachment Techniques 425

1. Bias 425

a. Relevance 425

b. Extrinsic Evidence 426

c. Possible FRE 403 Limitations on Extrinsic Evidence of Bias 426

d. Bias Versus Character 427
CHAPTER EIGHT

THE HEARSAY RULE 441

A. The General Rule of Exclusion and the Definition of Hearsay 441
   1. FRE 801 and 802 442
   2. Explanation of FRE 801 and 802 443
      a. The Relevancy of Sally’s Testimony Depends on Generalizations About Sally’s Testimonial Qualities 443
      b. The Relevancy of Sally’s Hearsay Statement Also Depends on Generalizations About Sally’s Testimonial Qualities 445
      c. Hearsay Policy Differentiates Between Witnesses and Hearsay Declarants 447
         Key Points 449
         Problems 450
      a. Identifying What a Hearsay Statement Is Offered to Prove 450
      b. Testimony by Witnesses About Their Own Out-of-Court Statements May Still Be Hearsay 452
      c. Hearsay, Lay Opinions, and the Firsthand Knowledge Rule 452
      d. Multiple Hearsay 453
         Key Points 453
         Problems 454
   4. Explanation of FRE 801(c): Nonhearsay Statements with No Hearsay Dangers, 454
      a. Nonhearsay Uses 454
      b. Statements Relevant for Both Nonhearsay and Hearsay Uses 459
5. Explanation of FRE 801(a)(2): Nonverbal Conduct 462
   a. The Relevancy of Nonverbal Conduct to Prove Belief 462
   b. Application of FRE 801(a) 463

6. Elaboration of FRE 801(a): Justification for the Distinction Between Assertive and Nonassertive Conduct 465
   a. Absence of Hearsay Danger 465
   b. Necessity 466
   c. Should Nonassertive Conduct Be Excluded from the Definition of Hearsay? 467
   d. Disguised Assertions 468

7. Utterances Relevant for the Truth of the Declarant's Unstated Beliefs 471
   a. The Relevancy of Unstated Beliefs 471
   b. Application of FRE 801(a) and (c) 473

8. Elaboration of FRE 801: Courts Reject the Literal Approach and Apply an “Intent” Test 475
   a. The Judicially Created Intent Test 476
   b. The Difficulties of Applying an Intent Test 477
   c. Some Courts Still Adhere to the Common Law Approach 478


B. A General Approach to the Admission of Hearsay Under the Exemptions and Exceptions 483
   1. Justification for the Exemptions and Exceptions 483
   2. The Categorical Approach 483
   3. The Process of Admission 484
   4. The Foundational Requirements 484
   5. Multiple Exemptions and Exceptions May Apply 485
   6. FRE 805 485
   7. The Confrontation Clause 486

C. Hearsay Exemptions 487
   1. FRE 801(d)(1) and (2) 487
   2. Explanation of FRE 801(d)(1): The Testifying Declarant Must Be “Subject to Cross-examination About the Prior Statement” 488
      a. Preliminary Factfinding 488
      b. Other Justifications for the FRE 801(d)(1) Exemptions 491
      a. Preliminary Factfinding 491
b. Justification for the FRE 801(d)(1)(A) Limitations 492
c. Prior Inconsistent Statements Not Within FRE 801(d)(1)(A) 493

   a. Preliminary Factfinding 493
   b. Justification for the FRE 801(d)(1)(B)(i) Limitation 495
   c. Beyond Motive: FRE 801(d)(1)(B)(ii) 495
   d. Limits on Credibility-bolstering Statements Continue to Apply 495

5. Explanation of FRE 801(d)(1)(C): Prior Statements of Identification 496
   a. Preliminary Factfinding 496
   b. Justifications for the Admissibility of Prior Statements of Identification 497
   c. Constitutional Dimension 498
      Key Points 499
      Problems 499

   a. Preliminary Factfinding 503
   b. Individual and Representative Capacity 504
   c. Admissions, Personal Knowledge, and Lay Opinions 504

   a. The Opportunity to Cross-examine and Explain 505
   b. Fifth Amendment Concerns 506

9. Further Elaboration of FRE 801(d)(2)(A) 506
   a. Preliminary Factfinding on the Identity of the Declarant 506
   b. Admissibility of Party Admissions in Multiparty Cases: The Bruton Problem 507

    a. Preliminary Factfinding 508
    b. Justification for the Admissibility of Adoptive Admissions 509
    c. Adoption by Silence 510

11. Explanation of FRE 801(d)(2)(C) and (D): Admissions by Agents, Servants, and Employees 511
    a. Preliminary Factfinding 511
    b. Justification for the Admissibility of Statements Under FRE 801(d)(2)(C) and (D): Necessity, Fairness, and Reliability 513
    c. Personal Knowledge and Lay Opinions 514
    d. Admissions by Government Employees 515

    a. Preliminary Factfinding 515
    b. Justification for the Admissibility of Co-conspirators’ Statements 518

    a. Bourjaily v. United States 518
<table>
<thead>
<tr>
<th>Contents</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>b. The Amendment to FRE 801(d)(2): The Requirement of Additional Evidence</td>
<td>519</td>
</tr>
<tr>
<td>c. Process for Admission of a Co-conspirator's Statement</td>
<td>520</td>
</tr>
<tr>
<td>Key Points</td>
<td>520</td>
</tr>
<tr>
<td>Problems</td>
<td>521</td>
</tr>
<tr>
<td>D. Hearsay Exceptions Not Requiring the Unavailability of the Declarant</td>
<td>524</td>
</tr>
<tr>
<td>1. FRE 803</td>
<td>525</td>
</tr>
<tr>
<td>2. Explanation of FRE 803(1): Present Sense Impression</td>
<td>528</td>
</tr>
<tr>
<td>a. Preliminary Factfinding</td>
<td>529</td>
</tr>
<tr>
<td>b. Justification for the Admissibility of Present Sense Impressions</td>
<td>529</td>
</tr>
<tr>
<td>3. Explanation of FRE 803(2): Excited Utterance</td>
<td>529</td>
</tr>
<tr>
<td>a. Preliminary Factfinding</td>
<td>530</td>
</tr>
<tr>
<td>b. Justification for the Admissibility of Excited Utterances</td>
<td>530</td>
</tr>
<tr>
<td>4. FRE 803(1) and (2): Practical Effects of the Categorical Approach</td>
<td>531</td>
</tr>
<tr>
<td>a. The Categories Determine Admissibility</td>
<td>531</td>
</tr>
<tr>
<td>b. The Categorical Terms Require Judicial Interpretation</td>
<td>532</td>
</tr>
<tr>
<td>c. Use of the Statement Itself in Preliminary Factfinding</td>
<td>534</td>
</tr>
<tr>
<td>d. Proof of Personal Knowledge</td>
<td>535</td>
</tr>
<tr>
<td>e. Criticism of FRE 803(1) and (2)</td>
<td>536</td>
</tr>
<tr>
<td>Key Points</td>
<td>537</td>
</tr>
<tr>
<td>Problems</td>
<td>537</td>
</tr>
<tr>
<td>5. Explanation of FRE 803(3): Declarant's Statement of His Then-Existing State of Mind</td>
<td>538</td>
</tr>
<tr>
<td>a. Preliminary Factfinding</td>
<td>539</td>
</tr>
<tr>
<td>b. Exclusion of &quot;Facts Remembered or Believed&quot;</td>
<td>539</td>
</tr>
<tr>
<td>c. Justification for the State-of-Mind Exception</td>
<td>540</td>
</tr>
<tr>
<td>d. State-of-Mind Utterances Are Classified as Either Direct or Circumstantial</td>
<td>541</td>
</tr>
<tr>
<td>6. FRE 803(3): Relevant Uses of State-of-Mind Evidence</td>
<td>542</td>
</tr>
<tr>
<td>a. Future and Past State of Mind of the Declarant</td>
<td>542</td>
</tr>
<tr>
<td>b. Statements of Intent to Prove the Declarant's Subsequent Conduct</td>
<td>542</td>
</tr>
<tr>
<td>c. Distinguishing State of Mind from Past Facts</td>
<td>543</td>
</tr>
<tr>
<td>d. Statements About the Declarant's Will</td>
<td>544</td>
</tr>
<tr>
<td>e. The Hillmon Case: Using the Declarant's Statement of Intent to Prove the Conduct of Another</td>
<td>544</td>
</tr>
<tr>
<td>Key Points</td>
<td>547</td>
</tr>
<tr>
<td>Problems</td>
<td>548</td>
</tr>
<tr>
<td>7. Explanation of FRE 803(4): Statement Made for Medical Diagnosis or Treatment</td>
<td>549</td>
</tr>
<tr>
<td>a. Preliminary Factfinding</td>
<td>549</td>
</tr>
<tr>
<td>b. Justification for the Admissibility of Statements for Medical-Purposes</td>
<td>550</td>
</tr>
<tr>
<td>c. Statements About the Cause or External Source Must Be &quot;Pertinent&quot;</td>
<td>550</td>
</tr>
<tr>
<td>d. Requiring Proof of Medical Purpose</td>
<td>551</td>
</tr>
</tbody>
</table>
8. FRE 803(4): Patient's Statements to Medical Expert Witnesses 552
   Key Points 552
   Problems 553
9. Explanation of FRE 803(5): Recorded Recollection 553
   a. Preliminary Factfinding 554
   b. Justification for the Admissibility of Recorded Recollections 557
   c. Recorded Recollections Created by Multiple Declarants 557
10. Refreshing Memory versus Recorded Recollection: FRE 612 558
    a. Explanation of Refreshing Memory 558
    b. The Impact of FRE 612 on Refreshing Recollection 560
    c. Witness Memory Lapses in Practice: The Interplay of Recorded Recollection and Refreshing Memory 560
11. Explanation of FRE 803(6): Records of a Regularly Conducted Activity 563
    a. Preliminary Factfinding 564
    b. Justification for the Admissibility of Records of Regularly Conducted Activities 568
12. FRE 803(6): Practical Applications and Problems 569
    a. Exclusion for Untrustworthiness 569
    b. Opinions and Diagnoses 570
    c. Records Containing Multiple Levels of Hearsay 571
    d. Computer Documents and Electronic Data 573
    Key Points 574
    Problems 575
    a. Preliminary Factfinding 577
    b. Justification for the Admissibility of Public Records 580
14. FRE 803(8)(A)(ii) and (iii) in Practice 580
    a. The Meaning of Law Enforcement Personnel 580
    b. The Relationship Between FRE 803(8)(A)(ii) and (iii) and Other Exceptions 582
15. FRE 803(8): The Problem of Multiple Hearsay Sources Within Investigative Reports 583
    a. Is the Report Itself Admissible? 583
    b. Are Otherwise Inadmissible Hearsay Sources Admissible? 584
    c. Administrative Findings 585
    Problems 585
16. Other Exceptions for Records Under FRE 803 586
    Key Points 587
17. Explanation of FRE 803(22): Judgment of Previous Conviction 588
    a. Preliminary Factfinding 588
    b. Justification for the Admissibility of Criminal Judgment 589
    c. The Admission of Misdemeanor Convictions for Impeachment 589
E. Hearsay Exceptions Requiring the Unavailability of the Declarant 589

1. FRE 804 590

2. Explanation of FRE 804(a): Grounds for a Finding of Unavailability 591

   Problem 593

3. Explanation of FRE 804(b)(1): Former Testimony 594

   a. Preliminary Factfinding 594

   b. Justification for the Admissibility of Former Testimony 597

   Note 598

4. FRE 804(b)(1): Practical Problems and Applications 598

   a. Former Testimony Offered By or Against a Nonparty to 598
      the Original Action
   b. Lack of Similar Motive Due to Differences in Procedural Context 600
   c. Using Former Testimony at the Current Proceeding 601

   Key Points 602
   Problem 602

5. Explanation of FRE 804(b)(2): Dying Declarations 603

   a. Preliminary Factfinding 603

   b. Justification for the Admissibility of Dying Declarations 604

   Key Point 605
   Problem 605

6. Explanation of FRE 804(b)(3): Declarations Against Interest 605

   a. Preliminary Factfinding 606

   b. Justification for the Admissibility of Declarations Against Interest 607

7. FRE 804(b)(3): Practical Applications and Problems 608

   a. Doubts About the Underlying Rationale for the Exception 608
   b. Statements That Inculpate Accomplices 609
   c. Requirement of Corroboration for Inculpatory Statements in 610
      Criminal Cases

   Key Points 612
   Problems 612

8. Explanation of FRE 804(b)(4): Statements of Personal or 613
   Family History

   a. Preliminary Factfinding 613

   b. Justification for the Admissibility of Statements of Personal or 614
      Family History

   Key Points 614
   Problems 615

9. Explanation of FRE 804(b)(6): Forfeiture by Wrongdoing 615

   a. Preliminary Factfinding 616

   b. Justification for the Admissibility of Forfeiture-by-Wrongdoing Statements 618

   c. Acquiescence in Wrongdoing 618

   d. Practical Applications 620
<table>
<thead>
<tr>
<th>Key Points</th>
<th>Problems</th>
</tr>
</thead>
<tbody>
<tr>
<td>620</td>
<td>621</td>
</tr>
</tbody>
</table>

**F. The Residual Exception**

1. FRE 807
2. Explanation of FRE 807
   a. Principles and Policies Underlying the Residual Exception
   b. Preliminary Factfinding
   c. FRE 807(a)(1): Circumstantial Guarantees of Trustworthiness
   d. FRE 807(a)(1) (continued): Equivalence
   e. FRE 807(a)(2)–(4): Preventing Overuse of the Exception
   f. Notice
3. FRE 807 in Practice: How Much Hearsay Is Admitted Under the Residual Exception

**G. Hearsay and the Confrontation Clause**

1. Ohio v. Roberts
   a. "Firmly Rooted" Hearsay Exceptions
   b. Not Firmly Rooted Exceptions Require “Particularized Guarantees of Trustworthiness”
2. Crawford v. Washington
   Crawford v. Washington
   Key Points
   Problems
   Notes
3. The Definition of “Testimonial” Statements After Crawford: Statements Made During Questioning by Police
   a. The “Primary Purpose” Test: Davis v. Washington
      Davis v. Washington, Hammon v. Indiana
      Key Points
      Problem
      Notes and Questions
   b. The “Primary Purpose” Test: Michigan v. Bryant
      Problems
      Notes and Questions
4. The Definition of “Testimonial” Statements After Crawford: Government Forensic Reports
   a. Melendez-Diaz v. Massachusetts
      Notes
   b. Bullcoming v. New Mexico
      Problem
      Notes
   c. Williams v. Illinois
      Notes
5. The Definition of “Testimonial” Statements After Crawford: Statements Not Made to Law Enforcement
a. Child Statements: Ohio v. Clark

Notes 675

b. Medical Interviews and Examinations 676
c. Other Types of Nontestimonial Hearsay 676

6. Testimonial Statements That Satisfy the Confrontation Right 677
a. The Declarant Testifies 677
b. Unavailability and Prior Opportunity for Cross-examination 678

7. Exceptions to the Requirement of Confrontation 678
a. Dying Declarations 679
b. Forfeiture by-Wrongdoing 679

Notes and Questions 682

H. Reflection on the Hearsay Rule 682
1. The Traditional Goals of Hearsay Policy 682
2. The Reliability Theory Does Not Work 683
3. A Rule of Discretion 684
4. Abolition 685
5. Reformulating Hearsay Policy 685
a. Is There a Need for a Hearsay Rule in Modern Civil Litigation? 685
b. Regulation Premised on the Excesses of the Adversary System 686
c. Notice-based Admission in Civil Cases: Reliance on the Adversary System 686
d. Why Hearsay Should Be Treated Differently in Criminal Cases 687

6. A Rebuttal 687
7. Conclusion 688
Assessments 689

CHAPTER NINE
LAY OPINIONS AND EXPERT WITNESSES 699

A. Lay Opinions 699
1. FRE 701 699
2. Explanation of FRE 701 700
3. FRE 701: Practical Applications 700
a. Recognizing Opinions 701
b. Fact Versus Opinion 702
c. Rationally Based on the Perception of the Witness 703
d. Helpful to the Trier of Fact 704
e. Not Based on Specialized Knowledge 705
f. Opinion Testimony: Practice Pointers 706
Key Points 707
Problems 707

B. Admissibility of Expert Testimony 708
1. FRE 702 709
2. Explanation of FRE 702(a) 710
Contents

a. Scientific, Technical, or Other Specialized Knowledge 710
b. Help the Trier of Fact 710
c. A Witness Qualified as an Expert 712
d. Burden of Proof 712

3. Explanation of FRE 702(b)-(d): The Reliability Requirement 712

4. Development of the FRE 702 Reliability Requirement:
   a. The Frye Test 713
   b. Daubert 714
      Daubert v. Merrell Dow Pharmaceuticals, Inc. 714
      Notes and Questions 720
c. Joiner 722
      General Electric Co. v. Joiner 722
      Notes and Questions 724
d. Kumho Tire 725
      Kumho Tire Company, LTD. v. Carmichael 725
      Notes and Questions 731

5. The 2000 Amendments to FRE 702 732
   Key Points 736
   Problems 736

C. Factual Basis for Expert Opinion 738
   1. FRE 703 738
   2. Explanation of FRE 703 738
   3. FRE 703: Policies, Problems, and Applications 740
      a. Historical Background 740
      b. The Jury’s Use of Inadmissible Facts Underlying Expert Opinion
         (Inadmissible “Basis Evidence”) 741
   4. FRE 705 746
   5. Explanation of FRE 705 746
   6. FRE 705: Practical Applications 747
      Key Points 748
      Problems 748

D. Opinions on an Ultimate Issue 749
   1. FRE 704 749
   2. Explanation of FRE 704(a) 749
   3. FRE 704: Policy, Problems, and Applications 750
      Key Points 754
      Problems 754

E. FRE 702-705: Practical Applications 755
   1. Defining the Scope of Expertise 755
   2. Types of Expert Opinions 756
   3. Types of Expert 758
      a. Retained Versus Percipiert Experts 758
      b. Consultants Versus Testifying Experts 761
   4. Working with Experts 762
   5. Direct and Cross Examination of Experts 764
3. Presumptions in Civil Cases
   a. Irrebuttable or Conclusive Presumptions
   b. Mandatory Rebuttable Presumptions
   c. Permissive or "Weak" Presumptions
   d. The Federal Rules Approach to Presumptions
B. The Process of Proof in Criminal Cases
   1. The Burdens of Proof in Criminal Cases
      a. The Burden of Persuasion: In re Winship's Mandate of Proof Beyond a Reasonable Doubt
      b. The Scope of Winship: Explicit Shifts in the Burden of Persuasion and Other Matters
         (1) The Elements Test
         (2) Federalism and the Political Compromise Test
         (3) The Proportionality Test
         (4) Justice Powell's Two-Part Test
            Martin v. Ohio
            Notes and Questions on Martin
            Key Points
            Notes and Questions on the Application of Winship in Other Contexts
      c. The Burden of Production in Criminal Cases
         Notes and Questions
         Key Points
   2. Judicial Summary and Comment on the Evidence in Criminal Cases
      Notes and Questions
   3. Presumptions in Criminal Cases: The Impact of Winship
      Notes and Questions
      Key Points
CHAPTER ELEVEN

JUDICIAL NOTICE

A. Judicial Notice of Adjudicative Facts
   1. FRE 201
   2. Explanation of FRE 201(a) and (b)
      a. Types of Adjudicative Facts That Are Frequently Noticed
      b. The Scope of FRE 201(a): What Are Adjudicative Facts?
      c. The Scope of FRE 201(b): The Required State of Knowledge of
         Adjudicative Facts That May Be Judicially Noticed
   3. An Application of FRE 201(a) and (b)
      In re Thirtyacre
   Notes and Questions
   4. Explanation of FRE 201(c) and (e)
   5. Explanation of FRE 201(d) and (f)
      a. Judicial Notice of Adjudicative Facts in Civil Cases: Mini Directed
         Verdicts
      b. Judicial Notice of Adjudicative Facts in Criminal Cases: Judicial
         Comments
      c. Timing of Judicial Notice
         Key Points
         Notes and Questions
         Problems
   B. Judicial Notice as Part of Judicial Decisionmaking
      1. Judicial Cognizance of Common Knowledge Without Formal Judicial
         Notice
         a. The Jury's General Background Knowledge
         b. Judges' Own Background Knowledge
            In re Marriage of Tresnak
            Notes and Questions
      2. Judicial Cognizance of Legislative Facts
         Notes and Questions
      3. Judicial Notice of Substantive Law
         Key Point
         Problems
         Assessments

CHAPTER TWELVE

PRIVILEGES

A. The Law of Privilege
   1. A General Introduction
   2. The Unique Operation of Privilege Rules
3. Historical Background and Current Status of Privilege Rules 890

B. General Structure of Privileges 893
1. Holder of the Privilege 893
2. Invocation 894
3. Scope and Limits 896
4. Waiver 896
5. Exceptions 898
6. Drawing Adverse Inferences from Invoking a Privilege 898
7. Constitutional Limitations on Privileges 899

C. The Attorney-Client Privilege 899
1. Elements of the Privilege 899
   a. Communications with a Lawyer or Representative of a Lawyer 901
   b. Communications for the Purpose of Legal Service 903
   c. The Scope of Confidential Communications Included in Privilege 904
   d. Limitations on Waiver of the Privilege 905
   e. Explanation of FRE 502 906
   f. Applying FRE 502: Practical Issues 907
   g. Potential Problems with FRE 502 910
      Key Points 912
      Notes and Questions 912
      Problems 913
      Notes and Questions 917
      Problems 918
2. The Corporate Client 919
   Upjohn Co. v. United States 920
      Key Points 929
      Notes and Questions 929
      Problems 931
3. The Government Client 932
4. Exceptions to the Privilege 934
   a. Breach of Duty by a Lawyer or Client 934
   b. Document Attested by a Lawyer 934
   c. Identity of Client, Fee Information, and Related Matters 934
   d. Communication in Furtherance of a Crime or Fraud 935
      Problems 937
5. Reflection on the Attorney-Client Privilege 938
   Ronald J. Allen et al., A Positive Theory of the Attorney-Client
   Privilege and the Work Product Doctrine 938
      Notes and Questions 953

D. The Marital Privileges 956
1. The Marital Communication Privilege 956
   a. Elements of the Privilege and Its Justifications 956
   b. Holder 957
   c. Scope of the Privilege 957
d. Exceptions
Problems 959

2. The Marital Testimonial Privilege 961
   a. Elements of the Privilege and Its Justifications 961
      Trammel v. United States 962
      Notes and Questions 966
   b. Exceptions 968
      Key Points 969
      Problems 969

E. The Physician-Patient and Psychotherapist-Patient Privileges 970
   1. The Physician-Patient Privilege 970
   2. The Psychotherapist-Patient Privilege 972
      a. Jaffee v. Redmond 972
      Jaffee v. Redmond 972
      Notes and Questions 984
      b. Scope of the Privilege After Jaffee 984
      c. Exceptions to the Privilege 987
      Key Points 990
      Problems 990

F. The Clergy-Communicant Privilege 991
   1. The Privilege and Its Justifications 992
   2. Scope of the Privilege 993
      a. Definition of Clergy 993
      b. Nature of the Communication 994
      c. Expectation of Confidentiality 994
      d. Exceptions 996
      Key Points 997
      Problems 997

G. Other Privileges 998
   1. Other Professional-Client Relationships 998
   2. Parent-Child Privilege 999
   3. Communications Made in Settlement Negotiations 1001
   4. Privileges Protecting Outside Sources of Information 1002
      a. Government Informant's Privilege 1003
      b. Journalist's Privilege 1003
      c. Scholar's (Academic Researcher's) Privilege 1005
   5. Peer Review Privilege 1006
   6. Self-evaluative Privilege 1007
   7. Government Privileges—Executive Privilege 1009
      a. State Secrets Privilege 1009
      b. Presidential Communications Privilege 1012
      c. Official Information (Deliberative Process) Privilege 1014
   8. Miscellaneous Privileges 1017
Contents

Problems 1018
Assessments 1020

Table of Cases 1025
Table of Authorities 1037
Index 1047