
CONTENTS

<i>Preface</i>	<i>xxxvii</i>
<i>Acknowledgments</i>	<i>xli</i>
<i>Why Study Evidence? A Student's Preface</i>	<i>xliii</i>
<i>Special Notice on Citations</i>	<i>xlvi</i>
Chapter 1 Evidence in Context: The Theory of the Case	1
A. Introduction to the Study of Evidence	1
B. Adversarial Presentation of Proof: The Idea of Competing Narratives and "Theory of the Case"	3
C. Case File: <i>United States v. Douglas</i>	5
Chapter 2 The Process of Proof: How Trials are Structured	21
A. The Adversary/Jury Trial System: An Overview	21
B. The Structure of a Trial	23
1. Pretrial Motions	23
2. Jury Selection	24
3. Preliminary Instructions	25
4. Opening Statements	25
5. Presentation of Evidence and the Burden of Production	26
a. The Order of the Parties' Presentation of Cases	26
b. The Burden of Production	27
6. Post-evidence Matters	28
7. Closing Arguments	29
8. Jury Instructions and the Burden of Persuasion	30
9. Jury Deliberations and Verdict	30
10. Post-trial Motions	32
C. Examination of Witnesses and FRE 611	33
1. FRE 611	33
2. Explanation of FRE 611(a) and (b)	34
3. FRE 611(a) and (b) and the Examination of Witnesses: Practical Applications	36
	ix

a. Direct Examination	36
b. Cross-examination	37
c. Direct Examination of “Adverse” and “Hostile” Witnesses	38
4. Explanation of FRE 611(c): Leading Questions	40
5. FRE 611(c) and Leading Questions: Practical Applications	40
a. What Is a Leading Question?	40
b. Leading Questions: Tactical Considerations	42
D. Objections and Preservation of Error for Appeal: FRE 103	42
1. FRE 103	42
2. Explanation of FRE 103(a) and (e): Objections, Offers of Proof, and Preservation of Evidentiary Issues for Appeal	43
3. FRE 103(a)(1) and (2) and Objections: Practical Applications	44
a. Two Types of Objections	44
b. Timing of Objections	46
c. Stating the Objection	47
d. Tactical Considerations	48
4. FRE 103(a) and (d): Preservation of Error for Appellate Review	49
a. Making the Record—In General	49
b. Making the Record for Appeal of Evidentiary Rulings	50
c. Standards of Appellate Review of Evidentiary Errors	50
E. Reflections on Natural Reasoning and the Adversary System	54
1. The Adversary System Reconsidered	54
2. Why Have Rules of Evidence?	56
3. Natural Reasoning and the Trial Process	58
4. The Behavior of Factfinders	62
Chapter 3 Relevance, Probative Value, and the Rule 403 Dangers	65
A. Relevance—the Basic Concept	66
1. FRE 401 and 402	66
2. Explanation of FRE 401 and 402	67
a. Relevant Evidence Is Offered to Prove a Fact of Consequence	67
b. Relevant Evidence Must Make a Fact of Consequence More Probable or Less	69
c. Relevance Is Not Sufficiency	73
d. Direct versus Circumstantial Evidence	74
e. Background Information	75
3. Applications of FRE 401 and 402	76
<i>Knapp v. State</i>	76

Contents	xi
<i>United States v. Stever</i>	77
Notes and Questions	79
Key Points	80
Problems	80
B. Probative Value and the Rule 403 Dangers	83
1. FRE 403	84
2. Explanation of FRE 403	84
a. Probative Value	84
b. Rule 403 Dangers	87
c. Probative Value Substantially Outweighed by One of the FRE 403 Dangers	91
3. FRE 403: Specific Problems and Applications	94
a. Gruesome Exhibits and Other Potentially Inflammatory Evidence	94
b. Spoliation	96
c. Curative Admissibility	97
Key Points	99
Problems	99
4. Appellate Review of Judicial Discretion Under FRE 403	101
<i>United States v. Hitt</i>	103
Notes and Questions	106
<i>Old Chief v. United States</i>	106
Notes and Questions	111
C. Reflection on Relevance, Probative Value, and Judicial Discretion	113
1. Can Relevance and Probative Value Be Measured?	114
2. Are Juries Rational?	117
3. How to Regulate Judicial Discretion?	118
Assessments	119
Chapter 4 Foundation	123
A. Foundation for Witnesses: Credibility and the Personal Knowledge Requirement	123
1. FRE 601	124
2. Explanation of FRE 601	124
3. FRE 602	125
4. Explanation of FRE 602	125
5. FRE 602: Practical Applications	127
Key Points	128
Problems	129

xii	Contents
B. Foundation for Exhibits	130
1. FRE 901	130
2. Explanation of FRE 901	131
3. FRE 901 — Practical Applications: The Problem of Incomplete Foundations	132
a. Basic Procedure: Offering an Exhibit Through a Foundation Witness	133
b. Partial Foundations and Connecting Up	134
4. FRE 901 — Practical Applications: Procedural Steps	138
Key Points	141
Problems	141
5. FRE 901 — Practical Applications: Generic Foundation Questions for Various Exhibit Types	142
a. Real Evidence Foundation Issues	143
b. Depictive Evidence Foundation Issues	146
c. Written Documents	150
d. Authenticity and Genuineness of Exhibits	153
e. Sum Up	154
Key Points	154
Problems	155
6. FRE 902	157
7. Explanation of FRE 902	159
Key Points	161
Problem	161
C. Preliminary Fact Questions Under FRE 104	162
1. FRE 104	162
2. Explanation of FRE 104(a)	162
Key Points	165
3. Explanation of FRE 104(b)	165
a. Relevance Depending on “Whether a Fact Exists”: FRE 104(b) as a General Foundation Requirement	166
b. Conditional Admissibility	168
4. FRE 104(b) in Practice	168
5. Theoretical Justifications for the FRE 104(a)/104(b) Distinction	172
Key Points	173
Problems	174
6. Reflection on FRE 104(b): Is There a Conditional Relevance “Problem”?	175
Problems	176
D. The Best Evidence Rule	177
1. FRE 1001-1008	178

Contents	xiii
2. Explanation of Best Evidence Rule	179
3. When Is Evidence Offered to “Prove [the] Content” of a Document?	181
4. Best Evidence Rule: Definitions and Exceptions	183
a. Definitions	183
b. Exceptions	184
5. Best Evidence Rule: Practical Applications	186
6. Explanation of FRE 1008	187
Key Points	188
Problems	188
7. The Best Evidence Rule: Policies and Problems	190
<i>Seiler v. Lucasfilm, LTD.</i>	190
Notes and Questions	192
Assessments	193
Chapter 5 The Character, Propensity, and Specific-Acts Rules	197
A. The Relevance of Character Evidence to Prove Conduct on a Particular Occasion	197
B. General Prohibition on Use of Character and “Other Crimes, Wrongs, or Acts” Evidence	200
1. FRE 404	200
2. Explanation of FRE 404(a)(1) and (b)(1)	201
a. The Rationale for Restricting Evidence of a Person’s Character	202
b. Exceptions to the FRE 404(b)(1) Prohibition Against the Use of Specific Acts	204
Key Points	204
Problems	204
C. The Admissibility of Specific Acts That Are Deemed Relevant Without a Character Inference	206
1. Explanation of FRE 404(b)(2) and (b)(3)	206
a. Types of 404(b)(2) Evidence	207
b. Preliminary Factfinding with Respect to Whether the Person in Question Committed the Act	209
c. Probative Value and Prejudice Generally	209
Key Points	210
Problems	211
2. Difficulties Distinguishing FRE 404(b)(2) Evidence from Prohibited Character Evidence	213
a. The Problem of “Res Gestae”	213
b. The Problem of Specific-Acts Evidence to Prove Intent or Knowledge	214

c. The Problem of Specific-Acts Evidence to Prove Mental States That Are Not Disputed	214
d. Past “Accidents” or “Coincidences” and the Anticoincidence Theory	216
e. Modus Operandi and the Character Inference	219
Key Points	219
D. An Application of FRE 404(B) and FRE 403	220
<i>United States v. Varoudakis</i>	220
Notes and Questions	226
Problems	228
E. Habit and Routine Practice	228
1. FRE 406	229
2. Explanation of FRE 406	229
a. The Importance of Habit and Routine-Practice Evidence	230
b. Methods of Proving Habit and Routine Practice	230
c. The Distinction Between Habit and Character	230
d. The Rationale for Permitting Habit and Routine-Practice Evidence	231
e. Strategies for Distinguishing Between Habit and Character	232
f. Judicial Factfinding on the Question of Habit	233
g. An Application of the Character/Habit Distinction: Drinking “Habits”	233
h. Evidence of Custom or Routine Practice of an Organization	234
Key Points	236
Problems	236
F. Similar Happenings	238
1. No Specific Federal Rule for Similar Happenings	239
2. Similar Happenings, Character, and Habit Evidence Compared	239
3. The Admissibility of Similar Happenings Evidence Depends on FRE 403	240
4. Applications of FRE 403 to Similar Happenings Evidence in Practice	241
5. Similar Happenings Offered to Show an Institutional Policy or Practice	242
6. Evidence of Similar Nonhappenings	242
Key Points	243
Problems	243
G. Exceptions to the Prohibition on Use of Character to Prove Conduct on a Particular Occasion	245
1. Explanation of FRE 404(a) (2), (3)	245
a. FRE 404(a) (2) (A) and (B): A Criminal Defendant’s Right to Open the Door to Character Evidence	245
b. FRE 404(a) (2) (A) and (B): The Prosecution’s Right to Respond to a Defendant’s Character Evidence	245

c. FRE 404(a)(2)(C): The Prosecution’s Right to Use Character Evidence to Respond to Defense Attacks on a Homicide Victim’s Conduct	246
d. The FRE 404(a)(2) Requirement of Pertinence	246
e. The Rationales for the FRE 404(a)(2) Exceptions	247
f. FRE 404(a)(3): The Character of Witnesses	248
Key Points	248
2. Explanation of 405(a): How Character Is Proven When the FRE 404(a)(2) and (3) Exceptions Apply	249
a. The Prohibition Against Using Specific Acts to Prove Character	250
b. The Probative Value of Opinion and Reputation Evidence to Prove Character	250
c. Reputation Evidence versus Opinion Evidence	251
Key Points	252
Problems	252
3. The Cross-examination of Character Witnesses	253
a. The Relevance of the Specific-Acts Inquiries	253
b. The Prejudicial Impact of Specific-Acts Questions	254
c. The Relationship Between the Character Trait and the Specific-Acts Inquiries	254
d. The Character Witness’s Likely Knowledge of the Specific Act	255
e. The Cross-examiner’s Reasonable Belief That the Act Occurred	255
f. Acts, Arrests, and Convictions	256
g. The Form of the Questions on Cross-examination	257
4. Limitations on the Use of Character Evidence in Practice	257
a. The Inherent Weakness of Good Character Evidence	257
b. The Potential Unfairness of FRE 405	258
Key Points	258
Problems	259
H. Evidence of A Person’s Character When Character Is an Essential Element of a Claim or Defense	260
1. Explanation of FRE 405(b)	260
2. An Application: Reputation versus Character in Defamation Cases	261
Key Point	261
Problems	262
I. Evidence of Sexual Assault and Child Molestation	263
1. FRE 413-415	263
2. Explanation of FRE 413-415	264
a. The Relationship Between FRE 413-415 and Other Rules of Evidence	264

b. FRE 413-415 and Preliminary Factfinding	266
c. The Broad Definition of “Offense of Sexual Assault”	267
d. The Meaning of “Without Consent” in FRE 413(d) (2) and (3)	268
3. Elaboration of FRE 413-415	268
a. The Application of FRE 403 to Previously Inadmissible Character Evidence	268
b. The Underlying Rationale for Rules 413-415	269
c. The Significance of FRE 413-415 to Federal Litigation	272
Key Points	272
Problems	272
J. Evidence of an Alleged Victim’s Past Sexual Behavior or Disposition in Sex Offense Cases	274
1. FRE 412	275
2. Explanation of FRE 412	275
a. The Relevance of an Alleged Victim’s Sexual Behavior or Disposition	276
b. The Underlying Propensity Theory	276
c. The Scope of FRE 412	277
3. Elaboration of FRE 412	281
a. The Rationale for a Rule Excluding Evidence of Prior Sexual Behavior and Sexual Predisposition	281
b. Two Approaches to the Exclusion of Other Sexual Behavior and Sexual Predisposition Evidence	283
c. Rape Shield Rules and the Defendant’s Right to Testify	283
d. FRE 412 and Discovery in Civil Cases	284
Key Points	284
Problems	285
Assessments	287
Chapter 6 The Other Relevance Rules	291
A. Inadmissible to Prove “Negligence,” “Culpable Conduct,” or “Liability”	291
1. FRE 407	292
2. Explanation of FRE 407	292
a. The Exclusionary Mandate	292
b. Permissible Uses of Subsequent-Remedial-Measure Evidence	295
c. The “If Disputed” Requirement	296
d. The Relationship Between FRE 407 and FRE 403	296
3. Elaboration of FRE 407	296
a. The Rationales for FRE 407	296
b. Subsequent Remedial Measures by Third Persons	298

Contents	xvii
Key Points	298
Problems	299
3. FRE 408	300
4. Explanation of FRE 408	300
a. The Exclusionary Mandate; Permissible Uses; FRE 403	300
b. Conduct or Statements Made During Negotiations	301
c. The “Disputed Claim” Requirement	302
d. The Applicability of FRE 408 to Criminal Cases	302
e. A Party’s Own Offer of Compromise	303
f. Compromises and Offers of Compromises by Third Persons	303
5. FRE 409	304
6. Explanation of FRE 409	304
a. The Exclusionary Mandate	304
b. The Admissibility of Statements Made in Conjunction with Medical and Similar Payments	304
c. FRE 409 Permits Evidence of Payment for Purposes Other Than to Show Liability	305
d. What Constitutes a “Similar” Expense?	305
7. FRE 411	305
8. Explanation of FRE 411	305
a. The Exclusionary Mandate	305
b. The Permissible Uses of Evidence of Liability Insurance	306
Key Points	306
Problems	307
B. Reflection on Rules 407-409, 411	309
C. Withdrawn Guilty Pleas, Pleas of No Contest, and Statements Made During Plea Discussions	310
1. FRE 410	310
2. Explanation of FRE 410	310
a. Withdrawn Guilty Pleas	310
b. Pleas of No Contest	311
c. Statements Made in Conjunction with the Process of Making and Negotiating Pleas	311
d. The Scope of FRE 410(a)(4)	312
e. The FRE 410(b) Exceptions	313
f. Waiver of FRE 410’s Exclusionary Mandate	313
Key Points	314
Problems	314
Assessments	315

Chapter 7	The Impeachment and Rehabilitation of Witnesses	319
A.	Basic Concepts	319
1.	Impeachment: The Inferential Process	319
a.	The Testimonial Inferences	319
b.	Types of Impeachment Evidence	320
c.	Impeachment Evidence versus Substantive Evidence	321
2.	“Extrinsic Evidence” and Impeachment	323
3.	“Rehabilitating” versus “Bolstering” Evidence	323
B.	Impeachment and Rehabilitation with Character Evidence	324
1.	FRE 608	324
2.	Explanation of FRE 608(a)	325
a.	Reputation and Opinion Evidence to Prove Character for Untruthfulness	325
b.	The FRE 608(a) Limitation on Evidence of Good Character for Truthfulness	325
	Key Points	326
	Problems	326
3.	Explanation of FRE 608(b)	327
a.	The Prohibition Against the Use of Extrinsic Evidence	328
b.	The Limited Scope of Permissible Inquiry	328
c.	No Fifth Amendment Waiver	329
d.	The Scope of FRE 608(b)(1): Questioning Witnesses About Their Own Specific Acts	329
e.	Questions About Specific Acts and FRE 403	330
f.	Good-Faith Requirement; Practical Considerations	331
g.	Specific Acts Showing Good Character for Truthfulness	332
h.	“Cross-Examination”	332
i.	The Scope of FRE 608(b)(2): Questioning Character Witnesses Regarding Specific Acts of the Witnesses They Testify About	332
	Key Points	333
	Problems	333
4.	FRE 609	335
5.	Explanation of FRE 609(a) and (b)	336
a.	The Two FRE 609(a)(1) Balancing Tests	336
b.	The Automatic Admissibility of FRE 609(a)(2) “Dishonest Act or False Statement” Convictions	338
c.	The FRE 609(b) Reverse FRE 403 Balancing Test	340
6.	FRE 609(a) Impeachment: Policy and Practical Consideration	340
a.	The Rationale for FRE 609(a)(1)	340

Contents	xix
b. Prior Convictions and Prejudice	341
c. Extrinsic Evidence	342
d. The Factual Details of the Conviction	342
e. The Relationship Between FRE 609(a) and FRE 608(b)	343
f. Hearsay	343
g. Practical Considerations	344
Key Points	346
Problems	346
C. Impeachment and Rehabilitation with a Witness's Prior Statements	348
1. FRE 613	348
2. Explanation of FRE 613	349
a. FRE 613(a)	349
b. FRE 613(b)	349
c. FRE 613(b)'s Departure from the Common Law	350
d. Extrinsic Evidence in Practice: Practical Considerations	351
e. Probative Value and FRE 403 Concerns	351
3. Prior Consistent Statements	353
Key Points	353
Problems	354
D. Other Impeachment Techniques	357
1. Bias	357
a. Relevance	357
b. Extrinsic Evidence	358
c. Possible FRE 403 Limitations on Extrinsic Evidence of Bias	358
d. Bias versus Character	359
Key Points	360
Problems	360
2. Mental or Sensory Incapacity	362
a. Relevance	362
b. Extrinsic Evidence	362
c. Mental Incapacity as a Bar to Testimony	362
Keys Points	363
Problems	363
3. Contradiction	364
a. Relevance	364
b. Extrinsic Evidence	365
c. The Impeachment of Experts with Statements in Treatises	365

d. The “No Extrinsic Evidence to Impeach on a Collateral Matter” Doctrine	365
Key Points	367
Problems	368
E. Reflection on the Impeachment Process	369
Assessments	370
Chapter 8 The Hearsay Rule	373
A. The General Rule of Exclusion and the Definition of Hearsay	373
1. FRE 801 and 802	374
2. Explanation of FRE 801 and 802	375
a. The Relevancy of Sally’s Testimony Depends on Generalizations About Sally’s Testimonial Qualities	375
b. The Relevancy of Sally’s Hearsay Statement Also Depends on Generalizations About Sally’s Testimonial Qualities	377
c. Hearsay Policy Differentiates Between Witnesses and Hearsay Declarants	379
Key Points	381
Problems	382
3. Elaboration of FRE 801 and 802: Implications of the General Rule of Exclusion	382
a. Identifying What a Hearsay Statement Is Offered to Prove	382
b. Testimony by Witnesses About Their Own Out-of-Court Statements May Still Be Hearsay	384
c. Qualifying “Out-of-Court” Statements: The Meaning of “Other Trial or Hearing” in 801(c)(1)	384
d. Hearsay, Lay Opinions, and the Personal Knowledge Rule	385
e. Multiple Hearsay	385
Key Points	386
Problems	386
4. Explanation of FRE 801(c): Nonhearsay Statements with No Hearsay Dangers	387
a. Nonhearsay Uses	387
b. Statements Relevant for Both Nonhearsay and Hearsay Uses	392
Key Point	392
Problems	392
5. Explanation of FRE 801(a)(2): Nonverbal Conduct	394
a. The Relevancy of Nonverbal Conduct to Prove Belief	394
b. Application of FRE 801(a)	396

Contents	xxi
6. Elaboration of FRE 801 (a): Justification for the Distinction Between Assertive and Nonassertive Conduct	398
a. Absence of Hearsay Dangers	398
b. Necessity	398
c. Should Nonassertive Conduct Be Excluded from the Definition of Hearsay?	399
d. Disguised Assertions	400
Key Points	402
Problems	402
7. Utterances Relevant for the Truth of the Declarant’s Unstated Beliefs	404
a. The Relevancy of Unstated Beliefs	404
b. Application of FRE 801(a) and (c)	406
8. Elaboration of FRE 801: Courts Reject the Literal Approach and Apply an “Intent” Test	408
a. The Judicially Created Intent Test	408
b. The Difficulties of Applying an Intent Test	409
c. Some Courts Still Adhere to the Common Law Approach	411
Key Points	412
Notes and Questions	412
Problems	413
9. Reflection on the Definition of Hearsay: Should FRE 801 Be Revised?	414
B. A General Approach to the Admission of Hearsay Under the Exemptions and Exceptions	416
1. Justification for the Exemptions and Exceptions	416
2. The Categorical Approach	417
3. The Process of Admission	417
4. The Preliminary Factfinding Requirements	417
5. Multiple Exemptions and Exceptions May Apply	418
6. FRE 805	419
7. The Confrontation Clause	420
C. Hearsay Exemptions	420
1. FRE 801 (d) (1) and (2) Rule 801. Definitions	420
2. Explanation of FRE 801 (d) (1): The Testifying Declarant Must Be “Subject to Cross-examination About a Prior Statement”	421
a. Preliminary Factfinding	421
b. Other Justifications for the FRE 801(d) (1) Exemptions	424
3. Explanation of FRE 801 (d) (1) (A): Prior Inconsistent Statements	424
a. Preliminary Factfinding	424
b. Justification for the FRE 801 (d) (1) (A) Limitations	425

c. Prior Inconsistent Statements Not Within FRE 801(d)(1)(A)	426
4. Explanation of FRE 801(d)(1)(B): Prior Consistent Statements	426
a. Preliminary Factfinding	426
b. Justification for the FRE 801(d)(1)(B)(i) Limitation	428
c. Beyond Motive: FRE 801(d)(1)(B)(ii)	428
d. Limits on Credibility-bolstering Statements Continue to Apply	429
5. Explanation of FRE 801(d)(1)(C): Prior Statements of Identification	429
a. Preliminary Factfinding	429
b. Justifications for the Admissibility of Prior Statements of Identification	431
c. Constitutional Dimension	432
Key Points	432
Problems	433
6. Explanation of FRE 801(d)(2): Party Admissions in General	436
7. Explanation of FRE 801(d)(2)(A): A Party's Own Statements	437
a. Preliminary Factfinding	437
b. Individual and Representative Capacity	437
c. Admissions, Personal Knowledge, and Lay Opinions	438
8. FRE 801(d)(2)(A): Policies and Practical Applications	439
a. The Opportunity to Cross-examine and Explain	439
b. Fifth Amendment Concerns	439
9. Further Elaboration of FRE 801(d)(2)(A)	440
a. Preliminary Factfinding on the Identity of the Declarant	440
b. Admissibility of Party Admissions in Multiparty Cases: The <i>Bruton</i> Problem	441
10. Explanation of FRE 801(d)(2)(B): Adoptive Admissions	442
a. Preliminary Factfinding	442
b. Justification for the Admissibility of Adoptive Admissions	443
c. Adoption by Silence	443
11. Explanation of FRE 801(d)(2)(C) and (D): Admissions by Agents, Servants, and Employees	444
a. Preliminary Factfinding	444
b. Justification for the Admissibility of Statements Under FRE 801(d)(2)(C) and (D): Necessity, Fairness, and Reliability	446
c. Personal Knowledge and Lay Opinions	447
d. Admissions by Government Employees	448
12. Explanation of FRE 801(d)(2)(E): Coconspirators' Admissions	448
a. Preliminary Factfinding	448
b. Justification for the Admissibility of Coconspirators' Statements	451

13. Elaboration of FRE 801(d)(2)(E): Applying FRE 104 to the Coconspirator Exemption	451
a. <i>Bourjaily v. United States</i>	451
b. The Amendment to FRE 801(d)(2): The Requirement of Additional Evidence	452
c. Process for Admission of a Coconspirator's Statement	453
Key Points	454
Problems	454
D. Hearsay Exceptions Not Requiring the Unavailability of the Declarant	459
1. FRE 803	460
2. Explanation of FRE 803(1): Present Sense Impression	463
a. Preliminary Factfinding	463
b. Justification for the Admissibility of Present Sense Impressions	464
3. Explanation of FRE 803(2): Excited Utterance	464
a. Preliminary Factfinding	464
b. Justification for the Admissibility of Excited Utterances	465
4. FRE 803(1) and (2): Practical Effects of the Categorical Approach	466
a. The Categories Determine Admissibility	466
b. The Categorical Terms Require Judicial Interpretation	466
c. Use of the Statement Itself in Preliminary Factfinding	469
d. Proof of Personal Knowledge	470
e. Criticism of FRE 803(1) and (2)	470
Key Points	472
Problems	472
5. Explanation of FRE 803(3): Declarant's Statement of His Then-Existing State of Mind	473
a. Preliminary Factfinding	474
b. Exclusion of "Facts Remembered or Believed"	474
c. Justification for the State-of-Mind Exception	475
d. State-of-Mind Utterances Are Classified as Either Direct or Circumstantial	476
6. FRE 803(3): Relevant Uses of State-of-Mind Evidence	477
a. Future and Past State of Mind of the Declarant	477
b. Statements of Intent to Prove the Declarant's Subsequent Conduct	477
c. Distinguishing State of Mind from Past Facts	478
d. Statements About the Declarant's Will	479
e. The <i>Hillmon</i> Case: Using the Declarant's Statement of Intent to Prove the Conduct of Another	479
Key Points	482
Problems	483

7. Explanation of FRE 803(4): Statement Made for Medical Diagnosis or Treatment	484
a. Preliminary Factfinding	484
b. Justification for the Admissibility of Statements for Medical Purposes	485
c. Statements About the Cause or External Source Must Be “Pertinent”	485
d. Requiring Proof of Medical Purpose	487
8. FRE 803(4): Patient’s Statements to Medical Expert Witnesses	487
Key Points	488
Problems	488
9. Explanation of FRE 803(5): Recorded Recollection	489
a. Preliminary Factfinding	489
b. Justification for the Admissibility of Recorded Recollections	492
c. Recorded Recollections Created by Multiple Declarants	492
10. Refreshing Memory versus Recorded Recollection: FRE 612	493
a. Explanation of Refreshing Memory	493
b. The Impact of FRE 612 on Refreshing Recollection	495
c. Witness Memory Lapses in Practice: The Interplay of Recorded Recollection and Refreshing Memory	495
Key Points	497
Problems	497
11. Explanation of FRE 803(6): Records of a Regularly Conducted Activity	498
a. Preliminary Factfinding	499
b. Justification for the Admissibility of Records of Regularly Conducted Activities	503
12. FRE 803(6): Practical Applications and Problems	504
a. Exclusion for Untrustworthiness	504
b. Opinions and Diagnoses	506
c. Records Containing Multiple Levels of Hearsay	506
d. Computer Documents and Electronic Data	508
Key Points	510
Problems	510
13. Explanation of FRE 803(8): Public Records and Reports	512
a. Preliminary Factfinding	512
b. Justification for the Admissibility of Public Records	515
14. FRE 803(8)(A)(ii) and (iii) in Practice	515
a. The Meaning of Law Enforcement Personnel	515
b. The Relationship Between FRE 803(8)(A)(ii) and (iii) and Other Exceptions	517

Contents	xxv
15. FRE 803(8): The Problem of Multiple Hearsay Sources Within Investigative Reports	518
a. Is the Report Itself Admissible?	518
b. Are Otherwise Inadmissible Hearsay Sources Admissible?	519
c. Administrative Findings	520
Problems	520
16. Other Exceptions for Records Under FRE 803	521
Key Points	522
17. Explanation of FRE 803(22): Judgment of Previous Conviction	523
a. Preliminary Factfinding	524
b. Justification for the Admissibility of Criminal Judgment	524
c. The Admission of Misdemeanor Convictions for Impeachment	524
E. Hearsay Exceptions Requiring the Unavailability of the Declarant	525
1. FRE 804	525
2. Explanation of FRE 804(a): Grounds for a Finding of Unavailability	526
Problems	528
3. Explanation of FRE 804(b) (1): Former Testimony	529
a. Preliminary Factfinding	529
b. Justification for the Admissibility of Former Testimony	532
4. FRE 804(b) (1): Practical Problems and Applications	533
a. Former Testimony Offered By or Against a Nonparty to the Original Action	533
b. Lack of Similar Motive Due to Differences in Procedural Context	534
c. Using Former Testimony at the Current Proceeding	536
Key Points	537
Problems	538
5. Explanation of FRE 804(b) (2): Dying Declarations	538
a. Preliminary Factfinding	538
b. Justification for the Admissibility of Dying Declarations	539
Key Point	540
Problem	540
6. Explanation of FRE 804(b) (3): Declarations Against Interest	540
a. Preliminary Factfinding	541
b. Justification for the Admissibility of Declarations Against Interest	542
7. FRE 804(b) (3): Practical Applications and Problems	542
a. Doubts About the Underlying Rationale for the Exception	542
b. Statements That Inculpate Accomplices	543

c. Requirement of Corroboration for Inculpatory Statements in Criminal Cases	544
Key Points	546
Problems	547
8. Explanation of FRE 804(b) (4): Statements of Personal or Family History	548
a. Preliminary Factfinding	548
b. Justification for the Admissibility of Statements of Personal or Family History	549
Key Points	549
Problem	549
9. Explanation of FRE 804(b) (6): Forfeiture by Wrongdoing	550
a. Preliminary Factfinding	550
b. Justification for the Admissibility of Forfeiture-by-Wrongdoing Statements	552
c. Acquiescence in Wrongdoing	553
d. Practical Applications	554
Key Points	555
Problems	555
F. The Residual Exception	556
1. FRE 807	557
2. Explanation of FRE 807	557
a. Principles and Policies Underlying the Residual Exception	557
b. FRE 807(a) (1): Sufficient Guarantees of Trustworthiness	558
c. The Evolution of FRE 807	560
d. FRE 807(a) (2)	561
e. FRE 807(a) (2): Preventing Overuse of the Exception	562
f. Notice	562
3. FRE 807 in Practice: How Much Hearsay Is Admitted Under the Residual Exception?	563
Key Points	564
Problems	564
G. Hearsay and the Confrontation Clause	565
1. <i>Ohio v. Roberts</i>	566
a. “Firmly Rooted” Hearsay Exceptions	567
b. Not Firmly Rooted Exceptions Require “Particularized Guarantees of Trustworthiness”	567
2. <i>Crawford v. Washington</i>	567
<i>Crawford v. Washington</i>	567
Key Points	578

Contents	xxvii
Problems	578
Notes	579
3. The Definition of “Testimonial” Statements After <i>Crawford</i> : Statements Made During Questioning by Police	580
a. The “Primary Purpose” Test: <i>Davis v. Washington</i>	580
<i>Davis v. Washington, Hammon v. Indiana</i>	580
Key Points	588
Problem	588
Notes and Questions	589
b. The “Primary Purpose” Test: <i>Michigan v. Bryant</i>	590
Problems	594
Notes and Questions	595
4. The Definition of “Testimonial” Statements After <i>Crawford</i> : Government Forensic Reports	596
a. <i>Melendez-Diaz v. Massachusetts</i>	597
Notes	601
b. <i>Bullcoming v. New Mexico</i>	601
Problems	603
Notes	604
c. <i>Williams v. Illinois</i>	604
Notes	608
5. The Definition of “Testimonial” Statements After <i>Crawford</i> : Statements Not Made to Law Enforcement	609
a. Child Statements: <i>Ohio v. Clark</i>	609
Notes	611
b. Medical Interviews and Examinations	611
c. Other Types of Nontestimonial Hearsay	612
6. Testimonial Statements That Satisfy the Confrontation Right	613
a. The Declarant Testifies	613
b. Unavailability and Prior Opportunity for Cross-examination	613
7. Exceptions to the Requirement of Confrontation	614
a. Dying Declarations	615
b. Forfeiture by Wrongdoing	615
Notes and Questions	618
H. Reflection on the Hearsay Rule	618
1. The Traditional Goals of Hearsay Policy	618
2. The Reliability Theory Does Not Work	619
3. A Rule of Discretion	620

4. Abolition	621
5. Reformulating Hearsay Policy	621
a. Is There a Need for a Hearsay Rule in Modern Civil Litigation?	621
b. Regulation Premised on the Excesses of the Adversary System	622
c. Notice-based Admission in Civil Cases: Reliance on the Adversary System	622
d. Why Hearsay Should Be Treated Differently in Criminal Cases	623
6. A Rebuttal	623
7. Conclusion	624
Assessments	625
Chapter 9 Lay Opinions and Expert Witnesses	633
A. Lay Opinions	633
1. FRE 701	633
2. Explanation of FRE 701	633
3. FRE 701: Practical Applications	634
a. Recognizing Opinions	635
b. Fact Versus Opinion	636
c. Rationally Based on the Perception of the Witness	636
d. Helpful to the Trier of Fact	637
e. Not Based on Specialized Knowledge	638
f. Opinion Testimony: Practice Pointers	639
Key Points	640
Problems	641
B. Admissibility of Expert Testimony	642
1. FRE 702	643
2. Explanation of FRE 702(a)	643
a. Scientific, Technical, or Other Specialized Knowledge	643
b. Help the Trier of Fact	644
c. A Witness Qualified as an Expert	645
d. Burden of Proof	646
3. Explanation of FRE 702(b)-(d): the Reliability Requirement	646
4. Development of the FRE 702 Reliability Requirement: <i>Daubert</i> and Its Progeny	647
a. The <i>Frye</i> Test	647
b. <i>Daubert</i>	647
<i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i>	648
Notes and Questions	653

Contents	xxix
c. <i>Joiner</i>	654
<i>General Electric Co. v. Joiner</i>	655
Notes and Questions	657
d. <i>Kumho Tire</i>	657
<i>Kumho Tire Company, Ltd. v. Carmichael</i>	657
Notes and Questions	663
5. The 2000 Amendments to FRE 702	663
Key Points	668
Problems	668
C. Factual Basis for Expert Opinion	670
1. FRE 703	670
2. Explanation of FRE 703	671
3. FRE 703: Policies, Problems, and Applications	672
a. Historical Background	672
b. The Jury's Use of Inadmissible Facts Underlying Expert Opinion (Inadmissible "Basis Evidence")	673
4. FRE 705	678
5. Explanation of FRE 705	678
6. FRE 705: Practical Applications	679
Key Points	680
Problems	680
D. Opinions on an Ultimate Issue	681
1. FRE 704	682
2. Explanation of FRE 704(a)	682
3. FRE 704: Policy, Problems, and Applications	682
Key Points	686
Problems	686
E. FRE 702-705: Practical Applications	687
1. Defining the Scope of Expertise	687
2. Types of Expert Opinions	688
3. Types of Experts	690
a. Retained versus Percipient Experts	690
b. Consultants versus Testifying Experts	693
4. Working with Experts	694
5. Direct- and Cross-examination of Experts	696
Key Points	698
Problems	699
F. Reflections on Expert Testimony	700
1. Data on the Use of Experts in Litigation	700

Samuel Gross, Expert Evidence	700
Carol Krafka et al., Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials	701
2. Scientific Evidence and the <i>Daubert</i> Case	703
a. Introduction	703
b. Three Models of Expert Testimony	705
3. Court-appointed Experts	708
a. FRE 706	708
b. Is FRE 706 Underutilized?	708
4. Summary Witnesses	710
5. Problems in Forensic Science: Overview	711
6. Problems in Forensic Science: Some Specific Controversies	716
a. Recent Debates in DNA Testing	717
b. Psychological and Behavioral Sciences	717
c. Toxic Tort Causation	718
d. Traditional Law Enforcement Investigative Tools	721
Question	729
7. A Law and Economics Perspective on Experts	729
Richard A. Posner, The Law and Economics of the Economic Expert Witness	729
Assessments	731
Chapter 10 The Process of Proof in Civil and Criminal Cases: Burdens of Proof, Judicial Summary and Comment, and Presumptions	737
A. The Process of Proof in Civil Cases	738
1. The Burdens of Proof in Civil Cases	738
a. The Burden of Production	738
Key Points	742
b. The Burden of Persuasion	742
<i>Schechter v. Klanfer</i>	747
Notes and Questions	749
Key Points	751
2. Judicial Summary and Comment in Civil Cases	751
a. The Advantages and Disadvantages of Permitting Judicial Summary and Content	751
b. The Criteria for Evaluating Judicial Summary and Comment	753
c. Standardized Comments	754
d. The Relationship Between Comments on the Evidence and the Burden of Persuasion	754

Contents	xxxi
Key Points	755
Notes and Questions	755
3. Presumptions in Civil Cases	755
a. Irrebuttable or Conclusive Presumptions	756
Key Points	757
Problems	758
b. Mandatory Rebuttable Presumptions	758
Notes and Questions	759
Key Points	760
Notes and Questions	761
Key Points	761
Key Point	762
Problems	762
c. Permissive or “Weak” Presumptions	763
Key Points	764
Notes and Questions	764
d. The Federal Rules Approach to Presumptions	768
Key Points	769
B. The Process of Proof in Criminal Cases	769
1. The Burdens of Proof in Criminal Cases	770
a. The Burden of Persuasion: In re Winship’s Mandate of Proof Beyond a Reasonable Doubt	770
Notes and Questions	771
Key Point	774
b. The Scope of <i>Winship</i> : Explicit Shifts in the Burden of Persuasion and Other Matters	774
(1) The Elements Test	778
(2) Federalism and the Political Compromise Test	779
(3) The Proportionality Test	779
(4) Justice Powell’s Two-Part Test	780
<i>Martin v. Ohio</i>	781
Notes and Questions on <i>Martin</i>	784
Key Points	786
Notes and Questions on the Application of <i>Winship</i> in Other Contexts	786
c. The Burden of Production in Criminal Cases	789
Notes and Questions	790
Key Points	790
2. Judicial Summary and Comment on the Evidence in Criminal Cases	790
Notes and Questions	791

xxxii	Contents
3. Presumptions in Criminal Cases: The Impact of <i>Winship</i>	792
Notes and Questions	794
Key Points	794
Problems	795
Assessments	797
Chapter 11 Judicial Notice	801
A. Judicial Notice of Adjudicative Facts	801
1. FRE 201	801
2. Explanation of FRE 201(a) and (b)	802
a. Types of Adjudicative Facts That Are Frequently Noticed	802
b. The Scope of FRE 201(a): What Are Adjudicative Facts?	803
c. The Scope of FRE 201(b): The Required State of Knowledge of Adjudicative Facts That May Be Judicially Noticed	803
3. An Application of FRE 201(a) and (b)	804
<i>In re Thirtyacre</i>	804
Notes and Questions	806
4. Explanation of FRE 201(c) and (e)	806
5. Explanation of FRE 201(d) and (f)	807
a. Judicial Notice of Adjudicative Facts in Civil Cases: Mini Directed Verdicts	807
b. Judicial Notice of Adjudicative Facts in Criminal Cases: Judicial Comments	807
c. Timing of Judicial Notice	808
Key Points	809
Notes and Questions	809
Problems	810
B. Judicial Notice as Part of Judicial Decisionmaking	811
1. Judicial Cognizance of Common Knowledge Without Formal Judicial Notice	812
a. The Jury's General Background Knowledge	812
b. Judges' Own Background Knowledge	812
<i>In re Marriage of Tresnak</i>	813
Notes and Questions	815
2. Judicial Cognizance of Legislative Facts	815
Notes and Questions	816
3. Judicial Notice of Substantive Law	817
Key Point	817
Problems	818
Assessments	820

Contents	xxxiii
Chapter 12 Privileges	823
A. The Law of Privilege	823
1. A General Introduction	823
2. The Unique Operation of Privilege Rules	825
3. Historical Background and Current Status of Privilege Rules	826
B. General Structure of Privileges	829
1. Holder of the Privilege	829
2. Invocation	829
3. Scope and Limits	831
4. Waiver	832
5. Exceptions	833
6. Drawing Adverse Inferences from Invoking a Privilege	833
7. Constitutional Limitations on Privileges	834
C. The Attorney-Client Privilege	835
1. Elements of the Privilege	835
a. Communications with a Lawyer or Representative of a Lawyer	836
b. Communications for the Purpose of Legal Service	839
c. The Scope of Confidential Communications Included in Privilege	839
d. Limitations on Waiver of the Privilege	840
e. Explanation of FRE 502	842
f. Applying FRE 502: Practical Issues	843
g. Potential Problems with FRE 502	846
Key Points	847
Notes and Questions	848
Problems	849
Notes and Questions	853
Problems	854
2. The Corporate Client	855
<i>Upjohn Co. v. United States</i>	856
Key Points	865
Notes and Questions	865
Problems	867
3. The Government Client	869
4. Exceptions to the Privilege	870
a. Breach of Duty by a Lawyer or Client	870
b. Document Attested by a Lawyer	870
c. Identity of Client, Fee Information, and Related Matters	870
d. Communication in Furtherance of a Crime or Fraud	872
Problems	873

5. Reflection on the Attorney-Client Privilege	874
Ronald J. Allen et al., A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine	875
Notes and Questions	890
D. The Marital Privileges	893
1. The Marital Communications Privilege	893
a. Elements of the Privilege and Its Justifications	893
b. Holder	894
c. Scope of the Privilege	894
d. Exceptions	896
<i>United States v. Fomichev</i>	897
Problems	899
2. The Marital Testimonial Privilege	900
a. Elements of the Privilege and Its Justifications	900
<i>Trammel v. United States</i>	900
Notes and Questions	905
b. Exceptions	907
Key Points	908
Problems	908
E. The Physician-Patient and Psychotherapist-Patient Privileges	909
1. The Physician-Patient Privilege	909
2. The Psychotherapist-Patient Privilege	911
a. <i>Jaffee v. Redmond</i>	911
<i>Jaffee v. Redmond</i>	911
Notes and Questions	923
b. Scope of the Privilege After <i>Jaffee</i>	923
c. Exceptions to the Privilege	926
Key Points	929
Problems	929
F. The Clergy-Communicant Privilege	930
1. The Privilege and Its Justifications	931
2. Scope of the Privilege	932
a. Definition of Clergy	932
b. Nature of the Communication	933
c. Expectation of Confidentiality	933
d. Exceptions	935
Key Points	936
Problems	936

Contents	xxxv
G. Other Privileges	937
1. Other Professional-Client Relationships	937
2. Parent-Child Privilege	938
3. Communications Made in Settlement Negotiations	940
4. Privileges Protecting Outside Sources of Information	941
a. Government Informant's Privilege	942
b. Journalist's Privilege	942
c. Scholar's (Academic Researcher's) Privilege	944
5. Peer Review Privilege	945
6. Self-evaluative Privilege	946
7. Government Privileges—Executive Privilege	948
a. State Secrets Privilege	948
b. Presidential Communications Privilege	951
c. Official Information (Deliberative Process) Privilege	953
8. Miscellaneous Privileges	956
Problems	957
Assessments	959
<i>Table of Cases</i>	963
<i>Table of Authorities</i>	981
<i>Index</i>	995