Contents



Chapter 1

Why and How We Have Rules of Evidence

Key Terms 1
Chapter Overview 2
What Evidence Is Important in a Criminal Case? Louisiana v. Bright 2
Louisiana v. Bright 2
What Is Evidence? 6
Types of Evidence 6
Direct and Circumstantial Evidence 7
What Are the Rules of Evidence? 9
Where Are the Rules of Evidence Found? 10
Why Do We Have Rules of Evidence? 10
Why Not Eliminate the Rules of Evidence? 11
A Brief History of the Rules of Evidence 12
Ancient Systems of Evidence 12
Trial by Ordeal and Trial by Battle 13
The Development of the English Common Law
Evidentiary System 14
Significant Developments in English and U.S. Law 18
The Magna Carta 18
The Writ of Habeas Corpus 19
The American Revolution 19
The Bill of Rights and the Fourteenth Amendment 20

The Right to a Grand Jury 21 The Protection Against Double Jeopardy 21 The Protection Against Self-Incrimination 21 Deprived of Life or Liberty Without Due Process 22 Speedy Trial 22 Public Trial 22 Impartial Jury 23 The Right to Be Informed of the Charges 23 The Right to Confront Witnesses 24 The Subpoena Power for Favorable Witnesses 24 The Right to Counsel 25 The Presumption of Innocence 25 Comparing Our Rules of Evidence to Other Legal Systems in the World 26 The Trial of Amanda Knox 27 The Common Law System 28 The Civil Law System 29 The Communist Legal System 30 Islamic or Sharia Law 31

Chapter 2

The Stages of a Criminal Case and How to Read the Legal Documents Associated with a Criminal Case

> Key Terms 36 Chapter Overview 36 Initiating Charges Against a Defendant 36 Jurisdiction and Venue 37 The Setting of Bail 40 Evidence Gathering 41 Exculpatory Evidence 41

Police Reports 42 Witness Statements 43 Medical Reports 44 Photos, Videos, and Audio Recordings 45 Lineups, Photo Arrays, and Showups 45 Physical Evidence That Has Been Booked 46 Plea Bargaining and Types of Pleas 48 Pretrial Motions and Challenges to the Admissibility of Evidence 50 The Stages of Trial 51 Jury Selection 51 Preliminary Jury Instructions 53 Opening Statements by the Prosecution and the Defense 53 Prosecution Case in Chief 54 Defense Case in Chief 55 Prosecution's Rebuttal 55 Closing Arguments 55 Jury Instructions 56 Jury Deliberation and Verdict 56 **Trial Transcript 58** The People of the State of California v. James Johnson 58 Appellate Review and the Record 64 Appellate Cases: Reading a Court Opinion and Briefing a Case 66 Case Citation 66 The Court and Judges 69 The History of Case 69 Facts 70 Issue 70 Holding 70 Rules and Analysis 70 Result 71

A Briefed Case: Thornburgh v. Abbott, 490 U.S. 401 (1989) 71

Applying What You've Learned—An Opportunity to Brief a U.S. Supreme Court Case: Gideon v. Wainwright, 372 U.S. 335 (1963) 72 Gideon v. Wainwright 72

Chapter 3

Burden of Proof and Alternatives to Formal Proof: Judicial Notice, Presumptions, Inferences, and Stipulations

Key Terms 77 Chapter Overview 78 Burdens of Proof 78 **Reasonable Suspicion** 78 Probable Cause 79 Preponderance of the Evidence 79 Clear and Convincing 80 Beyond All Reasonable Doubt 81 In re Winship 81 The Perplexity of the Beyond a Reasonable Doubt Standard 82 The Duty of the Prosecution to Prove All Elements 85 Shifting the Burden: Affirmative Defenses 86 Martin v. Ohio 86 Alternatives to Formal Proof 90 Judicial Notice 90 Mandatory Versus Discretionary 91 Matters of General Knowledge 91 Matters Capable of Accurate Determination 92 Judicial Notice Versus Personal Knowledge of the Judge 93 State v. Vejvoda 94

Presumptions and Inferences 98 Mandatory Versus Permissive Presumptions 99 *County Court of Ulster County v. Allen* 100 Rebuttable Presumptions 105 The Presumption of Innocence 105 The Presumption of Sanity 107 Children Under Age Cannot Commit Crimes 107 Knowledge of the Law 107 Suicide 107 Flight or Concealment 107 Regularity of Official Acts 108 Stipulations 108

Chapter 4

Relevance: Probative Value and Materiality, and Exclusion of Relevant Evidence

Key Terms 113 Chapter Overview 114 Would You Date Chris? 114 Relevant Evidence Defined 115 Materiality 116 Probative Value 117 Commonwealth v. Zagranski 118 State v. Merrill 120 State v. Spears 123 United States v. McVeigh 125 Excluding Relevant Evidence under FRE 403 129 State of Maine v. Brandon Thongsavanh 129 Dissecting the Components of Rule 403 131 Contents

The Dangers of Rule 403 134

Unfair Prejudice 134

The Punishing/Rewarding Prejudice 135

United States v. Curtin 135

Bad Logic Prejudice 139

Confusion of the Issues 140

United States v. Noriega 140

Misleading the Jury 142

United States v. Call 142

Undue Delay, Waste of Time, and Needless Presentation of Cumulative Evidence 144

Evidentiary Alternatives 144

Chapter 5

Constitutional Exclusion of Evidence

Key Terms 149 Chapter Overview 150 The Fourth Amendment: Search and Seizure 150 The History of the Fourth Amendment 150 What Is a Search? 151 What Is a Seizure? 152 Warrants and the Need for Probable Cause 152 Arrest Warrants 153 Search Warrants 154 Exceptions to the Warrant Requirement 154 Warrantless Arrests 154 Warrantless Searches and Seizures 155 The Exclusionary Rule 161 Standing 161 Fruit of the Poisonous Tree Doctrine 162 Exceptions to the Exclusionary Rule 163 The Independent Source Doctrine 163

The Inevitable Discovery Doctrine 164 The Good Faith Exception 164 United States v. Leon 164 The Fifth Amendment: Self-Incrimination 170 Miranda Warnings: The Requirements of Custody and Interrogation 171 Rhode Island v. Innis 172 Voluntariness of Confessions 177 Colorado v. Connelly 177 The Sixth Amendment: Right to Counsel 182 The Pro Se Defendant 182 The Right to Counsel for an Indigent Defendant 182 The Stages of a Case Where the Right to Counsel Applies 183 The Stages of a Case Where the Right to Counsel Does Not Apply 184 The Massiah Doctrine 184

Chapter 6

Character Evidence

Key Terms 187 Chapter Overview 187 The Rule Excluding Character Evidence and Reasons for the Rule 188 Nonpropensity Uses of Character Evidence 189 Motive 190 Opportunity 191 Intent 192 Preparation 193 Common Plan 193 Identity 194 Knowledge 195 Absence of Mistake or Accident 195

Defendant's Prior Bad Acts Do Not Need to Be Proven 196 Rule 403 and Its Impact on Rule 404(b) 196 State v. Willis 198 Habit 203 State v. Gardner 204 Introducing the Character of the Accused to Show His Good Character 206 Introducing the Character of the Alleged Victim 208 The Mechanics of Introducing Character Evidence 208 Character Is an Element of the Charge or Defense 210 Introducing the Sexual History of the Defendant or the Victim 212 Sexual History of the Defendant in Cases Involving Sexual Assault and Child Molestation 212 United States v. Dillon 214 The Prior Sex Acts of the Sex Assault Victim 219 Luckett v. Commonwealth 221

Chapter 7

Privileges

Key Terms 227 Chapter Overview 227 What Is a Privilege and Why Do We Allow Privileges? 228 Established Privileges: Who Is Generally Allowed a Privilege? 228 The Attorney-Client Privilege 229 The Spousal Privilege 230 United States v. Acker 231 The Physician-Patient Privilege 232 The Clergy-Penitent Privilege 233 People v. Thompson 235 The Governmental Privileges 238 United States v. Reynolds 239 The News-Media-Informant Privilege 242 In re Inquest Subpoena (WCAX) 243 Is There a Need for More Recognized Privileges? 246 Waiver of the Privilege 247 Tasby v. United States 248 What Is Privileged? 251 State v. Broussard 251 Confidential Communications 253 Clark v. State 253 When Are Confidential Communications Not Privileged? 257 People v. Burnidge 259

Chapter 8

Witnesses and Competency

Key Terms 265 Chapter Overview 265 The Common Law Approach to Competency 266 The Federal Rules Approach to Competency 266 The Four Corners of Competency 268 Original Perception/Personal Knowledge 268 Marks v. State of Arkansas 269 Remembering What Happened 271 State of Rhode Island v. Eric Ranieri 272 Refreshed Memory 277 Communicating What Happened 278 State of Illinois v. Anita White 278 Taking an Oath 280 United States v. Wallace Ward 281 Roy Torres v. State of Texas 285 State of Washington v. William Orr Swan, et al. 286 A Low Burden: Courts Should Err on Admitting Witness Testimony 287 United States v. Randy Lightly 287 Judges as Witnesses 288 United States v. Mark Nickl 290 Jurors as Witnesses 292 United States v. Kerry Dean Benally 293 United States v. Hemant Lakhani 298

Chapter 9

Opinions, Experts, and Scientific Evidence

Key Terms 301 Chapter Overview 302 Facts Versus Opinion Under Common Law 302 The Federal Rules Approach to Lay Opinion 302 Rationally Based on the Perception of the Witness 305 United States v. Gregory Cox 305 Helpful to a Clear Understanding of the Witness's Testimony or the Determination of a Fact in Issue 306 State of Missouri v. Adriano Clark 308 Not Based on Scientific, Technical, or Other Specialized Knowledge 309 Topics for Lay Opinion 310 State of Hawai'i v. Jenaro Torres 311 Expert Opinion 315 The Frye Test 315 Daubert/Kumho Tire/Joiner 316 Expert Testimony According to FRE 702 316 Knowledge Will Assist the Trier of Fact 317 Alexa Whedon v. State of Indiana 317

Proper Qualifications 319

United States v. Arturo Garcia Parra 320

Sufficient Facts 322

United States v. Day 322

Reliable Principles and Methods 324

United States v. Victor R. Vargas 325

The Effect of FRE 403 on FRE 702 329
FRE 703 and the Bases of Opinion Testimony by Experts 330
FRE 704 and Opinion on Ultimate Issue 332

United States v. Perkins 333

Rule 705 and Disclosure of Facts or Data Underlying Expert Opinion 336

Chapter 10

Examination, Impeachment, and Rehabilitation of Witnesses

Key Terms 339 Chapter Overview 340 The Mechanics of Examining a Witness: Direct Examination, Cross-Examination, and Redirect Examination 340 An Example of a Direct Examination and Cross-Examination 343 Direct Examination 344 Cross-Examination 345 Redirect Examination 345 The Role of the Judge and the Exclusion of Witnesses 346 Impeachment Generally: Who May Impeach and When Impeachment Is Prohibited 348 Who May Impeach 348 The Judge May Call Witnesses to the Stand and Question Them 348 A Prohibition on Impeachment: The Religious Views and Opinions of the Witness 349 Slagle v. Bagley 350

How to Impeach a Witness 354

Incapacity 355

Bias, Motive, or Interest 355

United States v. Abel 355

Character for Dishonesty 358

Prior Inconsistent Statements 360

Specific Contradiction 361

Prior Criminal Convictions 361

The Impact of Rule 403 on Rule 609: Determining When Judges Should Exclude Prior Convictions Because of Their Prejudicial Effects **363**

United States v. Alexander 363

Determining Which Prior Convictions Qualify as an Act of Dishonesty or False Statement by the Witness **366**

Rehabilitation of the Witness 367

Character for Truthfulness 367

United States v. Murray 368

Prior Consistent Statements 372

Chapter 11

Hearsay and Hearsay Exceptions

Key Terms 378 Chapter Overview 378 Definitions Outlined in Rule 801 of the Federal Rules of Evidence 378 The Hearsay Rule and Reasons for the Rule 380 Statements That Are Not Hearsay: Statements Not Offered for the Truth of the Matter Asserted 381 Headley v. Tilghman 382 Statements That Are Not Hearsay: Prior Statements by a Witness That Qualify Under Rule 801(d) 384 Prior Inconsistent Statements Under Rule 801(d)(1)(A) 384 State v. Smith 385

Prior Consistent Statements Under Rule 801(d)(1)(B) 387

Statements That Are Not Hearsay: Admissions by a Party **Opponent 388** Statements That Are Not Hearsay: Identifications Under Rule 801(d)(1)(c) 389 The Effect of a Hearsay Objection and the Consequences of Failing to Object 389 Hearsay Exceptions: Generally 390 Hearsay Exceptions When the Availability of Declarant Is **Immaterial 390** Present Sense Impression 390 State v. Jones 391 Excited Utterance 395 Then Existing Mental, Emotional, or Physical Condition 395 Statements for Purposes of Medical Diagnosis or Treatment 396 Past Recollection Recorded 396 Business Records 398 Public Records and Reports 398 Various Records, Statements, Reports, and Miscellaneous **Exceptions** 399 Hearsay Exceptions When the Unavailability of the Declarant Required 399 Former Testimony 400 Dying Declaration 400 Wilson v. State 403 Statement Against Interest 405 Forfeiture by Wrongdoing 407 Hearsay Within Hearsay 407 Attacking and Supporting the Credibility of Declarant 408 The "Catchall" 408 Hearsay and the Constitution 408 Meeting a Hearsay Exception Does Not Guarantee Admissibility 411

Chapter 12

Authentication, Identification, Exhibits, and the Best Evidence Rule

Key Terms 415 Chapter Overview 415 Real and Demonstrative Evidence Defined 416 The Requirement of Authentication 417 Laying a Foundation 418 An Example of an Attorney Laying a Foundation 418 Methods of Authentication 419 A Witness Identifies the Evidence 419 State of North Dakota v. Jennifer Thompson 420 Chain of Custody 424 State of Tennessee v. Cannon 425 Demonstrative Evidence: Does the Object Fairly and Accurately Portray What It Depicts? 429 United States v. Robert Gaskell 430 Authenticating Photos, Audio Recordings, and Video Recordings 433 Rory Washington v. Maryland 435 State of Maine v. James Berke 440 United States v. Mitchell 441 Other Methods of Authentication According to Rule 901(b) 442 Self-Authenticating Documents 442 The Best Evidence Rule 443 Munsford v. State of Georgia 444 United States v. Gerald Jackson 446 Lumley v. State of Georgia 449 Commonwealth of Pennsylvania v. Dennis Lewis 450 GLOSSARY 455 APPENDIX 463

TABLE OF CASES 509

INDEX 511