SUMMARY OF CONTENTS

Contents xi
Preface xxxi
Acknowledgments xxxv
Special Notice xxxvii

1 Evidence Law and the System 1
2 Relevance 53
3 Hearsay 111
4 Hearsay Exceptions 165
5 Relevance Revisited 423
6 Competency of Witnesses 487
7 Direct and Cross-Examination Revisited 517
8 Impeachment of Witnesses 539
9 Opinion and Expert Testimony; Scientific Evidence 637
10 Burdens of Proof and Presumptions 713
11 Judicial Notice 763
12 Privileges 789
13 Foundational Evidence, Authentication 895
14 The “Best Evidence” Doctrine 929

Table of Cases 953
Table of Rules 969
Table of Authorities 973
Index 981

Includes small portions of the book for valuation purposes only. Please contact your sales rep if you are interested in seeing more.
CONTENTS

Preface xxxi
Acknowledgments xxxv
Special Notice xxxvii

1 EVIDENCE LAW AND THE SYSTEM 1

A. Why Rules of Evidence? 1
   1. Why Evidence Law at All? 1
   2. Why Rules Rather Than Common Law? 2

B. What Happens at Trial 4
   1. Jury Selection 5
   2. Opening Statement 6
   3. Presentation of Proof 6
   4. Trial Motions 8
   5. Closing Argument 9
   6. Instructions 9
   7. Deliberations 10
   8. The Verdict 11
   9. Judgment and Post-Trial Motions 12
  10. Appellate Review 12

C. Making the Record 13
   1. What Is the Record and How Is It Made? 13
   2. Beware the Pitfalls—What Not to Do 16
   3. Taking Care—What to Do 19

D. How Evidence Is Admitted or Excluded 20
   1. Getting Evidence In: Foundation and Offer 20
      a. Testimonial Proof—Direct Examination 20
      b. Testimonial Proof—Cross-Examination 21
      ▸ Problem 1-A. How Did It Happen? 26
      c. Real Evidence 27
      d. Demonstrative Evidence 28
      e. Writings 30
   2. Keeping Evidence Out 31
      a. The Objection 31
      b. The Motion in Limine 36

xi
3. The Offer of Proof 37
4. Judicial "Mini-Hearings" 42
E. Consequences of Evidential Error 44
  1. Appraising Such Error on the Merits 44
  2. Appellate Deference: The Discretion of the Trial Judge 47
  3. Procedural Pitfalls and Adversarial Gambits 48
    ■ Problem 1-B. He Didn’t Object! 50
F. Obtaining Review of Evidence Points 50
  1. Appeal from Judgment 50
  2. Interlocutory Appeal 51

2 RELEVANCE 53

Introduction 53
A. Logical Relevance 55
  1. Relevance and Materiality 55
    Old Chief v. United States (I) 56
    Notes on Relevance, “Fit,” and Offers to Stipulate 60
  2. Relevance as Threshold: Standard of Probative Worth
    (Weight and Sufficiency Contrasted) 62
  3. Establishing Relevance: The Evidential Hypothesis 64
    ■ Problem 2-A. Too Much Wax on the Floor? 67
    ■ Problem 2-B. Was He Going Too Fast? 68
    ■ Problem 2-C. Boys on the Bridge 68
    ■ Problem 2-D. Flight and Guilt 69
    Notes on Evidence of Attempts to Avoid Capture 69
B. Pragmatic Relevance 71
  1. Prejudice and Confusion 71
    State v. Chapple 72
    Old Chief v. United States (II) 75
    Notes on Prejudice, Gruesome Photographs, and Prior Crimes 79
    Picture: Justice David Souter 82
    ■ Problem 2-E. The Battered Wife 83
    ■ Problem 2-F. The Exploding Gas Tank 84
  2. Limited Admissibility—Confining the Impact of Proof 84
    ■ Problem 2-G. “My Insurance Will Cover It” 85
    Notes on Limited Admissibility 85
  3. Completeness—Providing Context 86
    ■ Problem 2-H. “Power Rollback Caused the Crash” 87
    Notes on the Completeness Doctrine 88
  4. “The Shortness of Life” 89
  5. The Functions of Judge and Jury 89
    ■ Problem 2-I. Raid on the Cedar Woods Apartment 91
    Notes on Conditional Relevance 93
C. The Relevance of Probabilistic Analysis

People v. Collins 95

Notes on Collins and the Misuse of Probabilities 105

■ Problem 2-J. The Exploding Tire 107

Notes on Probabilistic Proof in Civil Cases 107

3 HEARSAY 111

A. What Is Hearsay? 111

1. Underlying Theory: Risks and Safeguards 111

2. Out-of-Court Statement Offered for Its Truth 114

■ Problem 3-A. Three See a Robbery 114

B. A Closer Look at the Doctrine 115

1. What Is a Statement? 115

a. Assertive Conduct 115

b. Nonassertive Conduct 116

■ Problem 3-B. Kenworth and Maserati 116

Picture: Baron Parke 117

Wright v. Doe D. Tatham 118

Notes on Nonassertive Conduct as Hearsay 121

Comment/Perspective: Implied Statements 124

Cain v. George 125

Notes on Evidence of Noncomplaint 126

c. Indirect Hearsay 127

United States v. Check 128

Notes on Indirect Hearsay 131

d. Machines and Animals Speak 132

2. When Is a Statement Not Hearsay? 133

■ Problem 3-C. “The Blue Car Ran a Red Light” 134

Notes on Impeachment by Prior Statements 134

■ Problem 3-D. “Any Way You Like” 135

Notes on Verbal Acts In Criminal Cases 135

■ Problem 3-E. Whose Corn? 136

Notes on Verbal Acts In Civil Cases 136

■ Problem 3-F. “I’m from the Gas Company” 137

Notes on Proving Effect on Hearer or Reader 137

■ Problem 3-G. Eagles Rest Bar & Grill 138

Notes on Verbal Objects or Markers 139

■ Problem 3-H. Anna Sofer’s Will 140

■ Problem 3-I. “A Papier-Mâché Man” 141

Notes on Circumstantial Evidence of State of Mind and of Memory 142

C. Hearsay Under Rule 801: A Reprise 143

D. Hearsay and Nonhearsay—Borderland of the Doctrine 145
Contents

1. Statements with Performative Aspects 145
   United States v. Singer 146
   Notes on Statements with Performative Aspects 147
   ■ Problem 3-J. “My Husband Is in Denver” 148
   Notes on Lying and Hearsay 149
   ■ Problem 3-K. King Air YC-437-CP 150
   Notes on the Significance of Disclosure 151

2. Using Statements to Prove Matters Assumed 151
   United States v. Pacelli 151
   Notes on Using Statements to Prove Unspoken Thoughts 153

3. Statements That Are Questions or Commands 156
   Notes on Questions or Commands As Hearsay 157

E. Hearsay—Test Your Understanding 158
   Betts v. Betts 158
   Notes on Statements as Circumstantial Evidence of State of Mind 160
   Hearsay Quiz 161

4 HEARSAY EXCEPTIONS 165

Introduction—Organization of the Hearsay Exceptions 165
A. Exceptions in FRE 801(d)(1)—Declarant Testifying 166
   1. Prior Inconsistent Statements 167
      State v. Smith 167
      Notes on Prior Proceedings 171
      ■ Problem 4-A. “I Got Amnesia” 172
      Notes on Substantive Use of Inconsistent Statements:
      Memory Loss and Cross-Examinability 174
      Comment/Perspective: Lack of Memory as an Inconsistency 174
   2. Prior Consistent Statements 176
      ■ Problem 4-B. “He Thinks I’m His Wife” 180
      Notes on Prior Consistent Statements and FRE 801(d)(1)(B) 181
   3. Prior Statements of Identification 183
      State v. Motta 183
      Notes on Application of FRE 801(d)(1)(C) 186
      Comment/Perspective: Constitutional Issues with Identifications 187

B. Exceptions in FRE 801(d)(2)—Admissions by Party Opponent 188
   1. Individual Admissions 190
      ■ Problem 4-C. Fire in the Warehouse 190
      Notes on Individual Admissions 191
      Comment/Perspective: Apologies as Admissions 192
### Contents

- Problem 4-D. An Encounter Gone Bad
  - Notes on Prior Guilty Pleas
  - *Bruton v. United States*
- Problem 4-E. His Master’s Car
  - Notes on *Bruton* and the Problem of Admissions in Multiparty Situations
  - Comment/Perspective: Joint Trials and the *Bruton* Problem
- Problem 4-F. “Did You Rob That Bank?”
  - Notes on Tacit Admissions and Ambivalent Responses
  - *Doyle v. Ohio*
  - Notes on Silence as Admission
- Problem 4-G. Couldn’t He See the Boy?
  - Notes on Admissions in Judicial Proceedings
- Problem 4-H. “I Was on an Errand for My Boss”
  - Notes on Bootstrapping and Coincidence
- Problem 4-I. Drugs Across the Border
  - Notes on the Coconspirator Exception
- C. Exceptions in FRE 803—Unrestricted
  - 1. Present Sense Impressions and Excited Utterances
    - *Nuttall v. Reading Co.*
    - Notes on Present Sense Impressions
    - *United States v. Arnold*
    - Notes on Excited Utterances
    - Problem 4-J. “I Felt This Sudden Pain”
    - Notes on Proving Excitement for Purposes of the Exception
  - 2. State of Mind
    a. Then-Existing Physical Condition
    b. Then-Existing Mental or Emotional Condition
      - Problem 4-K. “He Says He’ll Kill Me”
      - Notes on Proving State of Mind by Fact-Laden Statements
    c. Subsequent Conduct
      - *Mutual Life Insurance Company v. Hillmon*

Includes small portions of the book for valuation purposes only. Please contact your sales rep if you are interested in seeing more.
## Contents

*United States v. Pheaster* 264  
Notes on State of Mind as Proof of Conduct 268  
Picture: Who Is Buried in Hillmon’s Grave? 271  
- Problem 4-L. Fright Points the Finger 272  
Notes on Statements and Behavior by Murder Victims Indicating Fear 272  
- Facts About Declarant’s Will 273  

3. Statements for Medical Treatment 274  
- Problem 4-M. Where Did She Fall? 274  
Notes on the Medical Statements Exception 275  
*Blake v. State* 276  
Notes on The Medical Statements Exception In Abuse Cases 279  

4. Past Recollection Recorded 284  
*Ohio v. Scott* 284  
Notes on Past Recollection Recorded 288  

5. Business Records 289  
*Petrocelli v. Gallison* 291  
Notes on Medical Records 295  
*Norcon, Inc. v. Kotowski* 296  
Notes on Internal Reports Offered as Business Records 299  
Picture: The Exxon Valdez 300  

6. Public Records 302  
- a. Introduction 302  
- b. Use in Civil Cases 304  
  *Baker v. Elcona Homes Corp.* 304  
  Notes on Public Records in Civil Cases 309  
  Notes on the Trustworthiness Factor 310  
- c. Use in Criminal Cases 311  
  Notes on Proving Forensic Lab Reports in Criminal Cases 315  
  Picture: Troubles In Forensic Crime Laboratories 316  
  Comment/Perspective: Handling Forensic Drug Reports 318  
  - Problem 4-N. “You Can’t Offer a Police Report” 318  
  Notes on Use of FRE 803(8) In Criminal Cases 319  

7. Learned Treatises 320  
Notes on Learned Treatises 321  

**D. The Minor Exceptions** 322  
**E. Exceptions in FRE 804—Declarant Unavailable** 325  
1. The Unavailability Requirement 326  
   *Barber v. Page* 330  
   Notes on Unavailability and the Constitution 332  
   - Problem 4-O. “The Government Let Her Go” 334  
   Notes on Procured Absence 335  
2. The Former Testimony Exception 336  
   *Lloyd v. American Export Lines, Inc.* 337  

Includes small portions of the book for valuation purposes only. Please contact your sales rep if you are interested in seeing more.
Contents

Notes on Prior Cross-Examination Requirement 343
Picture: S.S. Export Commerce 344
3. Dying Declarations 346
Notes on Dying Declarations 346
4. Declarations Against Interest 348
   a. Introduction and General Considerations 348
   b. Criminal Cases—Statements Implicating the Accused 351
   Williamson v. United States 351
   Notes on Statements Against Interest that Implicate the Accused 356
   c. Criminal Cases—Statements Exonerating the Accused 358
      ■ Problem 4-P. "He Had Nothing to Do with It" 358
   Notes on Statements Against Interest that Exonerate the Accused 359
   d. Corroboration Requirement; Other Details 360
5. Statements of Personal or Family History 361
6. Statements Admissible Because of Forfeiture by Misconduct 362
   Notes on Scope of the Forfeiture Exception 365
      ■ Problem 4-Q. "If You Want to Stay Healthy" 369
   Notes on Procedure In Applying the Forfeiture Exception 370
F. The Catchall Exception 371
   1. Origin of the Catchall 371
   2. The Catchall and Proof of Exonerating Facts 372
      State v. Weaver 372
      Notes on Proving Exonerating Facts with the Catchall 377
      Picture: Mary Weaver and Drama In Marshalltown 378
   3. The Catchall and Child Abuse Prosecutions 379
G. Impact of the Confrontation Clause 381
   1. Historical Antecedents 381
      Notes on the Roberts Doctrine 386
   2. Modern Doctrine: Crawford and “Testimonial” Hearsay 388
      Picture: Justice Antonin Scalia 388
      Crawford v. Washington 389
      Notes on Crawford's "Testimonial" Approach 400
   3. The “Emergency” Doctrine 404
      Davis v. Washington 404
      Notes on the Emergency Doctrine 411
   4. The Cross-Examination Factor 412
      a. Cross-Examination at Trial (Deferred Cross) 413
         ■ Problem 4-R. “Your Witness” 416
         Notes on Deferred Cross-Examination 419
      b. Cross-Examination Before Trial (Prior Cross) 420
   5. Protected-Witness Testimony 421
      Notes on Protected-Witness Testimony 422

Includes small portions of the book for valuation purposes only. Please contact your sales rep if you are interested in seeing more.
## 5 RELEVANCE REVISITED

**A. Character Evidence**

1. Relevancy and Form
   - Character of Criminal Defendant
     - **Problem 5-A. Fight in the Red Dog Saloon (Part 1)** 425
     - Notes on Evidence of Defendant’s Character 426
2. Character to Prove Conduct on a Particular Occasion
   - Character of Crime Victim
     - **Problem 5-B. Red Dog Saloon (Part 2)** 427
     - Notes on Evidence of the Victim’s Character 427
   - Methods of Proving Character
     - **Problem 5-C. Red Dog Saloon (Part 3)** 429
     - Notes on Opinion and Reputation 429
     - Comment/Perspective: Victim’s Character in the Zimmerman Case 431
   - Cross-Examination and Rebuttal
     - **Problem 5-D. What Price Truth?** 431
     - Notes on Cross-Examination of Character Witnesses 432
   - Civil Cases 433

3. Character as an Element of a Charge, Claim, or Defense
   - Criminal Cases
     - **Problem 5-E. “She’s a Known Thief”** 435
     - Notes on Character as an “Element” in Criminal Cases 436
   - Civil Cases
     - Notes on Character as an “Element” in Civil Cases 437

4. Prior Acts as Proof of Motive, Intent, Plan, and Related Points
   - General Considerations 438
   - Proving Intent
     - **Problem 5-F. Drug Sale or Scam?** 439
     - Notes on Prior Acts as Proof of Intent and Related Points in Criminal Cases 440
   - Identity, Modus Operandi
     - **Problem 5-G. “He Came Running in All Hunched Over”** 442
     - Notes on Prior Acts to Prove Modus Operandi 442
   - Plan, Design
     - **Problem 5-H. The Undercover Cop Trick** 444
     - Notes on Prior Acts Offered to Prove Plan or Design 445
   - Other Purposes
     - **Problem 5-I. “It Was an Accident”** 446
     - Notes on Other Uses of Prior Crimes Evidence 446
   - Proving Prior Acts
     - **Problem 5-J. “I Didn’t Know They Were Stolen”** 448
     - Notes on Proving Prior Acts 448
Comment/Perspective: Ongoing Debate Over Character Evidence 450

5. Character in Sex Offense Cases (Criminal and Civil) 451
a. Sexual History of Victim (Rape Shield Statutes) 451
■ Problem 5-K. Ordeal of Leslie or Fred 452
Notes on Evidence of Complainant’s Prior Sexual Conduct in Criminal Cases 453
■ Problem 5-L. Acting Out on the Assembly Line 455
Notes on Evidence of Complainant’s Prior Sexual Conduct in Civil Cases 456
b. Prior Offenses by Defendants in Sex Crime and Abuse Trials, and Civil Suits 457
■ Problem 5-M. “I Told Him to Stop” 458
Notes on Proving Defendant’s Prior Sexual Conduct in Trials for Sexual Assault and Child Abuse 459

B. Habit and Routine Practice 461
■ Problem 5-N. Death on the Highway 462
■ Problem 5-O. The Burning Sofa 463
Notes on Habit Evidence in Negligence Cases 464
■ Problem 5-P. Was He Served? 465
Notes on Organizational Custom and Practice 466

C. Remedial Measures 467
  *Tuer v. McDonald* 467
Notes on Subsequent Remedial Measures 472

D. Settlement Negotiations 475
  1. Civil Settlements 475
  ■ Problem 5-Q. Two Potato, One Potato 476
  Notes on Civil Settlement Offers in Civil Cases 477
  ■ Problem 5-R. “This Is Criminal; You Can’t Exclude Civil Settlements Here” 477
  Notes on Civil Settlement Offers in Criminal Cases 478
  2. Plea Bargaining in Criminal Cases 479
  ■ Problem 5-S. “I Used His Stuff” 480
  Notes on Plea Bargaining with Agents 481
  ■ Problem 5-T. “Just Keep Them Out of It” 482
  Notes on Plea Bargaining, Pleas, and Bargaining for Others 483

E. Proof of Payment of Medical Expenses 483
F. Proof of Insurance Coverage 484
  Notes on Evidence of Insurance Coverage 485

6 COMPETENCY OF WITNESSES 487

A. Historical Note 487
  Notes on Historical Grounds of Incompetency 489

Includes small portions of the book for valuation purposes only. Please contact your sales rep if you are interested in seeing more.
7 DIRECT AND CROSS-EXAMINATION REVISITED 517

A. Direct Examination 517

1. Nonleading Questions 517

2. Exceptions—Leading Questions Allowed 517
   Baker v. State 519
   Notes on Refreshing Recollection 524

B. Cross-Examination 524

1. Leading Questions 524

2. Cross-Examining on Witness Preparation Material 525
   James Julian, Inc. v. Raytheon Co. 525
   Notes on Applying Rule 612 529
3. Cross-Examination as an Entitlement 530

C. Excluding Witnesses 532

1. The General Principle 532
   *Susanna and the Elders* 533
   Notes on Excluding Witnesses 534
   ■ Problem 7-A. Daily Transcripts 535
   Notes on Breadth of FRE 615 535
   Picture: Witness Sequestration in Terrorism
   Trial of Zacarias Moussaoui 536

2. Traditional Exemptions from the Witness Rule 536

3. The Special Case of Crime Victims 537

8 IMPEACHMENT OF WITNESSES 539

Introduction 539

A. Nonspecific Impeachment 540

1. Bias and Motivation 540
   Picture: Deathrow Inmate John Clyde Abel 542
   *United States v. Abel* 542
   Notes on Showing Bias 548
   Comment/Perspective: Using the Name “Aryan Brotherhood” 549
   ■ Problem 8-A. The Hired Gun 550
   Notes on Cross-Examining the Paid Witness 551

2. Sensory and Mental Capacity 552
   Notes on Proving Lack of Capacity 553

3. Character for “Truth and Veracity” 554
   a. Cross-Examination on Nonconviction Misconduct 555
      *United States v. Manske* 557
      Notes on Cross-Examination on Nonconviction Misconduct 562
   b. Proving Prior Convictions 564
      ■ Problem 8-B. “Hit the Deck” 568
      Notes on Applying the First Prong—FRE 609(a)(1) 568
      Comment/Perspective: Prior Convictions and Untruthfulness 571
     ■ Problem 8-C. “A History of Lying” 572
      Notes on Applying the Second Prong—FRE 609(a)(2) 573
     ■ Problem 8-D. Faker, Thug? 575
      Notes on Coordinating FRE 608 with 609 576
      *Luce v. United States* 577
      Notes on Preserving Error for Review 580
   c. Character Witnesses 582
      Notes on Expert Opinion Relating to Credibility 583
B. Specific Impeachment 584

1. Prior Inconsistent Statements 584
   a. Procedural Issues 584
      ■ Problem 8-E. “He’s Trying to Sandbag Us!” 585
      Notes on Applying FRE 613(b) 586
   b. Inconsistent Statements and Misuse of the Impeachment Process 587
      United States v. Webster 588
      Notes on “Abuse” of FRE 607 589
   c. Constitutional issues 592
      Harris v. New York 592
      Notes on Impeachment by Miranda-Barred Statements 597
      Jenkins v. Anderson 599
      Notes on the Use of Silence to Impeach 602

2. Contradiction 604
   ■ Problem 8-F. “That’s Just Collateral, Your Honor” 608
   Notes on “Collateral Matters” and the Relevancy of Counterproof Offered to Contradict 609
   United States v. Havens 609
   Notes on Contradicting a Witness by Constitutionally Excludable Counterproof 615
   Comment/Perspective: Harris, Harvey, Havens (3 Hs Modifying 3 Ms) 616
   ■ Problem 8-G. “Have You Ever Sold Narcotics Before?” 617
   Notes on Contradicting a Witness by Counterproof Excludable Under the Rules 617

C. Repairing Credibility 619

1. What Constitutes an Attack on Credibility that Paves the Way for Repair? 619
   Notes on Rebutting Impeaching Attacks 620

2. Evidence of Good Character 621
   United States v. Medical Therapy Sciences 622
   Notes on Proving Truthfulness: Character and Behavioral Syndrome Evidence 626

3. Prior Consistent Statements 628
   ■ Problem 8-H. “She Handed Me the Heroin” 632
   Notes on Prior Consistencies 633

D. Forbidden Attacks 634

   Notes on Religious Belief and Impeachment 634
9  OPINION AND EXPERT TESTIMONY;  
SCIENTIFIC EVIDENCE  637

A. Lay Opinion Testimony 637
   ■ Problem 9-A. “It Was My Impression”  640
   Notes on Lay Testimony On Another’s Meaning or State  
of Mind  641
   ■ Problem 9-B. The Watchful Neighbor  642
   Notes on Lay Opinion Testimony  644

B. Expert Witnesses 645
1. Qualifying the Witness: Who Is an Expert?  646
Testimony  647
   ■ Problem 9-C. “They Saw It the Same Way I Did”  651
   Notes on Bases for Expert Testimony and the Conduit  
Problem  652
4. Formal Problems—The Mental State Restriction  654
   Notes on Formal Restrictions  655
5. Presenting Expert Testimony: Stating Opinion Directly  656
   Notes on Presenting Expert Testimony  660
6. Court-Appointed Experts  662

C. Reliability Standard for Scientific and Other Technical  
Evidence  663
1. Defining a Standard  663
   Picture: Karl Popper and Thomas Kuhn: The Nature  
of Science  665
   Daubert v. Merrell Dow Pharmaceuticals  666
   Notes on Daubert and the Reliability Standard  676
   Comment/Perspective: What Did Daubert Do?  677
   Kumho Tire Company, Ltd. v. Carmichael  678
   Notes on Kumho Tire and the Broadening of the Daubert  
Standard  686
   Comment/Perspective: Daubert in Civil Cases  690
2. Modern Science in the Courtroom  691
   a. Toxic Tort Cases  692
   b. Syndrome and Social Framework Evidence  693
      ■ Problem 9-D. “They Become Anxious and  
Guilt-Ridden”  694
      Notes on Syndrome and Framework Evidence  696
   c. DNA Evidence  698
      State v. Moore  698
      ■ Problem 9-E. “We Found a Match”  702
      Notes on DNA Evidence  703
   d. Serologic and DNA Testing and Paternity  705
# Contents

<table>
<thead>
<tr>
<th>Problem 9-F. Paternity Index</th>
<th>624 707</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notes on Serologic and Genetic Tests in Paternity Cases</td>
<td>708</td>
</tr>
</tbody>
</table>

## 10 Burdens of Proof and Presumptions

### A. Burdens and Presumptions in Civil Cases

1. Pretrial Burdens (Pleading, Pretrial Statement) | 713 |
2. Trial Burdens (Production and Persuasion) | 714 |
3. A Special Device for Shifting and Allocating Burdens: The Presumption
   a. Sources and Nature of Presumptions | 717 |
   b. Easy Cases: Presumption Controls, Disappears, or Is Contingent
      - Problem 10-A. The Unhappy Harpsichordist | 720 |
      - Notes on Presumptions in the Contingent Situation | 721 |
   c. Hard Cases—Presumption Operates a Little, or Maybe Disappears
      - Problem 10-B. The Death of Mason Parnell | 726 |
      - Notes on Presumptions in the "In-Between" Cases | 727 |
   d. Operation of Rule 301 | 729 |
      - Notes on Burdine and FRE 301 in "In-Between" Cases | 731 |
      - Notes on FRE 301 AND Federal Statutory Remedies | 732 |
   e. Bifurcated Approaches | 733 |
   f. State Presumptions in Diversity Cases | 734 |

### B. Burdens, Presumptions, and Inferences in Criminal Cases

1. Burden of Persuasion | 734 |
   - Notes on Burden of Persuasion in Criminal Cases | 736 |
      - Problem 10-C. Killing by “Calculation and Design”? | 739 |
   - Presumptions and Inferences
      - Sandstrom v. Montana | 741 |
      - Notes on the Significance of Sandstrom | 746 |
      - County of Ulster v. Allen | 748 |
      - Notes on the Significance of Allen | 758 |
      - Problem 10-D. Presence of a Firearm | 759 |
      - Notes on Inferences in Criminal Cases | 759 |

## 11 Judicial Notice

### A. Introduction | 763 |

### B. Judicial Notice of Adjudicative Facts

- Problem 11-A. Dry Pavement | 765 |
- Problem 11-B. The Subpoena | 765 |
Contents

■ Problem 11-C. Interstate Call 765
■ Problem 11-D. The Football Fan 766
■ Problem 11-E. Delayed Shipment 766
■ Problem 11-F. Asbestos and Cancer 766
Government of the Virgin Islands v. Gereau 767
Notes on Judicial Notice of Adjudicative Facts 768
Comment/Perspective: How Broad Should Judicial Notice Be? 770
C. Judicial Notice in Criminal Cases 770
United States v. Jones 770
Notes on Judicial Notice in Criminal Cases 772
■ Problem 11-G. Deadly Weapon 774
D. Evaluative Facts 774
■ Problem 11-H. “Okay, Maurie” 775
Notes on Judicial Notice of Evaluative Facts 775
E. Judicial Notice of Legislative Facts 777
Muller v. Oregon 777
Houser v. State 778
Notes on Judicial Notice of Legislative Facts 779
F. Judicial Notice of Law 780
Notes on Judicial Notice of Law 781
G. The Problem of Classification 782
United States v. Gould 782
■ Problem 11-I. Obscene Books 785
Notes on the Problem of Classification 785
■ Problem 11-J. “Drunk as a Skunk” 786
■ Problem 11-K. Lighter Fluid Explosion 787
■ Problem 11-L. Speed Trap 787
12 PRIVILEGES 789
A. Introduction 789
Notes on FRE 501 790
B. Attorney-Client Privilege 791
1. Reasons for the Privilege 791
5 J. Bentham, Rationale of Judicial Evidence 301 791
Notes on Justifications for the Privilege 792
Picture: Jeremy Bentham, Skeptical Curmudgeon 793
■ Problem 12-A. “A Bum Rap” 794
Notes on the Constitutional Right to Present a Defense 795
2. Professional Services 796
■ Problem 12-B. The Bail Jumper 796
Notes on Providing Professional Services 797
3. Communications 798

Includes small portions of the book for valuation purposes only. Please contact your sales rep if you are interested in seeing more.
Contents

■ Problem 12-C. The Tipsy Client 798
  Notes on Observations and Advice by Counsel 798
  *People v. Meredith* 799
  Notes on Applying the Privilege to Objects 804
4. Required Confidentiality 805
  a. Involving or Disclosing to Communicative Intermediaries 805
      Notes on Communicative Intermediaries and Other Aides 806
  b. Joint Clients and Pooled Defenses 806
      ■ Problem 12-D. A Failed Venture 807
      Notes on Intentional Disclosure 808
  c. Scavengers and Eavesdroppers 809
      *Suburban Sew ’N Sweep v. Swiss-Bernina* 809
      Notes on Scavengers and Eavesdroppers 811
5. The Corporate Client 812
  *Upjohn Co. v. United States* 813
  Notes on Corporate Attorney-Client Privilege 820
  Comment/Perspective: Attorney-Client Privilege and Work Product Protection 822
6. Exceptions to Coverage 823
  a. Client Identity 823
      *In re Osterhoudt* 823
      Notes on Privilege for Client’s Identity 826
  b. Future Crime or Fraud 828
      *United States v. Zolin* 828
      Notes on the Crime-Fraud Exception 833
7. Assertion and Waiver 834
  a. Asserting the Privilege 834
      ■ Problem 12-E. The Reluctant Lawyer 836
      Notes on Appellate Review of Privilege Issues 836
  b. Waiver 837
      ■ Problem 12-F. “The Disclosure Was Inadvertent” 840
      Notes on FRE 502 841
C. The Psychotherapist-Patient Privilege 844
  *Jaffee v. Redmond* 844
  Notes on *Jaffee* and the Federal Psychotherapist-Patient Privilege 853
  Picture: Karen Beyer and the Psychotherapist-Patient Privilege 855
D. Spousal Privileges 857
1. Introduction 857
2. Testimonial Privilege 858
  *Trammel v. United States* 859
  Notes on Spousal Testimonial Privilege 865

Includes small portions of the book for valuation purposes only. Please contact your sales rep if you are interested in seeing more.
Contents

- Problem 12-G. Hit-and-Run 866
- 3. Spousal Confidences Privilege 867
  *United States v. Montgomery* 869
  Notes on Spousal Confidences 874

**E. The Privilege Against Self-Incrimination** 875
1. Overview 875
2. Persons Protected 876
3. Scope of Privilege 877
  *Problem 12-H. The Uncooperative Driver* 877
4. Incrimination 878
5. Drawing Adverse Inferences 879
  *Griffin v. California* 879
  Notes on *Griffin Case* 882
  *Problem 12-I. “He Claimed the Fifth”* 883
6. Writings 884
  *Problem 12-J. The Inculpatory Diary* 884
  *United States v. Doe* 884
  Notes on Required Disclosure and the Fifth Amendment 891
7. Required Records and Reports 892
  Notes on the Required Records Doctrine 893

---

**13 FOUNDATIONAL EVIDENCE, AUTHENTICATION** 895

**A. Introduction** 895
  Notes on the Authentication Requirement 897

**B. Tangible Objects** 898
  *United States v. Johnson* 898
  Notes on Authenticating Tangible Objects 899
  *Problem 13-A. A White Granular Substance* 899
  *United States v. Howard-Arias* 900
  Notes on Chain of Custody 900

**C. Writings** 901
  *United States v. Bagaric* 901
  Notes on Authenticating Writings 902
  *Problem 13-B. The Land-Sale Contract* 903
  R. Keeton, *Basic Expressions for Trial Lawyers* (1979) 903

**D. Electronic Evidence and Social Media** 904
  *Problem 13-C. “The Wizard” and the Incriminating Email* 904
  Notes on Authentication of Social Media 905

**E. Recordings** 906
  *Problem 13-D. The Hidden Microphone* 906

Includes small portions of the book for valuation purposes only. Please contact your sales rep if you are interested in seeing more.
Contents

United States v. Oslund 906
Notes on Authenticating Recorded Conversations 910
Comment/Perspective: Transcripts of Recordings as Jury Aids 911

F. Other Exhibits 912

- Problem 13-E. The Photograph 912
- Problem 13-F. X-Ray 912
- Problem 13-G. Computer Printout 912

G. Telephone Conversations 913

United States v. Pool 913
Notes on Authenticating Phone Calls 914
- Problem 13-H. “This Is O’Rourke” 914

H. Self-Authenticating Exhibits 915

1. Acknowledged Documents 915

- Problem 13-I. The Rejected Easement 915
Notes on Acknowledged Documents 916

2. Certified Copies of Public Records 916

- Problem 13-J. The Death Certificate 916
Notes on Certified Copies of Public Records 918

3. Newspapers, Periodicals, and Other Self-Authenticating Material 918

- Problem 13-K. The House of the Rising Sun 919
Notes on Newspapers, Periodicals, and Other Self-Authenticating Exhibits 919

I. Demonstrative Evidence Generally 920

Belli, Demonstrative Evidence: Seeing Is Believing 920
Notes on Demonstrative Evidence 924

J. Computer Animations and Simulations 925

- Problem 13-L. “The Animation Will Help the Jury” 925
Notes on Computer-Created Animations 926

14 THE “BEST EVIDENCE” DOCTRINE 929

A. Introduction 929

Notes on the “Best Evidence” Doctrine 930
- Problem 14-A. The Defamatory Letter 931

B. Defining a “Writing, Recording, or Photograph” 931

United States v. Duffy 931
Notes on Defining a “Writing, Recording, or Photograph” 934

C. Defining an “Original” 935

- Problem 14-B. The Unprivate Physician 935
Notes on Defining an “Original” 935

Includes small portions of the book for valuation purposes only. Please contact your sales rep if you are interested in seeing more.
### Contents

#### D. Use of Duplicates
- Problem 14-C. “There Never Was Such an Original” 936
- Problem 14-D. Nine Hours or One? 937

#### E. Best Evidence Doctrine in Operation
- Problem 14-E. The XXX-Rated Movies 939
- Problem 14-F. The Surveillance Photograph 940
- *Meyers v. United States* 940
- Notes on *Meyers* and the Limits of the Best Evidence Doctrine 943
- Problem 14-G. The Recorded Conversation 944
- Problem 14-H. The Sick Chickens 945
- Problem 14-I. Cash Payment 945
- Problem 14-J. The Unreported Burglary 945
- Problem 14-K. The Unproduced X-Ray 946

#### F. Production of Original Excused
- *Sylvania Electric Products v. Flanagan* 946
- Notes on Admissibility of “Other Evidence of Contents” 948
- Problem 14-L. Testimony versus Photocopy 950
- Problem 14-M. The Tax Evader 950
- Problem 14-N. “No Pets” 950
- Notes on Other Escapes from Producing the Original 951

| Table of Cases | 953 |
| Table of Rules | 969 |
| Table of Authorities | 973 |
| Index | 981 |
The Federal Rules set out the law of evidence in the federal system, and these Rules have been adopted—with some variation—in 45 of the 50 states (a list of adopting states is found in footnote 2 of Chapter 1). American evidence law is unified around these Rules, and they are a natural focal point for the study of the subject. The Problems and cases in this book, and the narrative presentations too, apply and shed light on the Rules and how they work.

This edition of the book, which has now been in use for more than a quarter of a century, is substantially revised and reformatted. Some cases, particularly in the Crawford line of decisions interpreting confrontation rights, no longer seem so important that they should be experienced in full text, and these are presented in summary form. New Problems have been added, and the Notes are substantially revised to provide more guidance to students. The book has been redesigned to be more user-friendly, and of course it is available in an online version. We have added two new features, in the form of Picture boxes and Comment/Perspective boxes, and these are set out to differentiate them from other features of the book. The purpose of the Picture boxes is to add human interest to the materials, and the purpose of the Comment/Perspective boxes is to provide broader perspectives that should assist in understanding doctrine.

Reactions of professors and student users have strengthened our conviction that understanding evidence law requires more than cases. We consider the present work to be a coursebook that combines the strengths of standard materials, such as casebooks, collections of problems, and hornbooks. We set out basic ideas as narrative, and use Problems to present issues that arise every day. There are enough facts in the Problems to make evidence issues concrete and vivid. We hope these materials are self-contained—we think a conscientious student can grasp what is important about the subject from this book alone, without constantly going elsewhere to fill in gaps.

Evidence law is interesting because of its kinship with epistemology and its grounding in the real world of an adversary system: In the American courtroom, how do we go about finding the facts? Evidence law seeks to regulate a process of inquiry in a setting where lawyers, witnesses, courts, and jurors are important players. We encounter issues of policy, principle, and philosophy, often with constitutional dimensions. And because the Rules are, after all, rules—they are words with prescriptive meaning that is clear in core cases and less clear as we move away from the core—we grapple as well with narrow issues of application and construction. This book aims to raise both the larger and the
narrower issues, to be philosophical and policy-oriented as well as practical and concrete.

These are the Problems that are new in this edition: Problem 4-B (“He Thinks I’m His Wife”), which rests on (and substitutes for) the Supreme Court’s somewhat confused opinion on prior consistent statements in the Tome case; Problem 4-M (“Where Did She Fall?”), which explores the medical statements exception in FRE 803(4); Problem 4-N (“You Can’t Offer A Police Report”), which explores uses of police reports in criminal cases under the public records exception in FRE 803(8); Problem 5-H (“The Undercover Cop Trick”), which explores use of prior acts to prove plan or scheme (replacing an earlier problem); Problem 12-F (“The Disclosure Was Inadvertent”), which explores the operation of the privilege waiver provision in FRE 502.

We offer what we call a coursebook, and claim for it a kind of completeness not found in the usual casebook, but students sometimes find it useful to resort to secondary sources (full narrative accounts) in pursuing their study of evidence law, seeking additional explanation or further coverage. We have also written a student text (often called a hornbook) that presents a straightforward account of the subject, including an analysis of each Rule and descriptions of doctrinal developments, with reference to the important decisions in point. See Christopher B. Mueller and Laird C. Kirkpatrick, Evidence (5th ed. Aspen, 2012). This book, which is available in law school libraries and bookstores, is published in both hardbound and softbound format (with different cover designs). Many other excellent studies are readily available, and we recommend these:

McCormick on Evidence (7th ed. 2014) (single-volume source)
Charles Wright & Kenneth Graham, Federal Practice and Procedure, volumes 21-26A (FRE 101 through Rejected Rule 513); 27-29 (C. Wright & V. Gold) (FRE 601-706); 30 (K. Graham) (Hearsay Policy); 31 (FRE 801-1103) (M. Graham)

Before the revision culminating in this Eighth Edition, Aspen surveyed professors who used prior editions or were familiar with them. Many were generous in providing suggestions and criticisms that we received anonymously. We looked at everything, learned from what people had to say, and made many
changes as a result. To those of you who participated in this effort, we want to offer our special thanks, even though we don’t know who you are. Also we thank the Honorable Gerald Rosen who has made many helpful comments over a period of years. We wish we could thank others personally as well, but we can only do so in this way because we do not know who you are. Again thank you for taking the time and giving us your thoughts.

We also want to extend special thanks to Liesa Richter, Thomas P. Hester Presidential Professor at the University of Oklahoma College of Law, who provided detailed comments on every chapter of this book. Her insightful suggestions were very useful, and we have implemented them throughout. We are deeply grateful for her extraordinary help in improving the quality and teachability of this Eighth Edition.

Finally, we want to acknowledge friends whose comments have helped us in revising this book over the years: These include David Bernstein, Chris Blair, Mark Bonner, Ron Carlson, W. Burlette Carter, Sherry Colb, David Crump, James Duane, David Faigman, Michael Green, Steven Heyman, Paul Janicke, John Junker, Edward Kimball, Ronald Lansing, Lash LaRue, Brian Leiter, Tom Lininger, Graham Lilly, Peter Lushing, Dayna Matthew, Pedro Malavet, Kevin McMunigal, David McCord, David Rudovsky, Chris Sanchirico, Fred Schauer, David Siegel, Alex Stein, George Strickler, Eleanor Swift, Peter Tague, Suja Thomas, the Honorable Richard Unis, Robert Weninger, and Mimi Wesson. All of these colleagues in evidence have commented on these pages and helped us to improve them, and the book is much the better for their suggestions.

The authors wish also to extend their appreciation to Dean Phil Weiser at Colorado, and to Interim Dean Gregory Maggs and Dean Blake Morant at George Washington, for their encouragement and support in our efforts in revising this book.

In addition, we wish especially to thank Melissa Aubin, J.D. Oregon 2004, for her extensive work on recent editions of this work.

Finally some words to families. Spouses and children, even adult children who are gone from home and making their ways in the world, are often in the thoughts of authors. Especially our spouses are expected to understand, and in many ways large and small, they support what we do. It is to our families that we dedicate this work. On Laird Kirkpatrick’s side, we wish to acknowledge his wife Lind and his sons Ryan and Morgan. On Christopher Mueller’s side, we wish to acknowledge his wife Martha and their children Gretchen and David. We trust that our families know how much they mean to us.
WHAT IS HEARSAY?

1. Underlying Theory: Risks and Safeguards

A simple definition. To put it as simply as it can be put, hearsay is an out-of-court statement offered to prove the matter asserted—or as lawyers usually say, “offered to prove the truth of the matter asserted.”

Assume that plaintiff Abby wants to prove the blue car ran a red light, and she calls Faraway to testify that he heard the accident happen (but did not see it) and heard Bystander (who did see it) say shortly thereafter, “the blue car ran a red light.” Here Bystander’s statement is being offered (through Faraway’s testimony) to prove what it asserts—that the blue car ran a red light—and it is hearsay.

The result would be the same if Abby calls Faraway to lay the foundation for a letter from Bystander, in which Bystander wrote that “the blue car ran the red light.” The letter too is Bystander’s out-of-court statement. It too is offered to prove what it asserts, and it too is hearsay. (Nor would things change if Faraway testified to what he read in the letter from Bystander, for again Bystander’s out-of-court statement is offered to prove what it asserts. As you will see, there is an additional barrier to Faraway’s testimonial account of what was in the letter. The Best Evidence doctrine would require the party seeking to show what the letter says to offer the letter itself, or an excuse for not producing it. See Chapter 14.)

Assume now that Bystander is called as a witness, and that a party seeks to show that the blue car ran a red light. If Bystander is asked on the stand whether the blue car had the light in its favor, he might say “no, the blue car ran
the red light." Now there would be no hearsay objection, for Bystander is saying in court what he knows and remembers.¹

The simple one-liner suggested above gets to the heart of the matter, and everyone would agree that Faraway’s testimonial account of Bystander’s statement in the example is hearsay. If you look for a moment at FRE 801(a) through (c), you will see that our one-liner agrees substantially with the more elaborate formal definition adopted by the Federal Rules. But the hearsay doctrine draws a line through a vast domain of human expression, and charts a course across a boundless sea of evidential uses of human behavior, so we must take the one-liner for what it is and not expect too much. It is "right," but like the definition of justice offered by Glaucion in the early going of Plato’s Republic ("giving every man his due") it leaves much unsaid and is capable of mischief.

Our focus now is on recognizing hearsay, not on deciding whether it is admissible. Much that is hearsay is still admissible, and much that is not hearsay is not admissible anyway. Yet it is necessary to recognize hearsay because of the general principle, central to Anglo-American evidence law, that hearsay evidence is inadmissible unless it falls within one of many exceptions. Rule 802 states that general principle and hints at the exceptions. But for the time being our only concern is to get straight what hearsay is.

Reasons to exclude hearsay. Why exclude hearsay? Three reasons are usually given:

First and most important is the absence of cross-examination. Out-of-court statements are not subject to this truth-testing technique, at least when uttered, and in our example Bystander was not cross-examinable when he spoke. (Never mind for the moment the question whether deferred cross might be just as good—in other words, whether it would do to admit his statement in evidence if Bystander takes the stand and testifies at some point during the trial, and can then be questioned about his statement.) It is true that when Faraway testifies to what Bystander said, Faraway can be cross-examined, which is to say that his in-court testimonial account of what Bystander said can be probed, and this fact is valuable in itself. But it is Bystander on whom we rely when we take his statement as evidence of what happened at the intersection.

Second is the absence of demeanor evidence. The out-of-court declarant (Bystander in our example) is not under the gaze of the trier of fact, at least at the time he speaks, so the trier lacks those impressions and clues which voice, inflection, expression, and appearance convey. (Put aside for the moment the question whether deferred demeanor evidence might be adequate, if Bystander testifies so that his demeanor may be observed by the trier of fact when he is

¹The hearsay objection might reappear, however, if for some reason Bystander answered the question by testifying, "I told Faraway that the blue car ran the red light." The problem is that once again Bystander’s out-of-court statement is being offered as proof of what it asserts, even though now it is proved by Bystander’s own testimony. Therefore, under our one-line definition Bystander’s answer is hearsay. (The cure for the problem is to direct Bystander “to tell us what happened, and not what you told someone else,” which he might not fully understand but could probably comply with.)
What Is Hearsay?

asked about his earlier statement.) Again it is true that Faraway’s demeanor is observable by the trier and that this fact is helpful. But again we are relying on Bystander when we come to consider his statement as evidence.

Third is absence of the oath. Usually the out-of-court declarant was not under oath when he spoke (as Bystander was not, in our example), so the trier of fact has no indication that he felt any moral or legal obligation to speak the truth. (Put off the question whether a deferred oath might suffice—whether it would be good enough to call Bystander and question him under oath at trial about his prior statement.) Of course Faraway is under oath, which helps to some extent, but still it is Bystander on whom we rely when we consider his statement.

These three reasons for the hearsay doctrine express a preference for live testimony over out-of-court statements. They also describe three safeguards in the trial process: Testifying witnesses all swear (or affirm) under penalty of perjury that they will tell the truth, their demeanor is on display for the trier of fact to observe, and they are subject to immediate cross-examination. Why should these safeguards matter? Remember that the hearsay issue disappears when Bystander takes the stand and testifies that “the blue car ran a red light.” A testimonial account is obviously subject to the same human frailties as a substantially identical out-of-court statement. So why prefer the testimonial account?

The hearsay risks. The answer usually given is fourfold, which is to say that there are four “hearsay risks” associated with out-of-court statements that are substantially reduced (though certainly not removed entirely) by the safeguards of the trial process:

First is the risk of misperception. Maybe the car Bystander saw was not blue but silver; maybe what he thought to be a red light was glare from the sun; maybe the light changed after the blue car entered the intersection. The risk is not only a function of sensory capacity (such as acuity of vision) but of physical circumstance (such as distance and alignment of the sun) and of mental capacity and psychological condition. Even a well-situated witness with excellent vision can misinterpret or misunderstand what he sees, for lack of mental sharpness or because he is thinking of something else or is amused or expectant or angry or worried—in short, distracted or preoccupied.

Second is the risk of faulty memory. It is true that if Bystander related what he saw only moments afterwards, his statement is not likely to suffer in accuracy from failed or faulty memory. Indeed, memory problems increase with the time lapse between original observation and court appearance. But even

---

1 He would have been sworn if his statement was in the form of an affidavit, executed in cooperation with a notary public. But affidavits as such do not fit a hearsay exception. To be sure, they have limited evidential use with motions for summary judgment and applications for warrants. And it is true that various kinds of certificates, which are like affidavits in being sworn out-of-court statements, have important evidential use in authenticating other documents. See FRE 902(1) through (3) and (8). But the hearsay doctrine makes affidavits generally inadmissible as proof of what they assert.
a statement that follows close on the heels of an event might be affected by something like a memory problem: If Bystander glanced at the traffic light moments before the incident, then looked elsewhere, and only then saw the blue car enter the intersection, his remark might reflect a conflation of memories of the earlier condition of the light and later path of the car. As to this risk, cross-examination may be useful in bringing out, eliminating, or reducing uncertainties.

Third is the risk of misstatement, often called the risk of “ambiguity” or “faulty narration.” In saying the car “ran the red light,” perhaps Bystander meant to say the light changed to red before the car made it across the intersection; he said “blue” but might have meant to describe the car as “silver”; maybe what he meant to say was that the blue car “did not run a red light.” As to this risk, trial safeguards seem truly useful: Cross-examination can get at the limits and intended meaning of what Bystander has to say; the oath should bring home to him the need to speak with care; his demeanor adds dimension to the ways he affirms or qualifies his story of what happened.

Fourth is the risk of distortion (whether conscious or unconscious) and outright lying or deception, or (to put it in the customary and more gentle way) the risk of insincerity or lack of candor. Bystander may have shaded the truth in saying the blue car ran the red light, while knowing the light changed to red only after the blue car entered the intersection. Perhaps he did so because he knew and liked the other driver or felt animus toward the driver of the blue car, and the distortion may have been subconscious rather than calculated. Or he may have known full well that the driver of the blue car had the light in his favor and Bystander intended to fool the trier of fact. As to distortion, it is thought that trial safeguards do help, and we at least hope they do when the witness intentionally tries to deceive. There is reason to think the oath and the courtroom environment quell at least casual impulses to deceive, that the visible demeanor of the witness provides clues if she tries to mislead, and that cross-examination can bring to light subconscious distortion and sometimes succeeds in exposing lies.

2. Out-of-Court Statement Offered for Its Truth

Often the hearsay doctrine is simple in application, as illustrated by the statements of Bystander in Abby’s suit. But people do not always express themselves so directly. Consider now a series of statements, all describing the same incident.

PROBLEM 3-A. Three See a Robbery

Higgins is charged with the armed robbery of BankSouth. As part of its case-in-chief, the state calls to the stand one Lissner, who entered BankSouth shortly after the fact and conversed with three people who
Shepard v. United States, 290 U.S. 96, 104-106 (1933). Why would there be “an end” to the hearsay doctrine (“or nearly that”) if statements of memory could be admitted to prove the fact believed? After Pheaster, does lake spill over the dike?

Who Is Buried in Hillmon’s Grave?

The question who is buried in Hillmon’s grave presents one of the great mysteries in American evidence law. If it is John Hillmon, the insurance carriers unjustly resisted Sallie Hillmon’s claim, leading to six trials and two appeals to the Supreme Court over 25 years. If it is Adolph Walters, the carriers were justified in resisting her claims, and Hillmon likely committed insurance fraud and murder. The letter Walters sent to his fiancée Alvina Kasten was persuasive evidence: When he wrote of going someplace he “never expected to see” with a man named Hillmon, perhaps the prediction included eternity. He was never seen or heard from again. But then neither was Hillmon. One scholar suggests that the insurance carrier fabricated Walter’s letter and manipulated evidence. See Marianne Wesson, “Remarkable Stratagems and Conspiracies”: How Unscrupulous Lawyers and Credulous Judges Created an Exception to the Hearsay Rule, 76 Fordham L. Rev. 1675 (2007) (tentatively concluding that the man in the grave is Hillmon). Professor Wesson unearthed the bones seeking a DNA sample to compare with one from a descendant of Hillmon, but groundwater had bleached away the DNA. A forensic anthropologist at the University of Colorado examined photos presented in the Hillmon trials and thinks the corpse was not Walters and was probably Hillmon. See Dennis Van Gerven, A Digital Photographic Solution to the Question of Who Lies Buried in Oak Hill Cemetery (Feb. 13, 2007), at http://www.thehillmoncase.com/results.html. See also Wesson, A Death at Crooked Creek: The Case of the Cowboy, the Cigarmaker and the Love Letter (NYU Press, 2013); Douglas McFarland, Dead Men Tell Tales: Thirty Times Three Years of the Judicial Process After Hillmon, 30 Vill. L. Rev. 1 (1985).
CHARACTER EVIDENCE

1. Relevancy and Form

“Character” is a loaded term. In its broadest sense it suggests a unique combination of human qualities that defines the essence (and in a sense measures the worth) of a person. He is good or kind or caring, or awful, vicious or selfish. Even talking about character in this sense is awkward. It casts the speaker in a judgmental role and trenches on the privacy of the person in question.

“Character” also carries a narrower meaning, describing inclinations and suggesting their innateness. We speak of someone as being “by nature” cautious or careless, brave or fearful, combative or affable, meaning that these traits shape her natural tendencies.

Character as evidence of conduct. It is in the narrower sense that “character” has evidential significance because specific inclinations are predictive, suggesting patterns of behavior and telling us something about the likelihood that a person would or would not do certain acts. Emphasizing this predictive aspect, we may say that a person is “by disposition” tricky or deceitful, or “disposed” in the opposite direction, toward fairness and honesty. If the question is whether $X$ knowingly made a false statement in selling his car, proof that he is honest is some indication he did not or (if he did) he thought it to be true, while proof he is tricky or deceitful is some indication that he made the statement and knew it was false. When proof of character is used in these ways, we speak of the “propensity argument,” which describes using proof of character as “substantive evidence of conduct on a particular occasion.”

Prohibition with exceptions. Now look at FRE 404, which states what seems to be a blanket prohibition: Character evidence cannot be used “to prove
that on a particular occasion the person acted in accordance with the character or trait.” But the devil here is in the details. Exceptions in FRE 404(a)(2) allow the defense in a criminal case to prove “a pertinent trait” of the defendant and, if such proof comes in, the prosecutor can “offer evidence to rebut it.” The exceptions are huge, and we will take them up in detail. Notice two other major points: First, there are no “exceptions” in civil cases, which means that character cannot be used to prove conduct in that setting. Second, the same exclusionary principle is restated in FRE 404(b), but here we learn that “specific instances” of conduct can be used to show things like “motive” or “intent” or “plan.”

Probative worth: prejudice. If character has a predictive aspect, why does Rule 404 begin with that broad prohibition? There are two reasons: First, the probative worth of character evidence is hard to assess. It turns in part on the inclination and the point to be proved: If, for example, we have in one case evidence of a fair and honest disposition and in another evidence of treachery and dishonesty, the former seems more persuasive as proof that the person did not utter the falsehood in issue than the latter in proving that he did. The reason is that fairness and honesty seem to lessen the likelihood that a person uttered any falsehood (hence necessarily the one at issue), while treachery and dishonesty seem only to increase the likelihood that the person utters falsehoods (but not necessarily the one in issue). More generally, it is hard to know how strong or deep run the currents of any trait, to be sure a person truly has the trait, or to grasp what it tells us about the person under the circumstances confronting her at the crucial moment. In the end, probative worth seems limited and hard to assess.

Second, we worry that “character evidence” can be prejudicial, and you have already seen that Rule 403 empowers trial judges to exclude evidence—even relevant evidence—on account of the risk of “unfair prejudice,” which we defined to mean its tendency to make juries angry or to invite jury misuse. Recall the decisions in Chapple and Old Chief II (Chapter 2B), the first involving a photograph of the charred body and skull of a murder victim, where we were concerned about jury anger, the second involving proof of a prior violent crime, where we were concerned about jury misuse. It is in Old Chief II that we see most clearly the judgment reflected in the principle of exclusion stated in Rule 404—we think it would be misuse of a prior offense if it persuaded the jury to convict the defendant just because he did something wrong before.

The regulating scheme. FRE 404 and 405 restate principles that evolved at common law. Those principles are complicated and full of compromise. In Michelson, the Supreme Court took note of the common law scheme but declined to change it:

[M]uch of this law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counterprivilege to the other. But somehow it has proved a workable
Character Evidence

even if clumsy system when moderated by discretionary controls in the hands of a wise and strong trial court. To pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice.

Michelson v. United States, 335 U.S. 469, 486 (1948).

Now we focus on these issues: In what way (if at all) is character relevant? Is it provable under FRE 404 or 405? Why or why not? What form should the evidence take?

2. Character to Prove Conduct on a Particular Occasion

a. Character of Criminal Defendant

Consider evidence of the character of the accused, which has long presented the most common problem and acute difficulty.

■ PROBLEM 5-A. Fight in the Red Dog Saloon (Part 1)

Don and Vince come to blows in a local watering hole known as the Red Dog Saloon. Both suffer serious injuries, although Vince gets the worst of it: Wineglass in hand, Don takes a wild swing, and the glass shatters as it strikes Vince in the mouth, inflicting lacerations leading to permanent scars on his face. Don is charged with assault and battery. He pleads self-defense. Testimony conflicts as to who struck the first blow, though it appears that Don was seated at the bar enjoying his Chablis when Vince muttered something snide about what “real men” drink.

In the trial of Don, the prosecutor calls Coach Jones as a witness during the state’s case-in-chief, offering his testimony that Don is “one mean aggressive physical man, quick tempered and prone to violence.” Don objects that the proffered testimony is “irrelevant” and “barred by the character rule.”

During the defense case-in-chief, Don calls Reverend Gram, offering his testimony that Don is “peaceably disposed toward all people, gentle and nonviolent, more likely to run from a fight than to defend himself, and certainly not likely to initiate violence.” The prosecutor objects that the proffered testimony is “irrelevant” and “barred by the character rule.”

What result on these objections and why? If the court lets Reverend Gram testify, can the prosecutor call Coach Jones during the state’s case-in-rebuttal? See FRE 404(a).
NOTES ON EVIDENCE OF DEFENDANT’S CHARACTER

1. Under Rule 404, apparently it matters whether evidence of defendant’s character is first offered by the defense or by the prosecution. Why?

2. What is a “pertinent” trait? That depends on the charges. In a battery trial, a court would likely exclude evidence that defendant is “honest” but admit proof that he is “peacable” or “nonviolent.” See United States v. Jackson, 588 F.2d 1046, 1055 (5th Cir.) (in drug trial, proof of defendant’s reputation for truth and veracity was not admissible; truthfulness was “not pertinent to the criminal charges of conspiracy to distribute heroin or possession of heroin”), cert. denied, 442 U.S. 941 (1979).

3. What level of specificity is required? Rule 404(a)(1) and (2) speak of a pertinent “trait” of character, and the ACN speaks of limiting the evidence to such traits rather than proving “character generally.” Compare State v. Blake, 249 A.2d 232, 234-235 (Conn. 1968) (alleged indecent assault; on retrial, defendant should be permitted to prove “specific traits” of “sexual morality and decency,” but not “general good character”) with United States v. John, 309 F.3d 298, 303 (5th Cir. 2002) (in trial for sexual assault against minor, admitting testimony by (a) wife of defendant indicating that the two “had a good marriage and a normal sexual relationship,” (b) social service worker who placed eight foster children with defendant and his wife, indicating that she considered them “very good parents [who were] willing to do whatever needs to be done for the children,” (c) defendant himself indicating that he was “fifty-one years old and had never been accused of sexual misconduct,” and (d) defendant’s 33-year-old daughter indicating that defendant had a “good” reputation in the community for “sexual morality and decency”). General proof that defendant is “law abiding” seems at least marginally relevant in all contexts, and courts seem disposed to admit it. See United States v. Diaz, 961 F.2d 1417 (9th Cir. 1992) (in drug trial, error to block defense from asking pastor about defendant’s “character traits for being prone to criminal activity” since traits need not be specific and may be as general as being law abiding) (also “being prone to large-scale drug dealing” was not a character trait; court properly blocked defense cross raising this point).

4. If evidence of defendant’s good character is admitted, what should the jury be told? Can it properly acquit on the proof of good character alone, or should it be told to consider character evidence in the context of all the proof? Compare Edgington v. United States, 164 U.S. 361, 366 (1896) and United States v. Pujana-Mena, 949 F.2d 24, 29-32 (2d Cir. 1991) (both implying that jury should be told to consider evidence of good character in the context of all evidence) with United States v. John, 309 F.3d 298, 304-305 (5th Cir. 2002) (reversible error to refuse to instruct jury that evidence of defendant’s good character may itself create reasonable doubt).

5. Sometimes the best that defendant can offer is someone to testify that he “has heard nothing ill” of the defendant. Should such a lukewarm endorsement be permitted? See Michelson v. United States, 335 U.S. 469, 478 (1948) (Yes).
b. Character of Crime Victim

**PROBLEM 5-B. Red Dog Saloon (Part 2)**

In the trial of Don for the assault on Vince, Don calls Ernie, offering his testimony that Vince is "a belligerent, fight-picking, aggressive fellow with a real short fuse." The prosecutor objects that the proffered testimony is "irrelevant" and "barred by the rule against character evidence." Is this objection well taken on either ground? Spell out Don's argument that Ernie's testimony is relevant.

**NOTES ON EVIDENCE OF THE VICTIM'S CHARACTER**

1. The Rules let Don show that Vince is a violent person, and then the prosecutor can show that Don is violent too. Do these results make sense? Should the fact that Don attacks the character of Vince open the door for the prosecutor to attack Don's character?

2. If Vince sued Don for assault, could Don offer Ernie's testimony as described above? Could Don offer Reverend Gram's testimony, as described in Problem 5-A?

3. Assume that instead of calling Ernie to describe the character of Vince, Don calls an eyewitness to testify that Vince struck the first blow without provocation. Could the prosecutor then introduce evidence that Vince is by disposition peaceable? What if Don kills Vince and is charged with his murder?

4. In sexual assault trials, we follow different rules when it comes to defense attacks on the character of the complaining witness (the victim). Rule 412 addresses these cases, and we consider the differences and the reasons for them later (see section A5, infra).

5. Suppose the defense has proof that Vince had made threats to attack or kill Don. Should such evidence be admitted? What does it show? Do FRE 404 and 405 apply to such proof? See Torres v. State, 71 S.W.3d 758, 761 (Tex. Crim. App. 2002) (threats to harm defendant are not excludable as character evidence; they are admissible because they shed direct light on victim's intent, hence on the affray in issue).

c. Methods of Proving Character

If character (or a trait) is to be proved, how should it be done? There are three ways, all involving testimony by what we may call a "character witness." Such a witness might describe acts indicating the existence of the trait—that he falsified a document, for example, or rendered a correct
(recognizing qualified privilege that may be overcome for good cause); Saltz-
burg, Corporate-Attorney-Client Privilege in Shareholder Litigation and Simi-

8. Should the scope of the privilege for governmental entities be similar
to that for corporations? See Deuterium Corp. v. United States, 19 Cl. Ct. 697,
699 (1990) (applying reasoning of Upjohn to government employees “at all lev-
eels”). But in this setting the privilege is sometimes qualified. See In re Lindsey,
148 F.3d 1100 (D.C. Cir. 1998) (governmental attorney-client privilege may not
shield information about possible criminal misconduct by public officials from
disclosure to grand jury).

COMMENT/PERSPECTIVE:
Attorney-Client Privilege and Work Product Protection

As Upjohn shows, attorney-client privilege and work product protection
overlap. Basic points may help untangle things: First, the privilege belongs
to the client, but work product protection belongs to the lawyer. Second,
the privilege covers communications between client and lawyer, but work
product covers efforts by the lawyer in preparation for litigation, including
the lawyer’s theories and thoughts, and also the statements that the lawyer
gets from witnesses. Third, the purpose of the privilege is to encourage
the client to be candid, but the purpose of work product protection is to
courage the lawyer to work hard in representing his client. Fourth, there
are exceptions to the privilege, but it is more-or-less absolute when it ap-
plies, while work product protection (even when it applies) can be over-
come by a showing of substantial need. Both privilege and work product
protection apply in Upjohn. The managers’ responses to the questionnaire
were statements by the corporate client to its lawyer Thomas, according to
Upjohn, so the privilege applies. Thomas sought the statements about the
time the company told the SEC and IRS about “questionable payments,”
so litigation was anticipated and work product protection applies. And the
subpoena sought “all files,” including “memoranda and notes,” thus going
after what Thomas was thinking. The procedure course usually includes
Hickman made it clear that work product covers statements by witness-
es to lawyers, but not facts, so work product does not excuse the party
(usually acting through the lawyer) to reply to “searching interrogatories.”
Hence the lawyer need not turn over statements, but the information they
contain must be reflected in discovery responses by the client, at least to
the extent such information is accepted as correct.