

Contents

Foreword xxi

Acknowledgments xxiii

Chapter 1

Introduction 1

- 1.1** Overview 1
 - 1.2** Historical Development of the Rules of Evidence 2
 - 1.3** Ethics and Advocacy 4
 - 1.4** Reasons for the Rules of Evidence 4
 - 1.5** What Is Evidence? 5
 - 1.6** Role of the Paralegal 8
 - 1.7** Direct and Circumstantial Evidence 8
 - 1.8** How Is Evidence Obtained? 9
 - 1.9** Interviewing Witnesses 11
 - 1.10** Discovery Devices 12
 - 1.11** Evidentiary Procedures 13
 - 1.12** In Summary 14
- End of Chapter Review Questions 15*
- Applications 16*

Chapter 2

Relevance 19

- 2.1** Common Law Rules of Relevancy and Materiality 19
- 2.2** Relevancy Under the Federal Rules of Evidence 23
- 2.3** Admissibility of Relevant Evidence 25
- 2.4** Evolution of the Unfair Prejudice Objection 27
- 2.5** What Constitutes Unfair Prejudice 28
- 2.6** Undue Delay, Wasting Time, or Needlessly Presenting Cumulative Evidence 31

- 2.7** Objection for Unfair Prejudice Where Evidence Is Admissible for a Limited Purpose 31
- 2.8** Rule 403—Inapplicability 34
- 2.9** In Summary 35
- End of Chapter Review Questions* 36
- Applications* 36

Chapter 3

Character 37

- 3.1** Character Evidence Defined 37
- 3.2** Character Evidence in Civil Cases 39
- 3.3** Character of the Defendant in Criminal Proceedings 44
- 3.4** Character of the Victim in Criminal Proceedings 47
- 3.5** Prior Sexual Conduct Evidence in Civil and Criminal Sex Offense Cases 50
- 3.6** Methods of Proving Character 55
- 3.7** Character as an Essential Element of the Civil or Criminal Case 58
- 3.8** General Prohibition Against Evidence of Crimes, Wrongs, or Other Acts to Prove Conduct in Civil and Criminal Cases 64
- 3.9** Offering Extrinsic Evidence of Crimes, Wrongs, or Other Acts Through the Back Door 65
- 3.10** The Battle Between FRE 403 and FRE 404(b) 68
- 3.11** In Summary 72
- End of Chapter Review Questions* 73
- Applications* 73

Chapter 4

Habit and *Modus Operandi* 75

- 4.1** Habit Defined 75
- 4.2** Habit as an Organizational Function 76
- 4.3** Proving the Habit of an Individual 80
- 4.4** Proving the Habit of an Individual Who Follows a Professional Routine 84
- 4.5** *Modus Operandi* 88
- 4.6** Procedural Information 90
- 4.7** In Summary 91
- End of Chapter Review Questions* 91
- Applications* 92

Chapter 5 Witnesses and Competency 95

- 5.1** Common Law Rules of Competency 95
- 5.2** Who Is Competent to Testify Under the FRE? 96
- 5.3** Modern Competency Rules in the States 97
- 5.4** Personal Knowledge of the Witness 99
- 5.5** The Oath or Affirmation 102
- 5.6** Judges and Jurors as Witnesses 103
- 5.7** In Summary 108
- End of Chapter Review Questions* 108
- Applications* 109

Chapter 6 Impeachment 111

- 6.1** Impeachment—An Explanation 111
- 6.2** Who May Impeach? 112
- 6.3** Impeachment Based on Character for Truthfulness 113
- 6.4** Evidence of Specific Conduct on Cross-Examination 115
- 6.5** Impeachment by Evidence of Conviction of a Crime 120
- 6.6** Impeachment Based on Religious Beliefs or Opinions 122
- 6.7** Prior Inconsistent Statements 123
- 6.8** Refreshing a Witness’s Memory 128
- 6.9** Personal Bias 129
- 6.10** Collateral Extrinsic Evidence 132
- 6.11** Overlapping Rules and Limitations on the Use of Impeachment Evidence 135
- 6.12** In Summary 136
- End of Chapter Review Questions* 137
- Applications* 137

Chapter 7 Lay and Expert Opinions 141

- 7.1** Opinion Testimony by Lay Witnesses 141
- 7.2** Expert Opinions 147
- 7.3** Laying a Foundation for Expert Testimony and Demonstrative Evidence 148

- 7.4** The Use of Lay Testimony in Lieu of Expert Testimony 153
- 7.5** The Bases of Opinion Testimony by Experts and Refreshing the Expert's Recollection 156
- 7.6** Opinion as to the Ultimate Issue 158
- 7.7** Court Appointed Experts 159
- 7.8** In Summary 160
- End of Chapter Review Questions* 161
- Applications* 161

Chapter 8 Settlement, Negotiation, and Remedial Measures 165

- 8.1** The Role of Paralegals in Settlement and Negotiation 165
- 8.2** Compromise and Offers to Compromise 166
- 8.3** When Settlement Negotiations and Agreements Are Admissible 168
- 8.4** Excludability of Evidence of Remedial Measures 177
- 8.5** Payment of Medical and Similar Expenses 182
- 8.6** Exclusion of Evidence of Liability Insurance 183
- 8.7** Exclusion of Evidence of Unaccepted Plea Bargains, Withdrawn Pleas, and No Contest Pleas 183
- 8.8** In Summary 185
- End of Chapter Review Questions* 186
- Applications* 186

Chapter 9 Hearsay 189

- 9.1** Introduction to Hearsay 189
- 9.2** Purpose of Hearsay Rules 191
- 9.3** An Introduction to Nonhearsay 191
- 9.4** Nonverbal Conduct 192
- 9.5** Evidence That Is Not Hearsay Because the Rules Say It Is Not 193
- 9.6** Evidence That Is Not Hearsay Because the Court Says It Is Not 198
- 9.7** Identifying Nonhearsay Uses of Evidence Offered for Purposes Other Than to Prove the Truth, and Understanding Their Limitations 199

- 9.8** Verbal Acts 203
- 9.9** Implied Assertions 205
- 9.10** In Summary 206
- End of Chapter Review Questions 207*
- Applications 207*

Chapter 10 Hearsay Exceptions 209

- 10.1** Introduction to Hearsay Exceptions 209
- 10.2** The *Crawford* Confrontation Wrinkle 211
- 10.3** Present Sense Impression and Excited Utterance 214
- 10.4** *Res Gestae* 215
- 10.5** Then Existing Mental, Emotional, or Physical Condition 215
- 10.6** Statements for Purposes of Medical Diagnosis or Treatment 217
- 10.7** Recorded Recollection 218
- 10.8** Records 218
- 10.9** Reputation 225
- 10.10** Learned Treatises 225
- 10.11** Judgments 226
- 10.12** “Catch-All” Hearsay Exceptions 226
- 10.13** Availability of the Declarant 227
- 10.14** Hearsay Exceptions When the Declarant Is Unavailable 229
- 10.15** In Summary 234
- End of Chapter Review Questions 235*
- Applications 235*

Chapter 11 Authentication, Identification, and Exhibits 237

- 11.1** Introduction 237
- 11.2** Testimony of a Witness with Personal Knowledge 238
- 11.3** Chain of Custody 239
- 11.4** Authenticating Documents and Self-Authentication 240
- 11.5** Authenticating Business Records 241
- 11.6** Ancient Documents 246

- 11.7** Computer and Other Technologically Generated Records 248
- 11.8** State Statutes and Acts of Congress 251
- 11.9** Best Evidence Rule—Original, Duplicate, and Unavailable Documents 251
- 11.10** Summaries of Documents 253
- 11.11** In Summary 254
- End of Chapter Review Questions* 254
- Applications* 255

Chapter 12

Constitutional Constraints on the Admissibility of Evidence 257

- 12.1** Introduction 257
- 12.2** An Overview of the Fourth Amendment 258
- 12.3** The Fourth Amendment's Search and Seizure Requirements 259
- 12.4** Exceptions to the Search Warrant Requirement 260
- 12.5** The Fifth Amendment and the Right Against Compelled Self-Incrimination 262
- 12.6** The Miranda Warnings 263
- 12.7** The Sixth Amendment's Confrontation Clause 264
- 12.8** The Exclusionary Rule—The Cure for Constitutional Violations 265
- 12.9** Fruit of the Poisonous Tree 271
- 12.10** In Summary 272
- End of Chapter Review Questions* 273
- Applications* 273

Chapter 13

Common Law Privileges 275

- 13.1** Introduction to Common Law Privileges 275
- 13.2** The Attorney-Client Privilege and the Work-Product Privilege 280
- 13.3** Communications That Fall Outside the Attorney-Client Privilege 284
- 13.4** The Crime-Fraud Exception to the Attorney-Client Privilege 286
- 13.5** Spousal Privilege 289
- 13.6** The Physician-Patient Privilege 291
- 13.7** Religious Communication Privilege 292

- 13.8** Counselors, Therapists, and Social Workers,
and Chiropractors, Nurses, and Dentists 292
- 13.9** Military Secrets 292
- 13.10** Privileges on the Horizon 293
- 13.11** In Summary 293
End of Chapter Review Questions 294
Applications 294

Appendix A Federal Rules of Evidence 295

Glossary 329

Index 337