

CONTENTS

<i>Preface to the Sixth Edition</i>	<i>xxi</i>
<i>Preface to the First Edition</i>	<i>xxiii</i>

1 LEARNING AND APPLYING EVIDENCE LAW	1
A. What Is Evidence?	1
B. Why Study Evidence Law?	2
C. Why Study the Federal Rules of Evidence?	3
D. How the Federal Rules Work Together	4
E. How to Use This Book	5
F. The Trial: An Overview	6
1. The Adversary System	6
2. The Stages of the Trial	9
a. Pretrial Motions	9
b. Jury Selection	10
c. Preliminary Jury Instructions	11
d. Opening Statements	11
e. Presentation of Evidence and Limiting Instructions	12
i. Plaintiff's or Prosecution's Case-in-Chief	13
ii. Defendant's Case-in-Chief	14
iii. Plaintiff's or Prosecution's Rebuttal Case and Defendant's Surrebuttal	15
f. Motions After the Presentation of Evidence	15
g. Closing Arguments	15
h. Jury Instructions	16
i. Jury Deliberation and Verdict	16
j. Post-Trial Motions and Entry of Judgment	17
G. Appellate Review of Evidentiary Issues	17
■ Test Your Knowledge	26

2 SOURCES OF EVIDENCE AND THE NATURE OF PROOF	29
A. Sources of Evidence and the Nature of Proof	29
1. Introduction	29
B. Witnesses: The Requirements of Competency, Personal Knowledge, and Oath or Affirmation	30
1. “Competent to Be a Witness”	30
2. Competency of Judge, Jurors, and Attorneys	32
3. The Competency of a Witness Whose Recollection Has Been Refreshed Through Hypnosis	39
<i>People v. Shirley</i>	40
<i>Rock v. Arkansas</i>	42
4. The “Personal Knowledge” Requirement	45
5. The “Oath or Affirmation” Requirement	49
C. Real Evidence: Authentication and the Best Evidence Rule	50
1. Introduction: Tangible Evidence	50
2. Authentication	51
a. Introduction	52
b. Authentication of Photographs	55
c. Authentication by Chain of Custody	57
d. Examples of Authentication Under Rule 901(b)— Problems Posed by New Technologies	60
<i>United States v. Simpson</i>	61
<i>United States v. Jackson</i>	62
e. Self-Authentication	65
3. The Best Evidence Rule	68
a. The Basic Rule	68
b. Exceptions to the Best Evidence Rule	71
D. Judicial Notice	75
1. Adjudicative Facts	76
2. Judicial Notice of Law	79
3. Judicial Notice of Legislative Facts	81
E. Burdens of Proof and Presumptions: An Introduction	83
■ Test Your Knowledge	84
3 RELEVANCE	89
A. The Definition of Relevant Evidence	89
1. Relevance and Admissibility	90
2. The Test for Relevance	90

3. What Makes a Fact “of Consequence”?	91
4. When Does Evidence Make a Fact More or Less Probable?	92
5. Relevance and Culture	94
6. Similar Events	94
7. Relevancy versus Sufficiency	95
8. Relevancy: Putting It All Together	96
9. Relevance Distinguished from Probative Value	98
B. Balancing Probative Value Against Unfair Prejudice and Other Dangers	99
1. Introduction	99
2. “Probative Value”	100
3. Unfair Prejudice and other “Dangers”	103
a. Inferential Error Prejudice	103
b. Nullification Prejudice	104
4. Balancing Probative Value Against Dangers	107
C. Undisputed Facts	109
<i>Old Chief v. United States</i>	110
D. Probabilistic Evidence	113
<i>Adams v. Ameritech Services, Inc.</i>	116
E. A Special Application of Relevance: Preliminary Questions of Fact	117
1. The Purpose of Rule 104	118
2. Who Decides Preliminary Facts?	119
3. How Preliminary Facts Are Decided: Burden of Proof	121
4. How Preliminary Facts Are Decided: What Evidence Can Be Considered?	123
5. Does Rule 104(a) or Rule 104(b) Apply to the Preliminary Question of Fact?	124
6. What If the Preliminary Fact Is the Same as an Ultimate Fact the Jury Must Decide?	125
■ Test Your Knowledge	127
4 THE HEARSAY RULE	131
A. Introduction: The Idea Behind the Hearsay Rule	131
B. The Rule	135
1. “Statement”	136
2. “Declarant”	138
3. Statement Made “Other Than While Testifying at the Trial or Hearing”	140
4. Statement “a Party Offers in Evidence to Prove the Truth of the Matter Asserted”	142

C. Utterances and Conduct That Are Not Hearsay	146
1. Situations in Which the Utterance or Conduct Constitutes “Words of Independent Legal Significance” or “Verbal Acts”	146
2. Situations in Which the Value of the Evidence Derives from the Fact That Words Were Spoken, Not from the Truth of the Matter Asserted	149
3. Situations in Which the Words Are Being Offered to Show Their Effect on the Listener Rather Than to Prove the Truth of the Matter Asserted	150
4. Situations in Which the Words or Conduct Constitute Circumstantial Evidence of the Declarant’s State of Mind	152
5. Situations in Which Words or Conduct Are Not Assertive or Are Assertive of Something Other Than What They Are Offered to Prove	157
D. An Alternative Model of Hearsay	161
E. Hearsay Within Hearsay	163
F. Hearsay Versus Personal Knowledge Objections	165
G. Review: Hearsay or Not Hearsay	167
H. Rationales for Exceptions to and Exemptions from the Hearsay Rule	173
I. Exemptions: Statements That Are Not Hearsay Under Rule 801	174
J. Exemptions from the Hearsay Rule: Statements Offered Against a Party (“Admissions”)	174
1. Statements a Party Adopts as True	178
2. Vicarious Party Statements (Authorized and Agency Statements)	183
3. Co-conspirator Statements	186
K. Exemptions from the Hearsay Rule: Prior Statements of Witnesses	190
1. Introduction	190
2. Statements of Prior Identification	191
3. Prior Inconsistent Statements	196
a. Introduction	196
b. Substantive Use of Prior Inconsistent Statements	196
c. Impeachment Use of Prior Inconsistent Statements	197
d. A Note About Limited Admissibility	200
L. Exceptions to the Hearsay Rule: Form and Structure	202
M. Exceptions to the Hearsay Rule: Availability of Declarant Immaterial	204
1. Time-Sensitive Statements (Rules 803(1) and (2))	204
a. Excited Utterances (Rule 803(2))	204
b. Present Sense Impressions (Rule 803(1))	206

2. Statements Concerning State of Mind and Physical Condition	210
a. Statements of Declarant's Then-Existing State of Mind or Physical Condition	210
i. Statements That Look Forward	213
ii. Statements That Look Backward	215
b. Statements for Purposes of Medical Diagnosis or Treatment (Rule 803(4))	216
3. Recorded Recollection (Rule 803(5))	220
a. The Rule	220
b. Distinguishing Recorded Recollection from Refreshing a Witness's Recollection	222
4. Business and Public Records	228
a. Records of Regularly Conducted Activity (Rule 803(6))	229
b. Public Records and Reports (Rule 803(8))	237
c. Absence of Entry in Business or Public Record (Rules 803(7) and 803(10))	240
N. Exceptions to the Hearsay Rule: Unavailability of Declarant Required	242
1. Unavailability	242
2. The Former Testimony Exception (Rule 804(b)(1))	246
3. The Dying Declaration Exception (Rule 804(b)(2))	254
4. The Declaration Against Interest Exception (Rule 804(b)(3))	258
a. Rationale for the Exception	258
b. Nature of "Interests" Covered by the Exception	258
c. The Standard of the Rule	260
d. Applicability of the Exception to Neutral or Self-Serving Statements	262
e. Comparison to Statements Offered Against a Party ("Admissions")	264
5. The Forfeiture by Wrongdoing Exception (Rule 804(b)(6))	265
O. The Residual Exception (Rule 807)	267
1. Background	268
2. Requirements for Application of the Residual Exception	269
3. The "Near Miss" Problem	271
4. Is the Residual Exception Party-Neutral?	273
P. Miscellaneous Exceptions	275
1. Public Records of Vital Statistics (Rule 803(9)), Records of Religious Organizations Concerning Personal or Family History (Rule 803(11)), and Certificates of Marriage, Baptism, and Similar Ceremonies (Rule 803(12))	275
2. Records of Documents That Affect an Interest in Property (Rule 803(14)) and Statements in Such Documents (Rule 803(15))	277
3. Learned Treatises (Rule 803(18))	278

4. Reputation (Rule 803(21))	279
5. Judgment of Previous Conviction (Rule 803(22))	280
Q. The Hearsay Rule and the Constitution	281
1. Introduction	281
2. History and Purposes of the Right of Confrontation	282
3. Supreme Court Jurisprudence About the Relationship Between Hearsay and the Confrontation Clause	284
4. Constitutional Limits on the Exclusion of Hearsay	294
■ Test Your Knowledge	297
5 CHARACTER AND OTHER ACT EVIDENCE	301
A. The Definition Of Character Evidence	301
B. Character Evidence — The General Prohibition	303
C. Permissible Uses of Character Evidence	307
1. Character Evidence Allowed When Character Is “In Issue”	307
2. Evidence of a Criminal Defendant’s or Alleged Victim’s Character	309
a. Evidence of Defendant’s Pertinent Trait	310
b. Evidence of Alleged Victim’s Pertinent Trait	310
c. Evidence That Homicide Victim Was First Aggressor	311
3. Sexual Assault and Child Molestation Cases	313
a. Character Evidence of a Defendant Accused of Sexual Assault or Child Molestation	313
b. Character Evidence of an Alleged Victim of Sexual Assault	316
4. Character of a Witness for Truthfulness	320
D. How to Prove Character: FRE 405	320
1. Illustrating the Basic Rules	327
E. Non-Character Uses of Other Act Evidence	330
1. The Basic Principle	331
2. What Is a “Crime or Other Act”?	337
3. Proving the Other Act	339
4. Timing of Other Act	340
5. Degree of Required Similarity Between Charged and Other Conduct	342
6. Procedure for Determining Admissibility	344
7. Putting It All Together	346
F. Habit Evidence	347
G. Evidence of Similar Events	350
■ Test Your Knowledge	352

6	EXCLUSION OF OTHER RELEVANT EVIDENCE FOR REASONS OF POLICY	357
A.	Introduction	357
B.	Subsequent Remedial Measures	358
1.	Rationale for the Rule	358
2.	Efficacy and Necessity of Exclusionary Rule	359
3.	Limited Exclusionary Principle	360
4.	Meaning of “Negligence [or] Culpable Conduct”	361
5.	What Is a “Subsequent Remedial Measure”?	362
6.	Timing of Subsequent Remedial Measure	362
7.	Admissibility to Prove “Feasibility of Precautionary Measures”	363
8.	Admissibility to Impeach	364
9.	Other Permissible Uses of Subsequent Remedial Measures Evidence; Viability of the Exclusionary Rule	366
C.	Compromise and Payment of Medical and Similar Expenses	367
1.	Introduction	368
2.	Rationales for the Rule	369
3.	Special Situation: The Biased Witness	370
D.	Plea Evidence	375
1.	Unwithdrawn Guilty Pleas	375
2.	Withdrawn Guilty Pleas	377
3.	Pleas of Nolo Contendere	377
4.	Statements Made at Hearing to Enter Plea	377
5.	Statements Made in the Course of Plea Bargaining	378
6.	Exceptions to Rule Excluding Statements Made in Formal Plea Hearings or During Plea Bargaining	378
7.	Impeachment Use of Plea Evidence	379
8.	Waiver of the Rule’s Protections	380
E.	Evidence of Liability Insurance	383
1.	Rationale for the Rule	383
2.	Limited Exclusionary Principle	384
■	Test Your Knowledge	387
7	EXAMINING WITNESSES: ATTACKING AND SUPPORTING THE CREDIBILITY OF WITNESSES	389
A.	Mode of Witness Examination	389
1.	Control over Mode and Order of Examining Witnesses and Presenting Evidence	390

2. Scope of Cross-Examination	393
3. Leading Questions	395
B. Impeachment: Introduction	397
C. Who May Impeach	399
D. Impeachment by Methods Not Covered by Specific Common Law or Statutory Rules	401
1. Factors Affecting the Witness's Opportunity to Perceive	401
2. Factors Affecting the Witness's Capacity to Perceive	402
3. Factors Affecting the Witness's Capacity to Recollect	402
4. Factors Affecting the Witness's Capacity to Narrate	403
5. Appearance and Status Factors	403
6. Demeanor	404
7. Plausibility of the Witness's Testimony	404
8. Illustration	404
E. Bias, Motive, and Interest	408
1. Effects of Bias	408
2. Proving Bias	409
3. Admissibility of Bias Evidence	410
4. Admitting Extrinsic Evidence of a Witness's Prior Statements Revealing Bias	410
<i>United States v. Abel</i>	411
F. Impeachment by Contradiction	416
1. The Collateral Matter Limit on Impeachment by Contradiction	417
2. Overlap with Other Impeachment Methods	419
G. Witness's Character	420
1. Introduction	420
2. Reputation or Opinion Concerning Truthfulness	422
a. Reputation and Opinion	423
b. Evidence of Truthfulness Admissible Only After Attack on Character for Truthfulness	424
3. Conduct Probative of Truthfulness	425
a. Rationale for Admitting Testimony About Witness Conduct Probative of Truthfulness	425
b. Extrinsic Evidence of Conduct Probative of Veracity Inadmissible	426
c. Cross-Examining the Principal Witness	427
d. Cross-Examining the Character Witness	427
4. Conviction of Crime	429
a. Rationale for Admitting Conviction Evidence to Impeach	430
b. Scope of Rule 609	431

c. Rule 609(a) — General Rule	432
i. Felony Convictions Offered to Impeach Character for Truthfulness	432
ii. Dishonest Act and False Statement Convictions Offered to Impeach Character for Truthfulness	433
d. Rule 609(b) — Old Convictions	434
e. Rule 609(c) — Effect of Pardon, Annulment, or Certificate of Rehabilitation	435
f. Rule 609(d) — Juvenile Adjudications	435
g. Rule 609(e) — Pendency of Appeal	436
h. Preserving the Right to Appeal Under Rule 609	436
H. Prior Statements of Witnesses	438
1. Prior Inconsistent Statements	438
a. Introduction	439
b. Substantive Use of Prior Inconsistent Statements	439
c. Impeachment Use of Prior Inconsistent Statements	440
d. A Note About Limited Admissibility	442
2. Prior Consistent Statements	444
a. Introduction	445
b. Foundation for Admission of Prior Consistent Statements	446
c. Purposes for Which Prior Consistent Statements May Be Offered; Comparing Prior Consistent and Prior Inconsistent Statements	449
3. Illustrating the Use of Prior Consistent and Inconsistent Statements	449
I. Religious Beliefs or Opinions	454
J. Transcript Exercise: Emphasis on Witness Impeachment	455
■ Test Your Knowledge	461
8 LAY AND EXPERT OPINION EVIDENCE	465
A. Introduction	465
B. Lay Opinion	466
1. Function of Rule 701: Requiring the Witness to Be More Specific	466
2. Who May Give Lay Opinions?	467
3. What Is a Proper Basis for Lay Opinion Testimony?	467
4. When Is Lay Opinion “Helpful”?	469
C. Expert Opinion	475
1. Introduction	476
2. Expert Testimony Must “Help the Trier of Fact”	476
3. Expert Witnesses Must Be Qualified	478

4. Expert Testimony Must Be Reliable: The <i>Daubert</i> Decision	479
<i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i>	480
5. Expert Testimony Must Be Reliable: The <i>Kumho Tire</i> Decision	482
6. Expert Testimony Must Be Reliable and Sufficient: Requirements of Rule 702	483
7. Expert Testimony Must Be Reliable: Problems Applying <i>Daubert/Kumho Tire</i>	486
8. Expert Testimony Must Have a Proper Basis	488
9. Expert Testimony: Limits on Opinions Going to Ultimate Issues	493
10. Expert Testimony: Disclosing Facts Underlying Opinion	497
11. Expert Testimony: Court-Appointed Experts	499
■ Test Your Knowledge	502
9 PRIVILEGES	507
A. Introduction	508
B. The Federal Rule	509
C. General Principles	510
1. The Nature of Privileges	510
2. Covered Relationships	511
3. “Confidential Communications”	511
4. Who Can Participate in the Communication?	513
5. “Holder” of the Privilege	515
6. “Waiver” of the Privilege	516
D. The Attorney-Client Privilege	518
1. In General	518
2. Definition of Client and Attorney	519
3. Survival of Attorney-Client Privilege After Death of Client	522
4. Exceptions to the Attorney-Client Privilege	522
5. A Note About the Attorney’s Ethical Obligation of Confidentiality	526
6. A Note About the Attorney Work Product Doctrine	527
7. Waiver of the Attorney-Client Privilege and the Work Product Doctrine	529
E. Medical Privileges	531
1. Physician-Patient Privilege	531
2. Psychotherapist-Patient Privilege	532
F. Clergy Privilege	535
1. In General	535
2. Exceptions	536

G. Spousal Privileges	538
1. In General	538
2. The Privilege for Confidential Communications Between Spouses	538
3. The Adverse Testimony Privilege	539
4. Exceptions to the Spousal Privileges	541
■ Test Your Knowledge	542
10 BURDENS OF PROOF AND PRESUMPTIONS	547
A. Burdens of Proof	547
1. Introduction	547
2. Burden of Persuasion	548
a. Specifying the Quantum of Evidence	548
b. Identifying Which Party Bears the Burden of Persuasion	549
3. Burden of Production	549
B. Presumptions	553
1. Inferences and Presumptions	554
2. A Word About “Conclusive” or “Irrebuttable” Presumptions	555
3. Why We Use Presumptions	555
4. How Presumptions Operate: Some Terminology	556
5. Causing a Presumption to Take Effect	556
6. Rebutting Presumptions	558
a. What If the Opponent Does Nothing?	558
b. What If the Opponent Only Challenges One or More of the Foundational Facts?	559
c. What If the Opponent Only Challenges the Presumed Fact?	559
d. What If the Opponent Challenges Both the Foundational and the Presumed Facts?	561
e. A Caveat	561
7. Conflicting Presumptions in the Same Case	561
8. Presumptions in Criminal Cases	563
9. Presumptions Under the Federal Rules of Evidence	563
<i>De Feo v. Merchant</i>	564
■ Test Your Knowledge	567
<i>Appendix A: The Federal Rules of Evidence</i>	573
<i>Appendix B: Unadopted Federal Rules of Evidence</i>	597
<i>Appendix C: Key Questions and Answers</i>	605
<i>Table of Cases</i>	623
<i>Table of Federal Rules of Evidence</i>	627
<i>Table of Authorities</i>	631
<i>Index</i>	633