

TABLE OF CONTENTS

Table of Checklists	xxxiv
Preface	xxxv
Casebook Correlation Chart	xxxvii
Capsule Summary	C-1

Chapter 1

BASIC CONCEPTS

I.	FIRST PRINCIPLES	1
	A. Only admissible evidence usable	1
	B. Roles of judge and jury	1
	C. The Federal Rules	1
II.	ORGANIZATION OF THE TRIAL	2
	A. Flow of the case	2
	B. Examination of witnesses	3
	1. Four stages	3
	2. Sequestration of witnesses	3
III.	MAKING AND RESPONDING TO OBJECTIONS	4
	A. Making objections	4
	B. Time for objection	5
	C. General vs. specific objections	5
	D. Taking of “exceptions”	6
	E. Offer of proof	6
	F. The “plain error” and “harmless error” doctrines	7
IV.	COMPETENCY	7
	A. Meaning	7
	B. General common-law approach	8
	C. Modern approach	8
	<i>Exam Tips on</i> <i>BASIC CONCEPTS</i>	9

Chapter 2

RELEVANCE

I.	RELEVANCE GENERALLY	11
	A. All relevant evidence admitted	11
	B. Two aspects of relevance	11
	1. Link One (probative relationship)	11

2. Link Two (materiality)	11
3. Rule 401	12
C. “Direct” vs. “circumstantial” evidence	12
II. PROBATIVE VALUE	13
A. The problem generally	13
B. Experience and logic, not law	13
C. Chain of inference	13
III. PREJUDICE, CONFUSION, AND WASTE OF TIME	15
A. “Counterweights” to relevance	15
B. Prejudice	15
1. Comparison standard	15
2. Gruesome photos	16
3. Evidence of other crimes	16
C. Confusion	17
D. Waste of time	17
E. No “unfair surprise”	18
F. Standard for appellate review	18
<i>Quiz Yourself on</i>	
RELEVANCE (ENTIRE CHAPTER)	18
<i>Exam Tips on</i>	
RELEVANCE	19

Chapter 3

CIRCUMSTANTIAL PROOF: SPECIAL PROBLEMS

I. CHARACTER EVIDENCE IN GENERAL	22
A. Nature of the problem	22
II. CHARACTER IN ISSUE	24
A. General rule	24
B. Federal Rules	24
C. Rare	24
D. Type of evidence	25
III. CHARACTER AS CIRCUMSTANTIAL EVIDENCE — GENERALLY	25
IV. USE OF CIRCUMSTANTIAL CHARACTER EVIDENCE IN CIVIL CASES	26
A. General rule	26
B. Character for care	26
C. Quasi-criminal acts alleged	26

V. OTHER CRIMES AND WRONGS AS EVIDENCE, ESPECIALLY IN CRIMINAL CASES	27
A. General principle	27
B. FRE 404	27
C. Applies to other situations	28
1. No conviction, or action not constituting a crime	28
2. Use in civil cases	28
3. Use by defendant to show someone else did it	29
D. Proof offered for purpose other than to show propensity	29
E. Specific situations	30
F. Context	30
G. Larger plan	30
H. Preparation	31
I. “Identity” by showing “signature”	31
1. Requirements	31
2. Modus operandi	32
3. Non-signature ways to prove D’s “identity”	33
J. Intent	33
K. Sexual misconduct	34
L. Knowledge	34
1. Similar to intent	34
M. Motive	34
N. Opportunity	35
O. Identity	35
1. Must be issue	35
2. Relation to other exceptions	35
P. Conviction as predicate to present crime	35
Q. Impeachment	36
R. Other exceptions	36
S. Other aspects	36
1. Degree of certainty	36
2. Subsequent acts	37
3. Balancing	37
4. Notice	38
5. Limiting instruction	38
VI. EVIDENCE OF CRIMINAL DEFENDANT’S GOOD CHARACTER	39
A. General rule	39
B. Method of proof	40
1. Reputation and opinion, not specific acts	40
2. Negative evidence	40
C. Rebuttal by prosecution	40
1. Character “in issue”	40
2. Cross-examination of defendant’s witness	40

VII. CHARACTER OF VICTIM, ESPECIALLY IN CASES OF ASSAULT, MURDER, AND RAPE	40
A. Problem generally	40
B. Murder and assault victims	41
1. Knowledge unnecessary	41
2. Rationale	42
3. Federal Rules	42
4. Rebuttal by prosecution	42
C. Rape and other sexual assault	44
1. Rationale	44
2. Disadvantages	44
3. “Rape shield” laws	44
4. The federal rape shield provision	45
VIII. METHODS OF PROVING CHARACTER (FRE 405)	48
A. FRE 405	48
1. Situations covered by 405(a)	48
2. Character of victim	49
3. Proof for “other purposes” than conduct in conformity with character ..	50
4. Essential element of charge, claim or defense	51
B. Special problems of each type of evidence	51
1. Reputation	51
2. Opinion	51
3. Specific instances	52
4. Form of question	53
IX. SEXUAL ASSAULT AND CHILD MOLESTATION — BY THE DEFENDANT	53
A. FRE 413-415 generally	53
1. Past sexual assaults	53
2. Past child molestations	54
3. Civil suits	54
B. Practical impact	54
1. Broadly drafted	54
2. Criticisms	55
<i>Quiz Yourself on</i>	
CIRCUMSTANTIAL EVIDENCE	55
X. HABIT AND CUSTOM	59
A. General rule allows	59
B. Distinction between habit and character	59
C. Federal Rule	60
1. No eyewitness requirement	60
2. How proved	60
D. Business practice	61
XI. SIMILAR HAPPENINGS	61

A. General problem	61
1. Objections	61
2. General rule	61
B. Similar accidents and injuries	62
1. Narrow element	62
2. Evidence of past safety	62
C. Other kinds of events	63
1. Criminal allegations	63
2. Prior claims by same plaintiff	63
3. Accident proneness	63
XII. SUBSEQUENT REMEDIAL MEASURES	64
A. Problem generally	64
B. Permissible purposes	65
1. Federal Rule	65
2. Typical issues	65
3. Must be controverted	67
C. Product liability	67
XIII. LIABILITY INSURANCE	68
A. General rule	68
XIV. COMPROMISES, OFFERS TO PLEAD GUILTY, AND OFFERS TO PAY MEDICAL EXPENSES	69
A. Compromises generally	69
B. Compromises — Federal Rules	69
C. Compromises — Actual dispute required	69
D. Compromises — Must be intent to compromise	70
E. Compromises — Collateral admissions	70
1. Common-law admits	70
2. Federal Rule	70
F. Compromises — Other purposes	71
1. Impeachment use	72
G. Proof by party of her own settlement offer	72
H. Compromises — Completed settlements	73
1. Federal Rule	73
I. Guilty pleas	73
Table 3-1 CHECKLIST: Special Issues as to Circumstantial Evidence	75
J. Payment of medical expenses	80
<i>Quiz Yourself on</i>	
HABIT & CUSTOM; SIMILAR HAPPENINGS; SUBSEQUENT REMEDIAL MEASURES; LIABILITY INSURANCE; COMPROMISES; OFFERS TO PLEAD GUILTY AND OFFERS TO PAY MEDICAL EXPENSES	80
<i>Exam Tips on</i>	
CIRCUMSTANTIAL PROOF: SPECIAL PROBLEMS	83

Chapter 4

EXAMINATION AND IMPEACHMENT OF WITNESSES

I.	DIRECT EXAMINATION	92
	A. Definition of direct examination	92
	B. Free narrative vs. specific questions	92
	C. Leading questions	93
	D. Impeachment of own witness	95
	E. Juror testimony and affidavits impeaching the verdict	95
II.	CROSS-EXAMINATION	106
	A. Nature of cross-examination	106
	B. Leading questions allowed	106
	C. The “rule of completeness”	107
	D. Scope of cross	108
	1. “Restrictive” majority rule	108
	E. Art of cross-examination	109
III.	REDIRECT AND RECROSS	110
	A. Redirect	110
	1. Scope	111
	2. Discretion of judge	111
	B. Recross	111
	<i>Quiz Yourself on</i>	
	DIRECT EXAMINATION, CROSS-EXAMINATION, REDIRECT, AND RECROSS	111
IV.	REFRESHING RECOLLECTION AND OTHER TECHNIQUES	114
	A. Refreshing the witness’s recollection — generally	114
	B. Refreshing recollection — Adversary’s right to inspect document	117
	C. Argumentative and misleading questions	118
V.	EXAMINATION BY COURT	119
	A. General rule	119
	1. Witness called by judge	119
	2. Judge’s discretion	119
	3. Questioning by judge	119
VI.	IMPEACHMENT — GENERALLY	119
	A. Meaning of “impeachment”	119
	B. Five types	119
	C. Impeaching one’s own witness	120
	1. Rationale	120
	2. Exceptions to common-law rule	120
	3. Modern and Federal rule	120

4. Leading questions	121
VII. IMPEACHMENT BY PRIOR CRIMINAL CONVICTIONS	121
A. Problem generally	121
B. Common law approach	122
C. Federal Rules — Generally	122
D. FRE 609 — “Falsehood or dishonesty” (crimen falsi) convictions	124
1. Significance	124
2. Definition of “ <i>crimen falsi</i> ”	124
3. Looking to facts of particular crime	126
4. No discretion	126
5. Time limit	127
E. FRE 609 — Felonies not involving dishonesty or false statement	127
1. Must be felony	127
2. W is the accused	127
3. W is not the accused	127
4. Balancing	128
F. FRE 609 — Time limit	129
G. FRE 609 — Other issues	129
1. In limine motions	129
2. Procedure	129
3. Permitted detail	129
4. State or federal	130
5. Juvenile adjudications	130
6. Appeals	130
7. <i>Nolo contendere</i> pleas	130
8. Harmonizing convictions and bad-acts evidence under FRE 608	130
VIII. IMPEACHMENT BY PRIOR BAD ACTS	130
A. Use of bad acts generally	130
1. Common-law view	131
B. Federal Rules	131
1. Summary	132
2. Self-incrimination	133
3. Bad acts that are also crimes	133
4. Direct examination	135
5. No use of extrinsic evidence	135
6. Good-faith basis	136
IX. IMPEACHMENT BY OPINION AND REPUTATION REGARDING CHARACTER	137
A. Issue generally	137
1. Distinguished from substantive evidence	137
B. Common-law rule	137
C. Federal Rule	138
X. IMPEACHMENT BY PRIOR INCONSISTENT STATEMENTS	138

A. General principle	138
1. Relation to hearsay rule	139
B. General rule	139
1. Limits	139
2. Parties not covered	139
C. Foundation requirement	140
1. Common law	140
2. Federal Rule	140
3. Writing	141
D. Extrinsic evidence	141
1. Limits	142
2. Federal Rule	142
XI. IMPEACHMENT FOR BIAS	144
A. Proof of bias generally	144
B. Types of bias	144
1. Friendly feeling	144
2. Hostility	144
3. Self-interest	144
4. Membership in group	144
C. Foundation	144
1. Extrinsic evidence	144
2. Federal Rules	145
3. Bias never collateral	145
D. Confrontation Clause rights in criminal cases	145
1. Sexual history of rape victim	145
XII. IMPEACHMENT BY SENSORY OR MENTAL DEFECTS	145
A. General rule	145
1. Sensory defect	145
2. Mental defect	145
3. Drugs and alcohol	146
B. Extrinsic evidence allowed	146
XIII. IMPEACHMENT BY CONTRADICTION; THE “COLLATERAL ISSUE” RULE	146
A. General theory of contradiction	146
B. Incomplete contradiction	147
C. Rules of exclusion	148
D. “Collateral issue” rule	149
1. Summary	150
2. Federal approach	150
3. The <i>Oswalt</i> case as illustration	150
4. Solely for contradiction	151
5. Rationale	151
6. Various contexts for rule	151
7. Fact about which no honest mistake possible	153

8. Impeachment by physical evidence	153
9. Not applicable to cross of principal witness	153
XIV. RELIGIOUS BELIEFS	153
A. Issue	153
XV. REHABILITATING THE IMPEACHED WITNESS	154
A. General rules	154
1. No bolstering	154
2. Exceptions	154
B. Rehabilitation	154
C. Must meet the attack	155
1. Two categories	155
2. Good character	155
3. Prior consistent statement	156
D. Anticipating impeachment (“drawing the sting”)	158
1. Right to rebut if impeachment comes	158
Table 4-1 CHECKLIST: Impeaching and Rehabilitating Witnesses	159
<i>Quiz Yourself on</i> REFRESHING RECOLLECTION; IMPEACHMENT; REHABILITATION ..	164
XVI. SOME SPECIAL TECHNIQUES FOR DEVELOPING OR EVALUATING TESTIMONY	168
A. Scope	168
B. Psychiatric testimony	169
C. Hypnosis and truth serum	169
1. Statement made under influence	169
2. Testimony at trial	169
D. Lie detector tests	171
<i>Exam Tips on</i> EXAMINATION & IMPEACHMENT OF WITNESSES	172

Chapter 5

HEARSAY

I. INTRODUCTION	184
A. Nature of hearsay	184
1. Basic definition	184
2. Written hearsay	184
B. Truth of matter asserted	184
C. Dangers of hearsay	185
D. Dangers of out-of-court declaration	186
II. THE DEFINITION OF HEARSAY	188
A. The problem generally	188

1. Common-law definition	188
2. Use of triangle	189
3. Federal Rule	191
B. Statement made “out of court”	193
C. “Truth of matter asserted”	193
1. Significance of assertions for truth	193
2. Approach	194
3. Verbal acts	194
4. Verbal parts of acts	195
5. Effect on hearer or reader	196
6. Declarant’s state of mind	197
7. Impeachment	198
D. Statements and conduct	198
1. Open question	198
2. Assertive conduct	199
3. Silence	199
4. Non-assertive conduct	201
E. Assertions not offered to prove truth of matter asserted	203
1. “Two-step inference”	203
2. Treatment	203
3. Circumstantial evidence	204
F. Other hearsay problems	206
1. Lack of first-hand knowledge	206
2. “Not offered in presence of party”	206
3. Multiple hearsay	206
4. “Statements” by machines or animals	207
<i>Quiz Yourself on</i>	
HEARSAY	209
<i>Exam Tips on</i>	
HEARSAY	212

Chapter 6

EXCEPTIONS TO THE HEARSAY RULE

I. CHAPTER SCOPE	215
I. INTRODUCTION	217
A. Significance	217
B. Availability of declarant	217
C. Confrontation Clause of Constitution	217
II. ADMISSIONS	217
A. Neither category	217
B. General rule	218
1. Exception or outside of scope	218

2.	Rationale	218
3.	Distinguish from declaration against interest	218
4.	Not binding	219
5.	Can be opinion or conclusion	219
6.	Federal Rule	219
C.	Personal admissions	220
1.	Representative capacity	220
2.	Pleadings	220
3.	Admissions in criminal cases	221
D.	Adoptive admissions	221
1.	Test for adoption	221
2.	Real acquiescence	222
3.	Silence	222
4.	Who makes decision on adoption, judge or jury	225
E.	Representative admissions	225
1.	Explicitly authorized admission	225
2.	Vicarious admissions by agents	227
3.	Other exceptions	228
F.	Co-conspirators	228
1.	General rule on co-conspirators	228
2.	Need for exception	228
3.	FRE's requirements for exception	229
4.	"During course of"	229
5.	"In furtherance" requirement	230
6.	No need to charge conspiracy	230
7.	Procedure	231
III.	AVAILABILITY IMMATERIAL — GENERALLY	232
A.	Rationale	232
B.	Partial list of exceptions	232
IV.	SPONTANEOUS, EXCITED, OR CONTEMPORANEOUS UTTERANCES (INCLUDING STATEMENTS ABOUT THEN-EXISTING PHYSICAL OR MENTAL CONDITION)	232
A.	General principle	232
1.	" <i>Res gestae</i> "	232
B.	Statements of physical condition	233
1.	Statements to laypersons	233
2.	Statements to a treating physician	234
3.	Statements by third persons	235
4.	Statements to third persons	235
5.	Physician who does not treat but testifies	235
C.	Statements about the declarant's mental state	236
1.	State of mind directly in issue	236
2.	Proof of subsequent act	238
3.	Cooperation of other	240
4.	Proof of prior acts	241
D.	Excited utterances	244

1. Federal codification	244
2. Rationale	245
3. Sufficiently startling	245
4. Time factor	245
5. Reference to exciting event	246
6. Declarant must have personal knowledge	246
E. Present sense impressions	247
1. Federal formulation	247
2. <i>Houston Oxygen</i> case	247
3. Immediacy	248
4. Description	248
5. Perception	248
6. Opinions allowed	248
7. No corroboration required	248
8. “ <i>Res gestae</i> ” label	248
V. PAST RECOLLECTION RECORDED	248
A. The rule generally	248
1. Typical applications	248
2. Relation to business records exception	249
3. FRE 803(5) recognizes a hearsay exception for	249
B. Requirements for the rule	249
1. First-hand knowledge	249
2. Made when fresh in memory	249
3. Impaired recollection	250
4. Accuracy when written	250
C. Other considerations	251
1. Non-writings	251
2. Best Evidence rule	251
3. Not always admissible as evidence	251
4. Distinguished from present recollection refreshed	251
VI. BUSINESS RECORDS	251
A. Problem generally	251
B. Federal Rule	252
C. Definition of a “business”	253
D. Person who originally supplies information	253
1. First-hand information	253
2. Requirement of business duty	253
E. Made in “regular course of business”	254
1. <i>Palmer</i>	254
2. Modern view	255
3. Police reports and records	256
F. Opinions	256
1. Speculative opinion	256
2. Lay opinions	256
3. Expert testimony	256
4. Federal Rules	256

G. Trustworthiness	257
H. Absence of entry	257
I. Oral reports	258
J. Proving the record	258
1. Not self-proving	258
2. Who must be called	258
K. Special situations	259
1. Hospital records	259
2. Computer print-outs	261
VII. PUBLIC RECORDS AND REPORTS	262
A. Exception generally	262
B. Common-law rule	262
C. Federal Rule	263
D. Three categories	263
1. Activities of the office	263
2. Matters observed under duty	264
3. Investigative reports	264
E. Criminal cases	265
1. Federal language	265
2. Accused's use of subsection (A)(ii)	265
3. "Other law enforcement personnel"	265
4. Routine observations	266
5. Use of "business records" or other rules	266
F. Other issues	268
1. "Factual" versus "evaluative"	268
2. Trustworthiness in (a)(iii) cases	269
3. Multiple hearsay	270
4. Trustworthiness in (A)(i) and (A)(ii) cases	271
VIII. MISCELLANEOUS EXCEPTIONS — AVAILABILITY	
IMMATERIAL	271
A. In general	271
B. Learned writings and commercial publications	271
1. Common law	271
2. Federal Rules	272
3. Commercial publications	273
C. Ancient documents and documents relating to property	273
1. Ancient documents	273
2. Newer title documents	275
D. Reputation	275
1. Personal or family history	276
2. Boundaries and general historical facts	276
3. Reputation for character	276
E. Miscellaneous public and quasi-public records	277
1. Vital statistics	277
2. Marriage certificates	277

3.	Vital statistics kept by religious organizations	277
4.	Absence of public record	278
5.	Previous felony convictions	278
IX.	UNAVAILABILITY REQUIRED — GENERALLY	279
A.	Introduction	279
B.	Meaning of “unavailable”	280
1.	The Federal Rule	280
2.	States generally follow	280
3.	Constitutional problems	280
X.	FORMER TESTIMONY	283
A.	In general	283
1.	Federal Rule	283
2.	Rationale	283
3.	Requirements summarized	283
B.	Meaning of “hearing” and “proceeding”	283
1.	Broadly defined	284
2.	What’s covered	284
3.	What’s not covered	284
4.	Under oath	284
C.	Opportunity for cross-examination	284
1.	Actual examination not required	284
2.	Direct examination	285
D.	“Similar motive” to cross-examine	285
1.	Common-law approach	285
2.	Rationale for “similar motive” rule	285
3.	Same issues, same stakes and same parties	286
4.	Specific contexts	287
E.	Identity of parties	289
1.	Applies only to opponent	289
2.	FRE approach	290
XI.	DYING DECLARATIONS	292
A.	General rule	292
B.	Requirements	293
1.	Awareness of imminent death	293
2.	Actual death required	293
3.	Homicide	294
4.	Declarant must be victim	294
5.	Must relate to circumstances of killing	294
C.	Miscellaneous	294
1.	Usable on accused’s behalf	294
2.	First-hand knowledge	294
3.	Opinions	295
4.	Preliminary fact questions	295
XII.	DECLARATIONS AGAINST INTEREST	295

A. Generally	295
1. Summary of requirements	295
2. Distinguished from admissions	296
3. Rationale	296
4. Federal Rule	297
B. Meaning of “against interest”	297
1. When made	297
2. Pecuniary interest	297
3. Against penal interest	298
4. Collateral statements	301
5. Factual background	303
C. Constitutional issues	303
1. Use by prosecution	303
2. Use by accused	304
XIII. STATEMENTS OF PEDIGREE	305
A. In general	305
B. Family relationship	305
C. Before controversy	306
D. Relation to reputation evidence	306
XIV. FORFEITURE BY WRONGDOING	306
A. The problem generally	306
B. FRE 804(b)(6)’s solution	306
XV. PRIOR STATEMENTS OF AVAILABLE WITNESSES	308
A. In general	308
1. Not necessarily exception	308
2. Three different problems	309
3. Common-law rules in brief	309
4. Federal Rules	310
B. Prior inconsistent statements	311
1. In favor of admitting	311
2. In favor of exclusion	312
3. Federal Rules compromise	312
4. Special contexts	313
5. Statement remembered but repudiated	313
6. Prior statement denied	313
7. Prior statement adopted but underlying facts not remembered	314
8. Prior statement eventually adopted by witness	315
C. Prior consistent statements	315
D. Prior identification	315
XVI. THE RESIDUAL (“CATCH ALL”) EXCEPTION	318
A. Generally	318
B. Federal Rules	318
1. Text of Federal Rule	318

2. Three requirements	318
3. How used	320
C. Sufficient guarantees of trustworthiness	320
1. Factors bearing on declarant	320
2. Corroboration by other evidence	321
D. “Near-miss” problem	321
E. Notice	322
F. Child-abuse victims	322
<i>Quiz Yourself on</i>	
EXCEPTIONS TO THE HEARSAY RULE (ENTIRE CHAPTER).....	323
Table 6-1 CHECKLIST: Major Hearsay Exceptions and Exclusions	325
<i>Exam Tips on</i>	
EXCEPTIONS TO THE HEARSAY RULE	344

Chapter 7

CONFRONTATION AND COMPULSORY PROCESS

I. INTRODUCTION	363
A. Constitutional limits	363
1. Confrontation Clause	363
2. Compulsory Process Clause	364
II. CONFRONTATION CLAUSE — INTRODUCTION	364
A. History	364
B. Declarant produced at trial	365
C. Preference for live testimony	365
III. CONFRONTATION CLAUSE — THE MODERN APPROACH	366
A. Modern cases	366
B. The old approach (<i>Ohio v. Roberts</i>)	366
C. <i>Crawford v. Washington</i>	367
D. The meaning of “testimonial”	369
E. The significance of an “emergency” (<i>Michigan v. Bryant</i>)	373
F. Interrogations by persons not working for law enforcement (<i>Ohio v. Clark</i>)	379
G. Forensic reports	384
1. Lab reports by law-enforcement personnel (<i>Melendez-Diaz</i>)	384
2. “Surrogate testimony” won’t suffice (<i>Bullcoming</i>)	386
3. Report comes in without testimony of preparer (<i>Williams v. Illinois</i>) ..	388
IV. CONFRONTATION CLAUSE — AN ATTEMPTED SYNTHESIS	392
A. An attempted synthesis	392
B. The main rule	392

C. Distinguishing testimonial and non-testimonial statements	392
D. Present law on “non-testimonial” statements	398
V. CONFRONTATION: SOME SPECIAL ISSUES	398
A. Five special topics	398
B. What constitutes “subject to cross-examination”	399
C. D’s forfeiture of rights by making the witness unavailable	401
D. Special problem of multi-party confessions and joint trials (<i>Bruton</i>)	402
E. Can D “open the door” to uncross-examined declarations	403
F. Right to confront testifying witnesses	404
1. W’s refusal to answer	404
2. Restrictions on cross-examination	404
3. Right to be face-to-face with W	405
VI. COMPULSORY PROCESS	406
A. General meaning	406
B. State or federal rules restricting evidence	406
C. Equality principle	407
D. Only “weighty interests” are protected	408
E. Due process	408
<i>Quiz Yourself on</i>	
CONFRONTATION AND COMPULSORY PROCESS (Entire Chapter)	409
<i>Exam Tips on</i>	
CONFRONTATION AND COMPULSORY PROCESS	412

Chapter 8

PRIVILEGES

I. PRIVILEGES GENERALLY	416
A. Introduction	416
B. Where applicable	418
C. Who may assert	418
D. Sources of privileges	418
1. State development	419
2. Federal courts	419
II. THE ATTORNEY-CLIENT PRIVILEGE	420
A. Introduction	420
1. Proposed Federal Rule	420
2. State approach	421
3. Summary of requirements	421
B. The professional relationship	422
1. No retainer needed	422
2. Non-legal advice	422
3. Reasonable belief	422

4. Client holds the privilege	422
C. Confidential communications	422
1. Client-to-lawyer	422
2. Lawyer-to-client statements	423
3. Information involving third parties	423
4. Tangible evidence and documents	424
5. Miscellaneous issues	424
D. Fact of employment; client's identity	426
E. Physical evidence and documents	427
1. Can't assist in ongoing fraud	427
2. Concealment of evidence	427
3. Attorney's choices	428
4. Evidence of source	429
5. Information from third parties	430
6. Writings	430
F. Corporate clients	430
1. Corporations have privilege	431
2. Who may communicate	431
3. Must concern employee's employment	432
4. Reports and other routine communications	432
5. Confidentiality	432
G. Exceptions to the privilege	432
1. Crime or fraud	432
2. Through same deceased client	434
3. Attorney-client dispute	434
4. Joint clients	434
H. Other constraints and ethical issues	435
1. Code of Professional Responsibility	435
2. Work product immunity	435
 III. PHYSICIAN-PATIENT PRIVILEGE; PSYCHOTHERAPIST- PATIENT PRIVILEGE	 437
A. Generally	437
B. Special issues	438
1. Relationship	438
2. Confidentiality	438
3. Who holds privilege	438
4. Waiver	438
5. "Public safety"	439
C. Psychotherapist-patient	440
 IV. THE PRIVILEGE AGAINST SELF-INCRIMINATION	 441
A. Introduction	441
B. General rules	442
1. Who may assert	442
2. Proceedings where applicable	444
3. Information must be "testimonial"	444
4. Testimony must be "compulsory"	445

5. Must be incriminatory	445
C. Procedure for invoking	445
1. Criminal defendant	445
2. Non-defendant witness	446
D. Waiver	447
1. Criminal defendant	447
2. Witness	447
E. Documentary evidence	448
1. Contents	448
2. Production	448
3. The “required records” exception	449
F. Inferences and comment	449
1. “No comment” rule	450
2. Right to instruction	450
3. Silence at other proceedings	450
4. Civil suits	451
G. Immunity	451
1. “Transactional” vs. “use” immunity	451
2. Use immunity sufficient	452
3. Procedural issues	452
4. Defense witness immunity	453
V. THE MARITAL PRIVILEGES	453
A. Two privileges	453
B. Adverse testimony privilege	455
1. Who holds	455
2. Criminal vs. civil	456
3. “Testimony” required	456
4. Divorce	456
5. Crime or tort against spouse or children	456
C. Confidential communications	456
1. Where applied	456
2. Who holds	456
3. “Communication” required	457
4. Confidentiality	457
5. Marital status	457
6. Exceptions	457
VI. MISCELLANEOUS PRIVILEGES	458
A. Priest-penitent privilege	458
B. Journalist’s privilege	458
C. Government information	459
1. Organization of discussion	460
2. Government secrets generally	460
3. Military and diplomatic secrets	460
4. Other government information	460
5. Consequences of upholding claim	461
6. Government informers	462

7. Required reports and returns	462
D. Trade secrets	462
1. Qualified privilege	463
2. Protective order	463
E. Exclusionary rule	463
<i>Quiz Yourself on</i>	
PRIVILEGES (Entire Chapter).....	463
<i>Exam Tips on</i>	
PRIVILEGES.....	465

Chapter 9

**REAL AND DEMONSTRATIVE
EVIDENCE, INCLUDING
WRITINGS**

I. INTRODUCTION	473
A. Real and demonstrative evidence	473
B. Direct vs. circumstantial	476
II. AUTHENTICATION	476
A. Authentication generally	476
B. Methods of authentication	477
1. Real evidence	477
2. Demonstrative evidence	479
3. Writing	479
4. Federal Rules	479
5. Judge-jury allocation	480
C. Authentication of writings and other recorded communications	481
1. Authorship	481
2. No presumption of authenticity	481
3. Direct testimony	481
4. Distinctive characteristics; circumstances	482
5. Signature or other handwriting	482
6. Reply letters and telegrams	483
7. Telephone conversations	483
8. Sound recordings	485
9. Attesting witnesses	485
10. Ancient documents	486
D. Self-authentication	487
1. State statutes	487
2. Federal Rules	487
3. Attack on genuineness	490
E. Ways of avoiding authentication	490
1. Request for admission	491
2. Stipulation	491

III. OTHER FOUNDATION REQUIREMENTS AND OBJECTIONS	491
A. Introduction	491
B. Mere relevance not enough	491
1. Chain of custody	491
2. Condition unchanged	492
C. Demonstrative evidence	492
1. “Essential” vs. merely useful	492
2. Not a fair representation	492
D. Undue prejudice	493
1. Gruesome photos	493
2. “Day in the life” films	493
3. Bodily demonstration	493
IV. THE “BEST EVIDENCE” RULE FOR RECORDED COMMUNICATIONS	493
A. Best Evidence rule generally	493
1. Requirements	494
2. Only writings and equivalents	494
3. Rationale for rule	494
4. Federal Rules	494
B. What is a “writing” or other recorded communication	495
1. Short inscription	495
2. Photographic evidence	495
3. Sound recordings	496
C. What constitutes “proving the terms”	496
1. Existence, execution, etc.	496
2. Incidental record	496
3. Contract, deed, or other key document	498
D. Collateral writings	498
E. Which is the “original”	499
1. Duplicate originals	499
2. Original destroyed	499
F. Reproductions	499
1. Photocopying and other modern techniques	499
2. Federal Rules	500
G. Excuses for non-production	500
1. Loss or destruction	500
2. Inconvenience	501
3. Possession by third person	501
4. Original in opponent’s possession	501
5. Public records	501
H. Summaries	501
1. Underlying originals	501
2. Federal Rules	502
I. Admission by adversary	502
1. Federal Rules	502
J. Preferences among secondary evidence	503

1. Minority (“English”) rule	503
2. Majority rule	503
3. Federal Rules	503
K. Judge-jury allocation	503
V. SPECIAL TYPES OF REAL AND DEMONSTRATIVE EVIDENCE	504
A. Pictorial evidence (photographs, x-rays, and movies)	504
1. Authentication of pictures	504
2. Movies	505
B. Computer print-outs	505
1. Authentication	505
2. Best Evidence rule	506
C. Maps, models, diagrams, and summaries	506
D. Views	506
E. Demonstrations and experiments	507
F. Exhibits in the jury room	508
1. Tangible evidence including writings	508
2. Substitute for testimony	508
<i>Quiz Yourself on</i>	
REAL AND DEMONSTRATIVE EVIDENCE; WRITINGS (Entire Chapter)	509
<i>Exam Tips on</i>	
REAL AND DEMONSTRATIVE EVIDENCE; WRITINGS	513

Chapter 10

OPINIONS, EXPERTS, AND SCIENTIFIC EVIDENCE

I. FIRST-HAND KNOWLEDGE AND LAY OPINIONS	519
A. Generally	519
B. First-hand knowledge required	520
1. Distinguished from hearsay	520
2. Experts	520
3. Federal Rules	520
C. Lay opinions	520
D. Opinion on “ultimate issue”	523
II. EXPERT WITNESSES — GENERALLY	524
A. Reasons for using experts	524
1. Opinions	524
2. Statements of fact	524
B. When expert testimony allowed	525
1. Specialized knowledge will be helpful	525
2. Qualifications	526
3. Based upon “sufficient facts or data”	526
4. Product of “reliable principles and methods”	527
5. Reliable application to the facts of case	527

C. Role of trial judge	528
D. Factual basis for expert's opinion	529
1. Personal knowledge	529
2. Observation of prior evidence	529
3. Hypothetical questions	530
4. Otherwise inadmissible evidence	530
5. Mandatory disclosure to jury	531
E. The hypothetical question	532
1. General technique	532
2. Evidentiary basis required	532
3. Advantage of hypothetical	533
4. Federal approach	534
F. Procedural issues	534
1. Cross-examination	534
2. Court-appointed experts	535
3. Discovery	536
III. EXPERT WITNESSES — <i>DAUBERT</i>, FRE 702, AND THE EXCLUSION OF UNRELIABLE TESTIMONY	536
A. Special rule for scientific evidence	536
1. Danger of “junk” expert testimony	536
2. <i>Frye</i> case	537
3. <i>Daubert</i> rejects <i>Frye</i>	537
4. Questions raised by <i>Daubert</i>	540
5. What difference <i>Daubert</i> makes	540
B. The extension of <i>Daubert</i> to non-scientific evidence (<i>Kumho Tire</i>)	542
C. Present FRE 702	543
1. Three tests	543
2. <i>Daubert</i> factors not enumerated	543
3. Not just scientific testimony	543
4. Experience alone may suffice	544
5. Not a matter of which conclusion the trial court believes	544
IV. SCIENTIFIC EVIDENCE AND EXPERTISE — PARTICULAR TYPES	544
A. Overview	544
B. Probabilities	544
C. DNA testing	546
D. Speed detection	548
1. Radar	548
E. Intoxication	548
1. Breathalyzer	549
F. Handwriting and other forensic document analysis	549
G. Psychology and psychiatry	549
1. Mental condition of defendant	549
2. Behavioral syndromes	550
3. Reliability of eyewitness testimony	551

4. Lie detectors, truth serums, and hypnosis	552
<i>Quiz Yourself on</i>	
OPINIONS, EXPERTS AND SCIENTIFIC EVIDENCE (Entire Chapter)	552
<i>Exam Tips on</i>	
OPINIONS, EXPERTS, AND SCIENTIFIC EVIDENCE	555

Chapter 11

**BURDENS OF PROOF,
PRESUMPTIONS,
AND OTHER PROCEDURAL ISSUES**

I. BURDENS OF PROOF	562
A. Two burdens	562
1. Burden of production	562
2. Burden of persuasion	562
3. One burden shifts, other does not	563
B. Allocating the burdens in civil cases	566
C. Allocation of burdens of proof in criminal cases	567
1. Element distinguished from affirmative defense	567
2. Elements of crime	568
3. Allocation for affirmative defense	568
4. Production burden	568
5. Burden of persuasion	569
D. Satisfying the burden of production	570
1. Civil case	570
2. Criminal case	571
E. Satisfying the burden of persuasion	572
1. Civil cases	572
2. Criminal cases (“beyond reasonable doubt”)	573
II. PRESUMPTIONS	573
A. Presumptions generally	573
1. Four meanings	574
2. Presumptions are rebuttable	575
3. Reasons for creating	575
B. Effect of presumption in civil cases	576
1. Debate between Thayer and Morgan	576
2. Federal Rules	577
3. Constitutional questions	579
C. Effect in criminal cases	579
1. Terminology	579
2. Constitutionality of affirmative defenses	580
3. Presumptions	580
4. Reconciling affirmative defenses and presumptions	582
D. Choice of law	582

1. FRE 302	582
III. JUDGE-JURY ALLOCATION	583
A. Introduction	583
B. Issues of law	583
C. Issues of fact	583
1. Generally	583
2. Competence	583
3. Relevance	584
4. Presence of jury	586
D. Instructions	586
1. Limiting instructions	586
2. Cautionary instruction	587
E. Summary and comment	587
F. Nonjury trials	587
IV. APPEALS AND THE “HARMLESS ERROR” DOCTRINE	588
A. “Harmless error” generally	588
B. “Plain” error	589
C. Sufficiency of evidence	589
<i>Quiz Yourself on</i>	
BURDENS OF PROOF, PRESUMPTIONS AND OTHER	
PROCEDURAL ISSUES (Entire Chapter).....	
	590
<i>Exam Tips on</i>	
BURDENS OF PROOF, PRESUMPTIONS, ETC.....	
	592

Chapter 12

JUDICIAL NOTICE

I. JUDICIAL NOTICE GENERALLY	593
A. Function	593
B. Two types of facts	594
1. Adjudicative facts	594
2. Legislative facts	594
3. Significance of distinction	594
C. Judicial notice of law	595
D. Federal Rules	595
II. ADJUDICATIVE FACTS	595
A. Definition	595
B. Common knowledge	596
1. Judge’s own knowledge insufficient	596
C. Certain verification	596
1. History and geography	596
2. Scientific tests and principles	596

3. Court records	597
D. Federal Rule 201	597
E. Jury's right to disregard	597
1. Civil	597
2. Criminal	597
F. Procedure	598
1. Advance notice to parties	598
2. Contradictory evidence	598
3. When taken	599
III. LEGISLATIVE FACTS	599
A. Notice of legislative facts	599
1. Types of legislative facts	599
B. Not usually codified	600
1. Federal Rules silent	600
C. Binding on jury even in criminal case	600
IV. NOTICE OF LAW	601
A. Notice of law generally	601
B. Domestic law	601
C. Laws of sister states	602
D. Law of other countries	602
<i>Quiz Yourself on</i> JUDICIAL NOTICE (Entire Chapter)	602
<i>Exam Tips on</i> JUDICIAL NOTICE	603
Multistate-Style Exam Questions	605
Answers to Multistate-Style Exam Questions	615
Table of Cases	625
Table of References to the Federal Rules of Evidence	627
Subject Matter Index	631

CHECKLISTS

Table 3-1 Checklist: Special Issues as to Circumstantial Evidence	75
Table 4-1 Checklist: Impeaching and Rehabilitating Witnesses	159
Table 6-1 Checklist: Major Hearsay Exceptions and Exclusions	325
Table 11-1 Checklist: Rebuttable Presumptions	578