

| | |
|---|-----------|
| Preface | xxxiii |
| Acknowledgments | xxxv |
| | |
| Chapter 1 Introduction to Evidence Law | 1 |
| A. Good News and Bad News | 2 |
| B. The Nature and Development of Evidence Law | 5 |
| C. The Anglo-American Trial | 8 |
| D. The Role of the Trial Judge | 11 |
| 1. The Trial Judge’s Authority | 12 |
| Advisory Committee Note to F.R.E. 104(a) | 12 |
| 2. The Trial Judge’s Discretion | 12 |
| Roger C. Park et al., <i>Evidence Law: A Student’s Guide to the Law of Evidence as Applied in American Trials</i> | 12 |
| Stephen A. Saltzburg, Michael M. Martin & Daniel J. Capra, <i>Federal Rules of Evidence Manual</i> | 13 |
| <i>United States v. Walton</i> | 14 |
| <i>Bandera v. City of Quincy</i> | 14 |
| Problems 1.1–1.3 | 15 |
| E. The Future of Evidence Law | 16 |
| | |
| Chapter 2 Relevance | 17 |
| A. Relevance and Irrelevance | 17 |
| Advisory Committee Note to F.R.E. 401 | 18 |
| Advisory Committee Note to F.R.E. 402 | 19 |
| <i>Knapp v. State</i> | 19 |
| <i>United States v. Dominguez</i> | 20 |
| <i>State v. Larson</i> | 21 |
| <i>Crawford v. City of Bakersfield</i> | 22 |
| Edmund M. Morgan, <i>Basic Problems of Evidence</i> | 23 |
| Graham C. Lilly, <i>An Introduction to the Law of Evidence</i> | 24 |
| B. Probative Value and Prejudice | 24 |
| Advisory Committee Note to F.R.E. 403 | 25 |

| | |
|---|----|
| Eleanor Swift, One Hundred Years of Evidence Law Reform: Thayer's Triumph | 25 |
| <i>United States v. Noriega</i> | 26 |
| <i>United States v. Flitcraft</i> | 28 |
| <i>Abernathy v. Superior Hardwoods, Inc.</i> | 28 |
| <i>United States v. McRae</i> | 29 |
| <i>United States v. Mehanna</i> | 30 |
| <i>Old Chief v. United States</i> | 32 |
| Teneille R. Brown, Shifting the Male Gaze of Evidence | 40 |
| Problem 2.1 | 41 |
| C. Conditional Relevance | 41 |
| Advisory Committee Note to F.R.E. 104(b) | 42 |
| <i>Palin v. New York Times Co.</i> | 43 |
| Problem 2.2 | 45 |
| Chapter 3 Hearsay | 47 |
| A. The Hearsay Rule and Its Rationale | 47 |
| 1. Introduction | 47 |
| <i>Trial of Sir Walter Raleigh, Knight, for High Treason, by a Special Commission of Oyer and Terminer, at Winchester, 17th November, 1603, 2 James I</i> | 48 |
| <i>Queen v. Hepburn</i> | 50 |
| David A. Sklansky, The Neglected Origins of the Hearsay Rule in American Slavery: Recovering <i>Queen v. Hepburn</i> | 52 |
| McCormick on Evidence | 53 |
| Laurence H. Tribe, Triangulating Hearsay | 54 |
| Problem 3.1 | 56 |
| 2. Nonhearsay Uses of Out-of-Court Statements | 57 |
| Advisory Committee Note to F.R.E. 801(c) | 58 |
| <i>Lyons Partnership v. Morris Costumes, Inc.</i> | 58 |
| <i>United States v. Parry</i> | 59 |
| <i>Subramaniam v. Public Prosecutor</i> | 61 |
| <i>United States v. Feliz</i> | 62 |
| <i>United States v. Johnson</i> | 63 |
| <i>Campbell v. Boston Scientific Corp.</i> | 63 |
| <i>United States v. Jefferson</i> | 64 |
| <i>United States v. Saavedra</i> | 64 |
| <i>Hanson v. Johnson</i> | 65 |

| | |
|--|-----|
| <i>Creaghe v. Iowa Home Mutual Casualty Co.</i> | 66 |
| <i>United States v. Montana</i> | 66 |
| <i>Hart v. Keenan Properties, Inc.</i> | 67 |
| Problems 3.2–3.11 | 69 |
| 3. Implied Assertions | 70 |
| <i>United States v. Zenni</i> | 70 |
| <i>State v. Dullard</i> | 74 |
| Laurence H. Tribe, Triangulating Hearsay | 77 |
| Problems 3.12–3.18 | 78 |
| B. Hearsay and Confrontation | 79 |
| <i>Crawford v. Washington</i> | 80 |
| <i>Ohio v. Clark</i> | 88 |
| Problems 3.19–3.21 | 96 |
| C. Exceptions to the Hearsay Rule | 96 |
| Laurence H. Tribe, Triangulating Hearsay | 96 |
| Advisory Committee Note to Article VIII of the F.R.E. | 97 |
| 1. Prior Statements by Witnesses | 98 |
| <i>Albert v. McKay & Co.</i> | 98 |
| Advisory Committee Note to F.R.E. 801(d)(1) | 99 |
| Report of the Senate Judiciary Committee | 101 |
| Report of the Conference Committee | 101 |
| Report of the Senate Judiciary Committee | 101 |
| <i>United States v. Owens</i> | 102 |
| Problems 3.22–3.26 | 103 |
| 2. Admissions by Opposing Parties | 104 |
| a. Direct Admissions | 105 |
| (1) Generally | 105 |
| <i>Salvitti v. Throppe</i> | 105 |
| Advisory Committee Note to F.R.E. 801(d)(2) | 105 |
| Edmund Morgan, Admissions | 106 |
| <i>United States v. McGee</i> | 106 |
| McCormick on Evidence | 107 |
| <i>United States v. Phelps</i> | 107 |
| Jeffrey Bellin, The Evidence Rules That Convict the Innocent | 108 |
| (2) Admissions and Multiple Hearsay | 109 |
| <i>Reed v. McCord</i> | 109 |
| <i>Foster v. Commissioner of Internal Revenue</i> | 110 |

| | |
|---|-----|
| Stephen A. Saltzburg, Michael M. Martin, Daniel J. Capra & Jessica Berch, Federal Rules of Evidence Manual | 110 |
| (3) Admissions and Completeness | 111 |
| <i>Beech Aircraft Corp. v. Rainey</i> | 111 |
| Advisory Committee Note to 2023 Amendments to F.R.E. 106 | 113 |
| <i>Hemphill v. New York</i> | 114 |
| (4) Artistic Expression | 116 |
| <i>People v. Serrano</i> | 116 |
| Jack Lerner, Rap on Trial: A Brief History | 119 |
| Problem 3.27 | 120 |
| b. Adoptive Admissions | 120 |
| Advisory Committee Note to F.R.E. 801(d)(2)(B) | 120 |
| <i>Schack v. Property Owners Association of Sunset Bay</i> | 121 |
| <i>United States v. Rivera</i> | 123 |
| <i>United States v. Jemison</i> | 125 |
| <i>Moss v. Commonwealth</i> | 125 |
| Problem 3.28 | 126 |
| c. Authorized Admissions | 126 |
| <i>Hanson v. Waller</i> | 126 |
| Advisory Committee Note to F.R.E. 801(d)(2)(C) | 127 |
| Problem 3.29 | 127 |
| d. Agent and Employee Admissions | 128 |
| Advisory Committee Note to F.R.E. 801(d)(2)(D) | 128 |
| <i>Mahlandt v. Wild Canid Survival & Research Center, Inc.</i> | 128 |
| <i>Sea-Land Service, Inc. v. Lozen International, LLC</i> | 131 |
| <i>United States v. Mirabal</i> | 132 |
| Problems 3.30–3.33 | 135 |
| e. Co-Conspirator Admissions | 136 |
| Advisory Committee Note to F.R.E. 801(d)(2)(E) | 136 |
| Report of the Senate Judiciary Committee | 136 |
| Joseph H. Levie, Hearsay and Conspiracy | 136 |
| <i>Bourjaily v. United States</i> | 137 |
| Advisory Committee Note to 1997 Amendment to F.R.E. 801(d)(2) | 142 |
| Problem 3.34 | 142 |
| f. Admissions and the <i>Bruton</i> Rule | 143 |
| <i>Bruton v. United States</i> | 143 |
| <i>Samia v. United States</i> | 148 |

| | |
|---|-----|
| 3. Spontaneous and Contemporaneous Statements | 152 |
| Advisory Committee Note to F.R.E. 803 | 153 |
| <i>United States v. Obayagbona</i> | 154 |
| <i>People v. Cummings</i> | 156 |
| <i>People v. Carey</i> | 157 |
| <i>United States v. Elem</i> | 158 |
| Graham C. Lilly, An Introduction to the Law of Evidence | 159 |
| Robert M. Hutchins & Donald Slesinger, Some Observations on the Law of Evidence | 159 |
| Jon R. Waltz, The Present-Sense Impression Exception to the Rule Against Hearsay: Origins and Attributes | 160 |
| Problems 3.35–3.38 | 161 |
| 4. State of Mind | 161 |
| a. Generally | 161 |
| Advisory Committee Note to F.R.E. 803(3) | 162 |
| <i>United States v. Harris</i> | 162 |
| b. The Hillmon Doctrine | 164 |
| <i>Mutual Life Ins. Co. v. Hillmon</i> | 164 |
| Brooks W. MacCracken, The Case of the Anonymous Corpse | 167 |
| Robert A. Dykstra, Sallie Hillmon and the Bizarre Origins of the <i>Hillmon</i> Rule | 168 |
| <i>Shepard v. United States</i> | 169 |
| Advisory Committee Note to F.R.E. 803(3) | 171 |
| Report of the House Judiciary Committee | 172 |
| <i>United States v. Houlihan</i> | 172 |
| Problems 3.39–3.43 | 174 |
| 5. Injury Reports | 175 |
| Advisory Committee Note to F.R.E. 803(4) | 176 |
| <i>Rock v. Huffco Gas & Oil Co.</i> | 176 |
| <i>Ward v. State</i> | 178 |
| Problems 3.44 & 3.45 | 182 |
| 6. Recorded Recollection | 183 |
| Advisory Committee Note to F.R.E. 803(5) | 183 |
| <i>Fisher v. Swartz</i> | 184 |
| <i>United States v. Riccardi</i> | 186 |
| Problem 3.46 | 190 |
| 7. Business Records | 190 |
| a. Generally | 191 |

| | |
|---|-----|
| Advisory Committee Note to F.R.E. 803(6) | 191 |
| <i>State v. Acquisto</i> | 191 |
| Advisory Committee Note to the 2000 Amendment to F.R.E. 803(6) | 193 |
| b. Qualifying “Businesses” | 193 |
| Report of the House Judiciary Committee | 193 |
| Report of the Conference Committee | 194 |
| <i>Keogh v. Commissioner of Internal Revenue</i> | 194 |
| <i>United States v. Gibson</i> | 196 |
| c. Qualifying Records | 196 |
| <i>Palmer v. Hoffman</i> | 196 |
| <i>Lewis v. Baker</i> | 197 |
| Advisory Committee Note to F.R.E. 803(6) | 199 |
| d. Sources of Information | 200 |
| Advisory Committee Note to F.R.E. 803(6) | 200 |
| <i>Wilson v. Zapata Off-Shore Co.</i> | 201 |
| e. Absence of Record | 202 |
| Advisory Committee Note to F.R.E. 803(7) | 202 |
| <i>United States v. Gentry</i> | 202 |
| Problems 3.47 & 3.48 | 203 |
| 8. Public Records | 203 |
| Advisory Committee Note to F.R.E. 803(8) | 204 |
| <i>Beech Aircraft Corp. v. Rainey</i> | 205 |
| <i>Melendez-Diaz v. Massachusetts</i> | 210 |
| <i>Bullcoming v. New Mexico</i> | 218 |
| <i>State v. Davis</i> | 224 |
| <i>United States v. Torralba-Medina</i> | 225 |
| <i>United States v. Lundstrom</i> | 227 |
| <i>United States v. Foreman</i> | 228 |
| 9. Former Testimony | 230 |
| Advisory Committee Note to F.R.E. 804 | 230 |
| Robert C. Park et al., Evidence Law: A Student’s Guide to the Law of Evidence as Applied in American Trials | 231 |
| <i>United States v. Bollin</i> | 232 |
| <i>Kirk v. Raymark Industries, Inc.</i> | 233 |
| <i>Clay v. Johns-Manville Sales Corp.</i> | 234 |
| <i>Volland-Goland v. City of Chicago</i> | 236 |
| Glen Weissenberger, The Former Testimony Hearsay Exception: A Study in Rulemaking, Judicial Revisionism, and the Separation of Powers | 237 |

Contents**xvii**

| | |
|---|-----|
| <i>United States v. Salerno</i> | 238 |
| Problems 3.49 & 3.50 | 242 |
| 10. Dying Declarations | 242 |
| McCormick on Evidence | 242 |
| <i>Shepard v. United States</i> | 243 |
| <i>United States v. Sacasas</i> | 244 |
| Advisory Committee Note to F.R.E. 804(b) (2) | 245 |
| Report of the House Judiciary Committee | 245 |
| <i>Davis v. State</i> | 246 |
| Problem 3.51 | 248 |
| 11. Declarations Against Interest | 248 |
| Advisory Committee Note to F.R.E. 804(b) (3) | 249 |
| Report of the House Judiciary Committee | 250 |
| <i>United States v. Duran Samaniego</i> | 250 |
| <i>United States v. Jackson</i> | 252 |
| <i>Williams v. State</i> | 254 |
| Problems 3.52–3.54 | 255 |
| 12. Forfeiture by Wrongdoing | 255 |
| Advisory Committee Note to 1997 Amendment to F.R.E. 804 | 256 |
| <i>Giles v. California</i> | 256 |
| <i>Buchanan v. State</i> | 261 |
| 13. Residual Exception | 262 |
| Advisory Committee Note to F.R.E. 807 | 263 |
| Advisory Committee Note to 2019 Amendment to Rule 807 | 263 |
| Glen Weissenberger & James J. Duane, Federal Rules of Evidence | 264 |
| <i>United States v. Slatten</i> | 264 |
| <i>United States v. Boyce</i> | 266 |
| Victor Gold, The Three Commandments of Amending the Federal Rules of Evidence | 267 |
| 14. Review | 267 |
| Problems 3.55–3.80 | 267 |
| D. Hearsay and Machine-Generated Proof | 271 |
| <i>People v. Lopez</i> | 271 |
| <i>People v. Wakefield</i> | 272 |
| Andrea Roth, Machine Testimony | 274 |
| Edward Cheng and Alex Nunn, Beyond the Witness: Bringing a Process Perspective to Modern Evidence Law | 275 |

| | |
|---|-----|
| E. Hearsay and Due Process | 276 |
| <i>Chambers v. Mississippi</i> | 277 |
| <i>Fortini v. Murphy</i> | 285 |
| Chapter 4 Character Evidence | 287 |
| A. The Basic Rule and Its Exceptions | 287 |
| <i>People v. Zackowitz</i> | 288 |
| <i>Cleghorn v. New York Central & Hudson River R.R. Co.</i> | 291 |
| <i>Berryhill v. Berryhill</i> | 292 |
| <i>Larson v. Klapprodt</i> | 292 |
| <i>United States v. Baez</i> | 292 |
| Advisory Committee Note to F.R.E. 404(a) | 293 |
| McCormick on Evidence | 294 |
| Justin Sevier, Legitimizing Character Evidence | 294 |
| Problems 4.1–4.5 | 295 |
| B. Methods of Proving Character | 295 |
| <i>Michelson v. United States</i> | 296 |
| Advisory Committee Note to F.R.E. 405 | 300 |
| Advisory Committee Note to F.R.E. 803(21) | 301 |
| <i>Government of the Virgin Islands v. Roldan</i> | 301 |
| <i>United States v. Krapp</i> | 303 |
| <i>United States v. Setien</i> | 304 |
| <i>United States v. Ford</i> | 305 |
| McCormick on Evidence | 305 |
| Problems 4.6–4.8 | 305 |
| C. Other Uses of Specific Conduct | 306 |
| 1. Permissible Purposes | 306 |
| <i>United States v. Beechum</i> | 306 |
| <i>United States v. Boyd</i> | 308 |
| <i>United States v. DeJohn</i> | 308 |
| <i>Lewis v. United States</i> | 309 |
| <i>United States v. Crocker</i> | 310 |
| <i>United States v. Edwards</i> | 310 |
| <i>United States v. Weadick</i> | 311 |
| <i>United States v. Merritt</i> | 312 |
| <i>United States v. Wright</i> | 315 |
| <i>United States v. Davis</i> | 317 |
| <i>United States v. Ekiyor</i> | 318 |

| | |
|---|------------|
| Contents | xix |
| Advisory Committee Note to 1991 Amendment to F.R.E. 404 | 320 |
| Hillel J. Bavli, Correcting Federal Rule of Evidence 404 to Clarify the Inadmissibility of Character Evidence | 321 |
| Paul F. Rothstein, Intellectual Coherence in an Evidence Code | 321 |
| Mirko Bagaric & Kumar Amarasekara, The Prejudice Against Similar Fact Evidence | 322 |
| 2. Requisite Proof | 323 |
| <i>Huddleston v. United States</i> | 323 |
| Problems 4.9 & 4.10 | 327 |
| D. Character and Habit | 328 |
| Advisory Committee Note to F.R.E. 406 | 328 |
| Report of the House Judiciary Committee | 329 |
| <i>Kornberg v. United States</i> | 330 |
| <i>Ortiz v. City of New York</i> | 330 |
| <i>Commonwealth v. Byrd</i> | 332 |
| Thomas M. Mengler, The Theory of Discretion in the Federal Rules of Evidence | 333 |
| Edward K. Cheng, G. Alexander Nunn & Julia Simon-Kerr, Bending the Rules of Evidence | 333 |
| Andrew Guthrie Ferguson, Digital Habit Evidence | 334 |
| Problem 4.11 | 334 |
| E. Sexual Assault and Child Molestation | 334 |
| 1. Character of the Victim | 335 |
| John Henry Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law | 335 |
| <i>Graham v. State</i> | 336 |
| Remarks of Rep. Elizabeth Holtzman | 337 |
| Advisory Committee Note to 1994 Amendments to F.R.E. 412 | 337 |
| <i>United States v. Willis</i> | 339 |
| <i>United States v. Thompson</i> | 340 |
| <i>United States v. Zephier</i> | 342 |
| <i>Polo-Calderon v. Corporacion Puertorriqueña de Salud</i> | 344 |
| Aya Gruber, Sex Exceptionalism in Criminal Law | 346 |
| 2. Character of the Defendant | 346 |
| Remarks of Rep. Susan Molinari | 347 |
| Report of the Judicial Conference of the United States on the Admission of Character Evidence in Certain Sexual Misconduct Cases | 348 |
| Stephen A. Saltzburg, Michael M. Martin, Daniel J. Capra & Jessica Berch, Federal Rules of Evidence Manual | 350 |
| <i>United States v. LeCompte</i> | 350 |

| | |
|---|-----|
| <i>United States v. Majeroni</i> | 351 |
| Tamara Rice Lave & Aviva Orenstein, Empirical Fallacies of Evidence Law: A Critical Look at the Admission of Prior Sex Crimes | 353 |
| Tom Lininger, Evidentiary Issues in Federal Prosecutions of Violence Against Women | 354 |
| Problem 4.12 | 354 |
| Chapter 5 Other Forbidden Inferences | 357 |
| A. Subsequent Remedial Measures | 358 |
| Advisory Committee Note to F.R.E. 407 | 358 |
| <i>Clausen v. Storage Tank Development Corp.</i> | 359 |
| <i>In re Asbestos Litigation</i> | 360 |
| <i>Diehl v. Blaw-Knox</i> | 361 |
| B. Settlement Efforts | 364 |
| 1. Civil Settlements | 364 |
| Advisory Committee Note to F.R.E. 408 | 364 |
| <i>United States v. Davis</i> | 365 |
| <i>Ramada Development Co. v. Rauch</i> | 367 |
| <i>Carney v. American University</i> | 369 |
| <i>PRL USA Holdings, Inc. v. United States Polo Association, Inc.</i> | 370 |
| 2. Criminal Settlements | 372 |
| Advisory Committee Note to F.R.E. 410 | 372 |
| <i>United States v. Mezzanatto</i> | 373 |
| <i>United States v. Mitchell</i> | 377 |
| Peter C. Cornick, Reviving “Dead Letters”: Reimagining Federal Rule of Evidence 410 as a Conditional Privilege | 378 |
| John W. Strong, Consensual Modifications of the Rules of Evidence: The Limits of Party Autonomy in an Adversary System | 379 |
| C. Medical Payments and Liability Insurance | 380 |
| Advisory Committee Note to F.R.E. 409 | 380 |
| Advisory Committee Note to F.R.E. 411 | 380 |
| <i>Burress v. Mr. G & G Trucking, LLC</i> | 381 |
| <i>Echeverry v. Jazz Casino Company</i> | 381 |
| <i>Charter v. Chleborad</i> | 382 |
| <i>Higgins v. Hicks Co.</i> | 383 |
| Charles Alan Wright, Kenneth W. Graham, Jr. & Victor Gold, Federal Practice and Procedure: Evidence | 384 |
| Problems 5.1–5.4 | 385 |

| | |
|---|------------|
| Contents | xxi |
| Chapter 6 Trial Mechanics | 387 |
| A. Order of Proof | 387 |
| 1. Generally | 388 |
| Advisory Committee Note to F.R.E. 611 | 388 |
| Roger C. Park et al., Evidence Law: A Student’s Guide to the Law of Evidence as Applied in American Trials | 388 |
| <i>Stone v. Peacock</i> | 389 |
| <i>Elgabri v. Lekas</i> | 389 |
| <i>United States v. Wilford</i> | 390 |
| <i>United States v. Carter</i> | 391 |
| <i>United States v. Bailey</i> | 392 |
| 2. Rule of Completeness | 392 |
| Advisory Committee Note to F.R.E. 106 | 392 |
| Advisory Committee Note to 2023 Amendments to F.R.E. 106 | 393 |
| B. Mode of Questioning | 393 |
| Advisory Committee Note to F.R.E. 611 | 394 |
| <i>United States v. Nabors</i> | 394 |
| <i>Ellis v. City of Chicago</i> | 395 |
| Problems 6.1–6.3 | 397 |
| C. Sequestering Witnesses | 397 |
| Advisory Committee Note to F.R.E. 615 | 397 |
| Report of the Senate Judiciary Committee | 398 |
| Committee Note on 2023 Amendment to F.R.E. 615 | 398 |
| <i>United States v. Strickland</i> | 399 |
| D. Questioning by Judge | 400 |
| Advisory Committee Note to F.R.E. 614 | 401 |
| <i>United States v. Tilghman</i> | 401 |
| E. Questioning by Jurors | 406 |
| <i>United States v. Hernandez</i> | 406 |
| <i>State v. Fisher</i> | 409 |
| <i>United States v. Tavares</i> | 411 |
| Chapter 7 Impeachment and Rehabilitation | 413 |
| A. Introduction | 413 |
| McCormick on Evidence | 414 |
| B. Character for Untruthfulness | 415 |
| 1. In General | 416 |
| Advisory Committee Note to F.R.E. 608 | 416 |

| | |
|---|-----|
| Advisory Committee Note to F.R.E. 610 | 416 |
| <i>Grewal v. Greda</i> | 417 |
| <i>United States v. Lollar</i> | 418 |
| <i>Glaze v. Childs</i> | 419 |
| <i>United States v. Rosa</i> | 420 |
| <i>United States v. White</i> | 420 |
| <i>United States v. Aponte</i> | 421 |
| Problems 7.1–7.4 | 421 |
| 2. Prior Criminal Convictions | 422 |
| a. Admissible and Inadmissible Convictions | 422 |
| <i>United States v. Wong</i> | 422 |
| <i>United States v. Estrada</i> | 424 |
| <i>United States v. Amaechi</i> | 428 |
| <i>United States v. Hernandez</i> | 429 |
| Richard D. Friedman, Character Impeachment Evidence: The Asymmetrical Interaction Between Personality and Situation | 429 |
| Montré D. Carodine, “The Mis-Characterization of the Negro”: A Race Critique of the Prior Conviction Impeachment Rule | 430 |
| Julia Simon-Kerr, The New Baseline for Character Evidence | 431 |
| Jeffrey Bellin, Eliminating Rule 609 to Provide a Fair Opportunity to Defend Against Criminal Charges: A Proposal to the Advisory Committee on the Federal Rules of Evidence | 431 |
| Anna Roberts, Models and Limits of Federal Rule of Evidence 609 Reform | 432 |
| b. Preserving Claims of Error | 433 |
| <i>Luce v. United States</i> | 433 |
| <i>Ohler v. United States</i> | 434 |
| Problems 7.5 & 7.6 | 436 |
| C. Prior Inconsistent Statements | 436 |
| Advisory Committee Note to F.R.E. 613 | 436 |
| <i>United States v. Lebel</i> | 437 |
| <i>United States v. Truman</i> | 438 |
| <i>United States v. Ince</i> | 439 |
| <i>United States v. Webster</i> | 442 |
| <i>People v. Freeman</i> | 443 |
| Problems 7.7–7.10 | 445 |

| Contents | xxiii |
|--|--------------|
| D. Bias and Incapacity | 445 |
| <i>United States v. Abel</i> | 446 |
| <i>United States v. Thompson</i> | 450 |
| E. Specific Contradiction | 451 |
| <i>Simmons, Inc. v. Pinkerton's, Inc.</i> | 451 |
| <i>United States v. Kohli</i> | 454 |
| Kevin C. McMunigal & Calvin William Sharpe, Reforming Extrinsic Impeachment | 455 |
| Problems 7.11 & 7.12 | 456 |
| F. Rehabilitation | 457 |
| 1. In General | 457 |
| <i>United States v. Lindemann</i> | 457 |
| 2. Character for Truthfulness | 460 |
| Advisory Committee Note to F.R.E. 608 | 460 |
| <i>Beard v. Mitchell</i> | 460 |
| <i>United States v. Danehy</i> | 461 |
| <i>United States v. Drury</i> | 462 |
| <i>United States v. Murray</i> | 462 |
| Problems 7.13 & 7.14 | 464 |
| 3. Prior Consistent Statements | 465 |
| <i>Tome v. United States</i> | 465 |
| Advisory Committee Note to 2014 Amendment to F.R.E. 801 | 470 |
| <i>United States v. Portillo</i> | 471 |
| Problem 7.15 | 473 |
| Chapter 8 Competence | 475 |
| A. In General | 475 |
| James B. Thayer, Select Cases on Evidence at the Common Law | 476 |
| <i>Rosen v. United States</i> | 477 |
| Advisory Committee Note to F.R.E. 601 | 478 |
| <i>United States v. Barnes</i> | 479 |
| B. Personal Knowledge | 480 |
| Advisory Committee Note to F.R.E. 602 | 480 |
| <i>United States v. Hickey</i> | 481 |
| <i>Belcher v. State</i> | 482 |
| C. Oath or Affirmation | 483 |
| <i>United States v. Ward</i> | 483 |

| | |
|---|------------|
| Ian Gallacher, “Swear Not At All”: Time to Abandon the Testimonial Oath | 485 |
| <i>Cathell v. State</i> | 486 |
| Michael H. Graham, Handbook of Federal Evidence | 487 |
| Victor J. Gold, Federal Practice & Procedure: Evidence | 488 |
| Mae C. Quinn, Childist Objections, Youthful Relevance, and Evidence Reconceived | 488 |
| Problems 8.1–8.4 | 489 |
| D. Dead Man Statutes | 489 |
| Report of the House Judiciary Committee | 490 |
| McCormick on Evidence | 490 |
| Alabama Code §12-21-163 | 491 |
| California Evidence Code §1261 | 492 |
| E. Competence and the Constitution | 492 |
| <i>Rock v. Arkansas</i> | 492 |
| Problem 8.5 | 497 |
| F. Judges, Jurors, and Lawyers | 497 |
| Advisory Committee Note to F.R.E. 605 | 498 |
| <i>United States v. Andasola</i> | 498 |
| Advisory Committee Note to F.R.E. 606 | 500 |
| <i>Warger v. Shauers</i> | 502 |
| <i>Pena-Rodriguez v. Colorado</i> | 505 |
| <i>Harden v. Hillman</i> | 511 |
| <i>Ewing v. 1645 West Farragut, LLC</i> | 513 |
| <i>United States v. Rangel-Guzman</i> | 514 |
| Problems 8.6–8.9 | 516 |
| Chapter 9 Opinions, Experts, and Scientific Evidence | 517 |
| A. Lay Opinions | 518 |
| Advisory Committee Note to F.R.E. 701 | 518 |
| Advisory Committee Note to F.R.E. 704 | 518 |
| <i>Government of the Virgin Islands v. Knight</i> | 519 |
| <i>Robinson v. Bump</i> | 520 |
| <i>United States v. Howell</i> | 521 |
| Advisory Committee Note to 2000 Amendment to F.R.E. 701 | 522 |
| <i>United States v. Cabrera</i> | 523 |
| <i>United States v. Lugo</i> | 524 |
| <i>United States v. Phillips</i> | 525 |

| | |
|---|------------|
| Contents | xxv |
| B. Expert Testimony: Generally | 526 |
| 1. Permissible Subjects and Scope of Expert Testimony | 527 |
| Advisory Committee Note to F.R.E. 702 | 527 |
| Advisory Committee Note to 2023 Amendment to F.R.E. 702 | 528 |
| <i>Hatch v. State Farm Fire & Casualty Co.</i> | 528 |
| <i>Miguleva v. Washington State Dep't of Natural Resources</i> | 529 |
| Report of the Senate Judiciary Committee on Rule 704 | 530 |
| <i>Diaz v. United States</i> | 531 |
| Problem 9.1 | 534 |
| 2. Relating the Basis of an Expert Opinion to the Jury | 534 |
| Advisory Committee Note to F.R.E. 703 | 534 |
| Advisory Committee Note to 2000 Amendment to F.R.E. 703 | 535 |
| <i>Smith v. Arizona</i> | 535 |
| Problem 9.2 | 539 |
| 3. Court-Appointed Experts | 539 |
| Advisory Committee Note to F.R.E. 706 | 539 |
| <i>Carly v. Gentry</i> | 540 |
| James R. Steiner-Dillon, Epistemic Exceptionalism | 540 |
| 4. Special Reliability Requirements for Experts | 541 |
| a. Introduction | 541 |
| b. The Daubert Revolution | 542 |
| <i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i> | 542 |
| <i>General Electric Co. v. Joiner</i> | 548 |
| <i>Kumho Tire Company, Ltd. v. Carmichael</i> | 551 |
| Advisory Committee Note to 2000 Amendment to F.R.E. 702 | 557 |
| Advisory Committee Note to 2023 Amendment to F.R.E. 702 | 558 |
| c. The Current Legal Landscape | 558 |
| Eleanor Swift, One Hundred Years of Evidence Law | |
| Reform: Thayer's Triumph | 558 |
| Richard D. Friedman, "E" Is for Eclectic: Multiple Perspectives | |
| on Evidence | 559 |
| <i>State v. Swope</i> | 559 |
| <i>Walsh v. BASF Corporation</i> | 560 |
| Barbara Pfeffer Billauer, <i>Daubert</i> Debunked: A History of | |
| Legal Retrogression and the Need to Reassess "Scientific | |
| Admissibility" | 562 |
| Edward Cheng, The Consensus Rule: A New Approach to | |
| Scientific Evidence | 562 |

| | |
|--|-----|
| Bennett Capers, Race, Gatekeeping, Magical Words, and the Rules of Evidence | 563 |
| C. Expert Testimony: Current Controversies | 565 |
| 1. Lie Detection | 565 |
| <i>United States v. Scheffer</i> | 565 |
| <i>State v. Sharpe</i> | 570 |
| Emily Murphy & Jesse Rissman, Evidence of Memory from Brain Data Problem 9.3 | 574 |
| 2. Social Science Evidence | 575 |
| <i>State v. Young</i> | 575 |
| <i>State v. Carpenter</i> | 577 |
| <i>Tekoh v. City of Los Angeles</i> | 580 |
| <i>State v. Salazar-Mercado</i> | 582 |
| <i>People v. Cooper</i> | 584 |
| <i>United States v. Dingwall</i> | 585 |
| <i>State v. Quiroz</i> | 587 |
| Deborah Tuerkheimer, Victim, Reconstructed: Sex Crime Experts and the New Rape Paradigm | 589 |
| 3. Probabilistic Evidence | 590 |
| a. A Probability Primer | 590 |
| b. “Trial by Mathematics” | 593 |
| <i>People v. Collins</i> | 593 |
| Roger C. Park, Evidence Scholarship, Old and New | 599 |
| <i>United States v. Veysey</i> | 600 |
| <i>Carrizosa v. Chiquita Brands International, Inc.</i> | 603 |
| Michael Pardo, The Paradoxes of Legal Proof: A Critical Guide | 604 |
| <i>Ivey v. Commonwealth</i> | 605 |
| Problem 9.4 | 608 |
| 4. DNA Identification | 609 |
| <i>United States v. Gissantaner</i> | 609 |
| <i>Walker v. City of New York</i> | 614 |
| <i>People v. Pike</i> | 622 |
| Erin Murphy, The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence | 624 |
| 5. Non-DNA Forensic Disciplines | 625 |
| <i>United States v. Hebshie</i> | 626 |
| <i>United States v. Adams</i> | 628 |
| <i>State v. McPhaul</i> | 634 |
| <i>In re A.C.</i> | 636 |

| | |
|---|-----|
| Brandon Garrett, The Reliable Application of Fingerprint Evidence | 638 |
| National District Attorney’s Association, November 16, 2016, Letter to White House in Response to PCAST Report | 639 |
| Paul Giannelli, Forensic Science: <i>Daubert’s</i> Failure | 639 |
| Jennifer L. Mnookin, The Uncertain Future of Forensic Science | 640 |
| David A. Sklansky & Stephen C. Yeazell, Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa | 641 |
| Maneka Sinha, Radically Reimagining Forensic Evidence | 642 |
| 6. Digital Forensics and Beyond | 643 |
| <i>United States v. Baker</i> | 643 |
| <i>Commonwealth v. Davis</i> | 644 |
| <i>State v. Puloka</i> | 648 |
| Brandon Garrett & Cynthia Rudin, The Right to a Glass Box: Rethinking the Use of Artificial Intelligence in Criminal Justice | 651 |
| Chapter 10 Privileges | 653 |
| A. In General | 653 |
| McCormick on Evidence | 654 |
| Christopher B. Mueller, Laird C. Kirkpatrick & Liesa Richter, Evidence | 655 |
| Rebecca Wexler, Ignorance of the Rules of Omission: An Essay on Privilege Law | 655 |
| B. Attorney-Client Privilege | 657 |
| 1. Introduction | 657 |
| <i>Swidler & Berlin v. United States</i> | 657 |
| <i>United States v. Jicarilla Apache Nation</i> | 661 |
| Jeremy Bentham, Rationale of Judicial Evidence | 665 |
| William H. Simon, The Kaye, Scholer Affair: The Lawyer’s Duty of Candor and the Bar’s Temptations of Evasion and Apology | 666 |
| Benjamin H. Barton, Do Judges Systematically Favor the Interests of the Legal Profession? | 667 |
| 2. Elements of the Privilege | 667 |
| a. Communication | 668 |
| <i>United States v. Kendrick</i> | 668 |
| <i>Tornay v. United States</i> | 668 |
| b. In Confidence | 670 |
| <i>United States v. Gann</i> | 670 |
| <i>United States v. Evans</i> | 671 |

| | |
|---|-----|
| <i>United States v. Lawless</i> | 672 |
| <i>Smithkline Beecham Corp. v. Apotex Corp.</i> | 672 |
| c. Between Attorney and Client | 673 |
| <i>United States v. Kovel</i> | 673 |
| <i>United States v. McPartlin</i> | 676 |
| <i>Pasteris v. Robillard</i> | 677 |
| <i>Upjohn Co. v. United States</i> | 678 |
| <i>United States v. Ruehle</i> | 684 |
| d. To Facilitate Legal Service | 687 |
| <i>Hughes v. Meade</i> | 687 |
| <i>United States v. Davis</i> | 688 |
| <i>Wartell v. Purdue University</i> | 689 |
| <i>Luv N' Care, Ltd. v. Williams Intellectual Property</i> | 691 |
| Problems 10.1–10.6 | 692 |
| 3. Waiver | 693 |
| <i>United States v. Bernard</i> | 693 |
| <i>Tasby v. United States</i> | 694 |
| <i>Hollins v. Powell</i> | 695 |
| <i>In re von Bulow</i> | 696 |
| Christopher B. Mueller, Laird C. Kirkpatrick & Liesa Richter, Evidence | 699 |
| Advisory Committee Note to F.R.E. 502 | 699 |
| <i>Carmody v. Board of Trustees of the University of Illinois</i> | 700 |
| 4. Crime-Fraud Exception | 702 |
| <i>United States v. Zolin</i> | 702 |
| Tom Lininger, No Privilege to Pollute: Expanding the Crime-Fraud Exception to the Attorney-Client Privilege | 707 |
| C. Spousal Privileges | 707 |
| <i>Trammel v. United States</i> | 708 |
| <i>State v. Gutierrez</i> | 714 |
| Edward J. Imwinkelried, <i>State v. Gutierrez</i> Abolishing the Spousal Communications Privilege: An Opinion Raising Profound Questions About the Future of Evidentiary Privileges in the United States | 718 |
| Problems 10.7 & 10.8 | 718 |
| D. Other Privileges | 719 |
| McCormick on Evidence | 719 |
| <i>Jaffee v. Redmond</i> | 721 |
| <i>In re Grand Jury</i> | 731 |
| <i>Under Seal v. United States</i> | 736 |

| | |
|--|-------------|
| Contents | xxix |
| <i>Trump v. United States</i> | 737 |
| Mirjan R. Damaška, Evidence Law Adrift | 740 |
| | |
| Chapter 11 Physical Evidence | 743 |
| A. Authentication | 745 |
| Advisory Committee Note to F.R.E. 901 | 745 |
| Advisory Committee Note to F.R.E. 902 | 745 |
| <i>United States v. Craig</i> | 745 |
| <i>United States v. Vayner</i> | 748 |
| <i>United States v. Long</i> | 751 |
| <i>United States v. Lamm</i> | 752 |
| <i>United States v. Palmer</i> | 754 |
| <i>Irwin Industrial Tool Co. v. Pifer</i> | 755 |
| <i>United States v. Wise</i> | 757 |
| <i>State v. Brown</i> | 757 |
| Advisory Committee Note to 2017 Amendments to F.R.E. 902 | 759 |
| <i>United States v. Penn</i> | 760 |
| Rebecca A. Delfino, Deepfakes on Trial: A Call to Expand the Trial Judge’s Gatekeeping Role to Protect Legal Proceedings from Technological Fakery | 761 |
| Problems 11.1–11.5 | 762 |
| B. The Best Evidence Rule | 763 |
| 1. Scope and Purpose | 764 |
| John H. Langbein, Historical Foundations of the Law of Evidence: A View from the Ryder Sources | 764 |
| <i>Meyers v. United States</i> | 764 |
| Advisory Committee Notes to F.R.E. 1001–1002 | 767 |
| <i>United States v. Gonzales-Benitez</i> | 768 |
| Dale A. Nance, The Best Evidence Principle | 768 |
| 2. Exceptions | 769 |
| Advisory Committee Notes to F.R.E. 1003–1008 | 769 |
| Advisory Committee Note to 2024 Amendment to F.R.E. 1006 | 770 |
| <i>United States v. Ivey</i> | 771 |
| <i>United States v. Stockton</i> | 772 |
| <i>United States v. Standing Soldier</i> | 773 |
| <i>Seiler v. Lucasfilm, Ltd.</i> | 773 |
| <i>United States v. Miller</i> | 777 |
| Problems 11.6–11.8 | 778 |

| | |
|---|-----|
| C. Illustrative Evidence | 780 |
| 1. Traditional Illustrative Evidence | 780 |
| McCormick on Evidence | 780 |
| Jennifer L. Mnookin, <i>The Image of Truth: Photographic Evidence and the Power of Analogy</i> | 781 |
| <i>Martineau v. McKenzie-Willamette Medical Center</i> | 782 |
| <i>State v. Coulter</i> | 785 |
| <i>United States v. Weeks</i> | 786 |
| <i>United States v. Humphrey</i> | 787 |
| <i>Roland v. Langlois</i> | 788 |
| <i>United States v. Stewart-Carrasquillo</i> | 788 |
| Advisory Committee Note to 2024 Amendment to F.R.E. 107 | 790 |
| 2. The Digital Courtroom | 791 |
| <i>Verizon Directories Corp. v. Yellow Book USA, Inc.</i> | 791 |
| <i>Krause v. County of Mohave</i> | 797 |
| Hon. Herbert B. Dixon, Jr., #AI, #VR, and #IOT Are Coming to a Courtroom Near You! | 798 |
| Jennifer Mnookin, Repeat Play Evidence: Jack Weinstein, “Pedagogical Devices,” Technology, and Evidence | 798 |
| Edward Oh, Admitting AI Art as Demonstrative Evidence | 799 |
| | |
| Chapter 12 Burdens, Presumptions, and Judicial Notice | 801 |
| A. Burdens and Presumptions in Civil Cases | 802 |
| <i>In re Yoder Co.</i> | 803 |
| Law Revision Commission Comment to California Evidence Code §601 | 807 |
| Christopher B. Mueller, Laird C. Kirkpatrick & Liesa Richter, Evidence | 808 |
| Problems 12.1–12.3 | 808 |
| B. Burdens and Presumptions in Criminal Cases | 809 |
| <i>Patterson v. New York</i> | 810 |
| <i>County Court of Ulster County v. Allen</i> | 815 |
| <i>Sandstrom v. Montana</i> | 820 |
| <i>State v. Harrison</i> | 824 |
| Problems 12.4 & 12.5 | 825 |
| C. Judicial Notice | 826 |
| Advisory Committee Note to F.R.E. 201 | 827 |
| <i>United States v. Lewis</i> | 830 |
| <i>Carley v. Wheeled Coach</i> | 831 |

| | |
|--|-------------|
| Contents | xxxi |
| <i>United States v. Love</i> | 832 |
| <i>United States v. Bello</i> | 834 |
| <i>Reed v. State</i> | 836 |
| Jeffrey Bellin & Andrew Guthrie Ferguson, Trial by Google: Judicial Notice in the Information Age | 839 |
| Problems 12.6–12.11 | 841 |
| Table of Cases | 843 |
| Table of Rules, Statutes, and Constitutional Provisions | 859 |
| Index | 867 |