PREFACE

In this seventh edition of our book, we maintain our focus on the study of evidence law through the text of the Federal Rules of Evidence and the ideas and principles that underlie those rules. The book presents the rules in a systematic format that is used consistently throughout. This format provides students with the text of the rules, interpretations and illustrations of the rules' terms, an elaboration of principles and policies used to explain and interpret the rules, illustrations from recent case law, and problems that call for the application of each significant rule in its most basic as well as its most challenging contexts.

In the sixth edition, we returned to the book's former name, *An Analytical Approach to Evidence*, because we believe it captures one of the unique contributions of this book. This is a problem-based casebook designed to elicit a critical examination of the Federal Rules of Evidence in context and to illuminate the Rules' underlying theories and perspectives. (For the updated Federal Rules of Evidence, please visit https://www.uscourts.gov/sites/default/files/federal_rules_of_evidence_-_dec_1_2019_0.pdf.) Analysis is encouraged through explanatory text, excerpted materials, case summaries, and problems. Lively discussion and interesting problems engage students in discovering the principles, policies, and debates that surround evidence law. In every instance, although we begin with the basics, we deepen the analysis to the conceptual foundations of the particular aspects of evidence under consideration, and indeed to the conceptual foundations of the entire field.

Although the casebook text has been edited throughout, adding new excerpts from judicial opinions and scholarly work, updating the case citations that illustrate application of the rules, and adding new problems, much remains familiar. As always, we have sought throughout to present each set of problems in ascending order of difficulty—easy, medium, and difficult. This edition still includes ongoing "saga" problems that build, in successive chapters, on each developing "saga" fact pattern. These unique problems demonstrate how the rules of evidence actually apply to individual items of evidence in "layers" as students' knowledge of those rules increases.

New to this edition:

- The People v. Johnson transcript has been replaced with a case file that we believe will be pedagogically more effective. The *Johnson* transcript and the related problems remain available on the web at https://www.AspenPublishing.com/Allen-Evidence7.
- Probing discussions of fundamental moral questions (e.g., sexual politics rules)
- Enhanced focus on the way in which evidence law serves not just an epistemological function but also involves critically important allocations of

authority between trial and appellate courts, between the trial judges and the parties, and others
- Emphasis on another increasingly important aspect of the law of evidence in its effects on both non-litigation ("primary") and litigation behavior
- Economic justifications for different rules of evidence
- Self-assessment questions, accompanied with answers and explanations, in each chapter
- Additional pedagogical elements, redesigned formatting, and softened notes/questions to make the discussion less austere (without sacrificing intellectual sophistication)

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

From its inception, another factor has heavily influenced this book. We believe that the field of evidence is in large measure a coherent whole rather than an amalgam of virtually unrelated parts. Unlike traditional works on evidence, we present an analytic theme in our text that attempts to show the underlying relationships between the various common law categories of evidence. This theme is relevancy and the assumptions about decisionmaking that inhere in a system of proof based on relevancy. With this theme in mind, we explore all of the major federal rules of evidence, requiring students to develop a systematic approach to the admission of evidence that begins with the relationship of evidentiary facts to the essential elements of the case. Only with such a beginning can one properly understand the principles governing the selection of evidence and their judicial interpretation.

We also emphasize the process by which facts are established in court, and the roles played by each of the participants in the courtroom. Chapter One begins with an introduction to the adversary process and a fictitious case file. This introduces students to the process of analyzing evidence in terms of the essential elements of a legal dispute, as well as experiencing what is at stake in run-of-the-mill cases. We believe that the case file serves as an effective introduction to much of the course to follow. Although accurate fact finding is the dominant goal of trial, the rules of evidence also regulate with other goals in mind, such as efficiency, fairness and incentives to out-of-court behavior. The case file usefully illustrates these matters throughout the rest of the chapters as we return to it at relevant points throughout the text, and students see how various items of potential evidence are inadmissible.

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

Chapter Three examines the single most important concept in the study of evidence — relevance — and introduces students to the trial judge's discretion to

exclude even relevant, and probative, evidence. Some judicial opinions, including the U.S. Supreme Court's majority opinion in Old Chief v. United States, give students a more concrete understanding of how the context of the whole "case" can influence the judge's exercise of discretion.

Chapter Four discusses the foundation principle underlying evidence law: that no evidence is admissible until it is first shown to be what its proponent claims that it is. The chapter analyzes and elaborates the complex of rules from which this principle is derived, and applies the principle specifically to testimony and exhibits in various forms. Because of its close connection to documentary evidence, Chapter Four also covers the Best Evidence Rule.

Chapter Five focuses on the character and propensity rules. We start by introducing the primary rule of exclusion, the policies that justify exclusion, and the policing of the borderline between forbidden "character" and permitted "non-character" uses of specific acts. We then turn to instances in which character is a permissible topic of proof.

Chapter Six contains other relevancy rules. These rules determine the admissibility of subsequent remedial measures evidence, settlement and plea bargain discussions, availability of insurance, and offers to pay an opponent's medical expenses. Our analysis of these rules separates between permissible and impermissible uses of the evidence and explains how it affects the parties' litigation conduct and primary behavior.

Chapter Seven presents the doctrines of impeaching and rehabilitating witnesses, prior to the study of the hearsay rule. The attention paid to examining witnesses, we believe, helps students better understand the hearsay rules, which we discuss in Chapter Eight.

Chapter Eight unfolds a comprehensive analysis of hearsay dangers and the hearsay doctrine. This chapter contains the revised text on the problem of "implied assertions" from the sixth edition that we think streamlines presentation without sacrificing accuracy. It also provides an up-to-date discussion of the U.S. Supreme Court's jurisprudence on the Confrontation Clause.

Chapter Nine focuses on the rules governing lay and expert witness opinion testimony, and includes principal Supreme Court cases on rule 702 and the 2000 amendments to the Federal Rules. The chapter proceeds to elaborate on both practical and theoretical issues arising out of expert testimony, concluding with a substantial reflection section that features excerpts from the National Academy of Science Report in 2009 largely critiquing the current state of the forensic sciences.

Chapter Ten addresses burdens of proof and presumptions by focusing separately on civil and criminal law.

Chapter Eleven examines judicial notice.

The book concludes, as before, with an examination of rules of privilege in Chapter Twelve, which is thoroughly updated. This discussion includes material on Federal Rule 502 concerning waiver of the attorney-client privilege.

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

Perhaps the most important change in this edition has been the changed status of coauthor Alex Stein from Professor of Law at Brooklyn Law School to Justice of the Israel Supreme Court. Professor Stein is an eminent authority in evidence, torts, medical malpractice, criminal law, and legal theory, and he brings a wealth of expertise to the book. We are very pleased that he will be able to continue on the book notwithstanding his new responsibilities. As we noted in the last edition, Professor Swift has retired and did not contribute to the last or this revision. Although the book has undergone two revisions since she retired, her immense contribution to the previous editions continues. Her calm and erudite influence has been sorely missed, and we continue to wish her well in her new endeavors.

Ronald J. Allen
David S. Schwartz
Michael S. Pardo
Alex Stein

August 2021