

Preface	xxvii
Acknowledgments	xxix
Chapter 1 Introduction	1
Part A: The Rules of Evidence and Their Purpose	1
1. The Purpose and Policy Goals of the Federal Rules of Evidence	2
2. Is Evidence Law Neutral?	2
3. The Origin and Evolution of the Federal Rules of Evidence	3
4. The Scope of the Rules of Evidence	4
5. Interpreting the Rules of Evidence	6
6. The Influence of the Federal Rules	6
Part B: The Litigation and Trial Process	7
1. Initiating Civil and Criminal Proceedings	7
2. Pretrial Litigation	8
3. Trial	9
(a) Jury Selection	9
(b) Opening Statements	10
(c) Presentation of Proof	10
(i) Witness testimony	11
(ii) Exclusion and ordering of witnesses	14
(d) Jury Instructions	15
(e) Closing Arguments	15
(f) Deliberations and Rendering of the Verdict	15
(g) Sentencing	16
4. Post-Trial Litigation	16
5. The Appeal	16
(a) Was the Alleged Evidentiary Error “Preserved”?	16
(b) Was There Evidentiary “Error”?	19
(c) Does the Error Warrant Reversal of the Verdict?	19
Part C: Using This Book	20

Chapter 2	Relevance	23
Part A:	Logical Relevance [FRE 401]	24
1.	Is It Material?	24
2.	Is It Probative?	25
3.	Direct Versus Circumstantial Evidence	27
Part B:	Discretion to Exclude Relevant Evidence [FRE 403]	29
Part C:	Conditional Relevance [FRE 104]	40
Part D:	Rule of Completeness [FRE 106]	42
Part E:	Probabilistic Evidence	46
Chapter 3	Character Evidence	53
Part A:	Rationale for Limiting Character Evidence	55
Part B:	Rules for Character Evidence in Civil Cases [FRE 404(a)(1)]	57
1.	General Rule: Character Evidence Is Prohibited	57
2.	Exception: When Character Relates to an Element of the Claim or Defense [FRE 405(b)]	57
Part C:	Rules for Character Evidence in Criminal Cases [FRE 404(a)(2)]	60
1.	General Rule: Character Evidence Is Prohibited	60
2.	Exception: When the Defendant Opens the Door	60
(a)	Evidence of the Defendant’s “Good” Character Trait(s) [FRE 404(a)(2)(A)]	60
(i)	Pertinent character trait	61
(ii)	Form of character evidence	64
(b)	Evidence of the Victim’s “Bad” Character Trait(s) [FRE 404(a)(2)]	64
3.	Exception: When Character Relates to an Element of the Claim or Defense [FRE 405(b)]	67
Part D:	Methods of Proving Character	70
Part E:	Other Similar Acts and Habit Evidence [FRE 404(b), 406]	76
1.	Other Act Evidence [FRE 404(b)]	77
(a)	Other Act Evidence Is Generally Admissible	77
(b)	Approach for Admitting FRE 404(b) Evidence	81
(i)	Proper 404(b) purposes	81
(ii)	Probativeness	82
(iii)	FRE 403 considerations	83
(iv)	Responsibility for admitting FRE 404(b) evidence	83
2.	Habit Evidence [FRE 406]	87
Part F:	Character Evidence in Sex Offense Cases	88

Contents	xv
1. The Victim’s Other Sexual Conduct (Rape Shield Statutes) [FRE 412]	89
(a) Rape Shield Law in Criminal Cases	91
(b) Rape Shield Law in Civil Cases	93
(c) Procedures for Rule 412 (In Civil or Criminal Cases)	96
2. Other Sexual Misconduct Evidence Against Defendants in Sexual Assault and Misconduct Cases [FRE 413, 414, 415]	96
Chapter 4 Limits on Evidence for Policy Reasons	105
Part A: Subsequent Remedial Measures [FRE 407]	106
1. What Social Policy Does FRE 407 Serve?	107
2. What Are the Requirements of FRE 407?	107
(a) What Is a “Subsequent Remedial Measure”?	108
(b) What Is the Subsequent Remedial Measure Being Offered to Prove?	110
(i) Subsequent remedial measures to impeach	111
(ii) Subsequent remedial measures to show “feasibility”	111
(iii) Subsequent remedial measures to prove ownership or control	113
Part B: Settlement Offers and Negotiations [FRE 408]	113
1. What Social Policy Does FRE 408 Serve?	114
2. What Are the Requirements of FRE 408?	115
(a) Resolving a “Disputed” Claim	116
(b) Improper Use(s) of Settlement Offers and Negotiations	116
(c) Exceptions	120
(i) Compromise negotiations with public offices in criminal cases	120
(ii) Other express exceptions to FRE 408	120
Part C: Offers to Pay Medical and Similar Expenses [FRE 409]	121
1. What Social Policy Does FRE 409 Serve?	121
2. What Are the Requirements of FRE 409?	121
Part D: Pleas, Plea Bargaining, and Plea Agreements in Criminal Cases [FRE 410]	123
1. What Social Policy Does FRE 410 Serve?	124
2. What Are the Requirements of FRE 410?	125
(a) Plea Negotiations	126
(b) Exceptions to FRE 410	126
(c) Waiving FRE 410	126
Part E: Liability Insurance [FRE 411]	130
1. What Social Policy Does FRE 411 Serve?	130
2. What Are the Requirements of FRE 411?	131

Chapter 5 Hearsay	135
Part A: Rationale for the Hearsay Rule	135
Part B: The Rule Against Hearsay [FRE 802]	138
Part C: Definition of “Hearsay” [FRE 801]	139
1. Is the Evidence a Declarant’s Out-of-Court Statement?	139
(a) Who Qualifies as a “Declarant”?	140
(b) What Is a “Statement”?	143
(i) Statements or conduct intended as an assertion	143
(ii) Specific applications of this definition	146
2. Is the Statement Being “Offered in Evidence to Prove the Truth of the Matter Asserted”?	147
(a) Verbal Acts	149
(i) Civil cases	149
(ii) Criminal cases	150
(b) Words Proving Effect on Listener or Reader	151
(c) Statements Used to Impeach	153
(d) Statements Offered as Circumstantial Evidence of the Declarant’s State of Mind	155
(e) Verbal Objects and Markers	156
(f) Statements That Are Relevant Merely Because They Were Uttered Regardless of Their Truth	158
Part D: Indirect Hearsay and Hearsay Within Hearsay	161
1. Indirect Hearsay	161
2. Hearsay Within Hearsay	164
Chapter 6: Hearsay Exceptions Designated as “Not Hearsay”	169
Part A: Hearsay Exceptions for a Witness’s Prior Statements [FRE 801(d)(1)]	171
1. Prior Inconsistent Statements [FRE 801(d)(1)(A)]	173
(a) When Is a Prior Statement “Inconsistent”?	174
(i) When the prior “statement” is the witness’s silence	175
(ii) When a witness feigns a lack of memory	175
(b) When Is a Statement “Given Under Penalty of Perjury at a Trial, Hearing, or Other Proceeding”?	177
(i) “Penalty of perjury”	177
(ii) “At a trial, hearing, or other proceeding”	177
(iii) Absence of this requirement in other jurisdictions	180

Contents	xvii
2. Prior Consistent Statements [FRE 801(d)(1)(B)]	182
(a) When a Prior Consistent Statement Is Offered to Rebut a Claim That Witness Recently Fabricated Her Testimony or Is Testifying Out of an Improper Motive	184
(b) When the Prior Consistent Statement Is Offered to Rehabilitate the Witness After the Witness’s Credibility Is Attacked on Some Other Ground	189
3. Prior Statements of Identification [FRE 801(d)(1)(C)]	190
Part B: Hearsay Exceptions for Admissions by an Opposing Party [FRE 801(d)(2)]	194
1. Admissions Personally Made by an Adverse Party [FRE 801(d)(2)(A)]	195
(a) Statement Made by Party in Individual or Representative Capacity	196
(b) Statement Is Offered Against That Party	197
(c) Special Concerns When the Party Is a Criminal Defendant	197
(i) Confessions	197
(ii) Silence as an admission	198
(iii) Use of one defendant’s admission at a joint trial	199
2. Adoptive (Tacit) Admissions [FRE 801(d)(2)(B)]	200
3. Authorized Admissions [FRE 801(d)(2)(C)]	206
4. Admissions by Employees and Agents [FRE 801(d)(2)(D)]	209
(a) Statement by an “Agent” or “Employee”	210
(b) Statement Regards a Matter Within the Scope of Agency or Employment	211
(c) Statement Made While the Employment or Agency Relationship Was in Existence	211
5. Coconspirator Statements [FRE 801(d)(2)(E)]	216
(a) Statement Made by a Party’s Coconspirator	217
(b) Statement Was Made During the Conspiracy	217
(c) Statement Is in Furtherance of the Conspiracy	218
Chapter 7 FRE 803 Hearsay Exceptions Applicable Even When the Declarant Is Available to Testify	223
Part A: Present Sense Impression [FRE 803(1)]	224
1. When Does a Statement Describe or Explain an Event the Declarant Is Perceiving?	225
2. When Is a Statement Made “Immediately” After an Event?	227
Part B: Excited Utterances [FRE 803(2)]	232
1. Has a Startling Event or Condition Occurred?	233
2. Does the Statement Relate to the Startling Event or Condition?	233

3. Was the Statement Made While the Declarant Was Still Under the Stress of Excitement Caused by the Startling Event or Condition?	234
Part C: The “State of Mind” Exception [FRE 803(3)]	239
1. Mental or Physical Condition <i>at the Time the Statement Is Made</i>	241
2. Future Intent to Plan <i>at the Time the Statement Is Made</i>	242
3. Statements Relating to Past Condition or Intent of Declarant	249
4. Absolute Prohibition on Statements of Memory or Belief to Prove the Fact Remembered or Believed	250
Part D: Statements of Medical Diagnosis or Treatment [FRE 803(4)]	251
1. Is the Statement Made for Medical Diagnosis or Treatment?	253
2. Does the Statement Fall into Any of the Categories Covered by the Exception?	253
3. Is the Statement “Reasonably Pertinent” to Medical Diagnosis or Treatment?	254
Part E: Past Recollection Recorded [FRE 803(5)]	257
1. Sufficient Lack of Memory	260
2. Witness “Made or Adopted” a Record on the Matter	260
3. The Record Was Made When the Matter Was Fresh in the Witness’s Memory	260
4. Record Must Accurately Reflect the Witness’s Knowledge	262
5. Limitation on Form of Evidence	263
Part F: Business Records and the Absence of Business Records [FRE 803(6), (7)]	263
1. The Record Was Made at or Near the Time of the Act, Event, Condition, Opinion, or Diagnosis Either (a) by Someone with Knowledge or (b) from Information Transmitted by Someone with Knowledge	265
2. The Record Is Kept in the Course of a Regularly Conducted Activity of a Business, Organization, Occupation, or Calling	269
3. Making the Record Was a Regular Practice of the Business’s Regularly Conducted Activity	271
4. The Business Record Is Properly Authenticated	272
5. The Record Must Not Be Untrustworthy	274
6. The Absence of a Business Record	274
Part G: Public Records and the Absence of Public Records [FRE 803(8), 803(10)]	276
1. Public Records of the Office’s Public Activities	279
2. Matters Observed by Persons with a Duty to Report	280
3. Factual Findings from a Legally Authorized Investigation	283
4. Trustworthiness	286
5. The Absence of a Public Record	286

Contents	xix
Part H: Other Less Commonly Used Hearsay Exceptions Under FRE 803	289
1. Certain Private and Public Documents Considered to Be Reliable	289
2. Statements in Learned Treatises, Periodicals, or Pamphlets	291
3. Reputation Evidence	292
4. Judgments of Conviction to Prove an Essential Fact	294
Chapter 8 Hearsay Exceptions When the Declarant Is Unavailable and the Residual Hearsay Exception	297
Part A: Unavailability for Purposes of the Hearsay Exceptions in FRE 804 [FRE 804(a)]	298
1. Assertion of Privilege	299
2. Refusal to Testify	299
3. Lack of Memory	300
4. Death, Illness, or Infirmary	300
5. Inability, by Process or Other Means, to Procure the Witness's Attendance or Testimony	301
6. Finding of "Availability" If the Proponent Is Responsible for the Witness's Unavailability	304
Part B: Hearsay Exceptions Applicable When the Declarant Is Unavailable as a Witness	305
1. Former Testimony Exception [FRE 804(b)(1)]	305
(a) From What Types of Proceedings May the Prior Testimony Come, and Who Must Have Been a Party to Those Proceedings?	307
(b) When Does a Party to a Prior Proceeding (or, in a Civil Case, the Party's Predecessor in Interest) Have an Opportunity and Similar Motive to Examine the Witness?	310
(i) Prior trial	311
(ii) Prior grand jury proceeding	314
(iii) Prior preliminary hearing	317
(iv) Suppression hearings	317
(v) Depositions	317
(c) Against Whom May Former Testimony Be Introduced?	317
(i) Criminal proceedings	318
(ii) Civil proceedings	318
2. Dying Declaration Exception [FRE 804(b)(2)]	319
(a) Belief That Death Is Imminent	321
(b) Statement Regards Cause or Circumstances of Death	322
3. Declaration Against Interest Exception [FRE 804(b)(3)]	323
(a) When Is a Statement Against the Declarant's Interest?	325
(i) What interests must be negatively impacted?	325
(ii) When is a statement <i>against</i> the declarant's interest?	325

(b) What Type of Corroboration Is Required When a Statement That Subjects the Declarant to Criminal Liability Is to Be Admitted in a Criminal Case?	329
(c) Confrontation Clause Overlay	329
4. Statements of Personal or Family History Exception [FRE 804(b)(4)]	331
5. Forfeiture By Wrongdoing Exception [FRE 804(b)(6)]	334
(a) Party Against Whom Statement Is to Be Admitted Wrongfully Caused or Acquiesced in Someone Else Wrongfully Causing the Declarant's Unavailability	335
(b) Party Intended to Cause the Declarant's Unavailability	337
Part C: The Residual Hearsay Exception [FRE 807]	338
Chapter 9 The Constitutional Overlay	345
Part A: Constitutional Limitations on the Use of Out-Of-Court Statements	346
1. The Law Before <i>Crawford</i>	347
2. <i>Crawford</i>	348
3. Interpreting <i>Crawford</i> : Testimonial Versus Nontestimonial Statements	355
(a) When Is an Out-of-Court Statement "Testimonial"?	356
(i) "Testimonial" versus "nontestimonial" in the context of police interviews	356
(ii) "Testimonial" versus "nontestimonial" in the context of laboratory reports	362
(iii) "Testimonial" versus "nontestimonial" in the context of statements to private persons	370
(b) When Does a "Testimonial" Statement Satisfy <i>Crawford</i> 's Requirements?	373
(i) <i>Crawford</i> 's Stated Exception	374
(ii) Forfeiture of Rights Under <i>Crawford</i>	374
(iii) Categorical/Common Law Exceptions to <i>Crawford</i>	378
Part B: Limitations on the Admission of Evidence During Joint Criminal Trials (<i>Bruton</i> Issues)	380
Part C: Face-To-Face Confrontation and the Confrontation Clause	382
Part D: Compulsory Process	384
Part E: Due Process	385
Chapter 10 Competency of Witnesses	387
Part A: The General Presumption in Favor of Competency	388
1. The Common Law Approach	388
2. The Four-Pillared Modern Approach to Competency	389

Contents	xxi
Part B: Assuring the Competency of Witnesses	390
1. How the Federal Rules of Evidence Implement the Four Pillars	390
(a) Sincerity	390
(b) Perception	391
(c) Recollection and Narration	392
2. Situations in Which Competency Issues Arise with Frequency	392
(a) Child Witnesses	393
(b) Witnesses with Mental Illness	396
(c) Witnesses Under the Influence of Drugs or Alcohol	397
(d) Hypnotized Witnesses	398
3. Procedures for Assessing a Witness’s Competency to Testify	398
Part C: Special Rules of Competency	399
1. Lawyers as Advocates and Witnesses	399
2. Judges	400
3. Jurors	401
(a) During the Trial	402
(b) Using Jurors’ Testimony to Impeach Their Verdict	402
4. Persons Challenging a Decedent’s Will	415
Chapter 11 Impeachment of Witnesses	419
Part A: General Impeachment	422
1. Bias and Motive	423
2. Defects in Perception and Recollection	428
3. Character for Untruthfulness	429
(a) Prerequisites	429
(b) How Is Character for Untruthfulness to Be Proven?	431
(i) Reputation evidence	431
(ii) Opinion evidence	431
(iii) Evidence of specific instances of untruthfulness	432
(A) Eliciting specific instances on cross-examination	433
(I) Regarding the witness being impeached	433
(II) Regarding another witness	433
(B) Introducing extrinsic evidence of felony convictions	437
4. Demeanor	446
Part B: Specific Impeachment	450
1. Prior Inconsistent Statements	451
(a) Inconsistency	451
(b) Not “Collateral”	453

(c) Not Barred by Another Policy	454
(d) If the Witness Is Testifying at Trial, the Opportunity to Explain or Deny the Prior Inconsistent Statement	454
2. Contradiction by Other Evidence	456
(a) Not “Collateral”	457
(b) Not Barred by Another Policy	458
Part C: Rehabilitating Credibility	459
1. The “No Bolstering” or “Bad Before Good” Rule	459
2. Rehabilitating with Specific Types of Evidence	460
(a) Prior Consistent Statements	460
(b) Character for Truthfulness	460
(i) Prerequisites	460
(ii) How is character for truthfulness to be proven?	462
(c) Other Types of Rehabilitative Evidence	462
Part D: Forbidden Attacks	463
1. Religious Beliefs or Opinions	463
2. Other Forbidden Topics	464
Chapter 12 Lay and Expert Testimony	465
Part A: Lay Opinion Testimony [FRE 701 and FRE 602]	468
1. Personal Knowledge	469
2. Helpful to Understanding the Lay Witness’s Testimony	470
3. Not “Based on Scientific, Technical, or Other Specialized Knowledge”	471
Part B: Expert Testimony [FRE 702 Through FRE 706]	475
1. Proper Subject for Expert Testimony	478
(a) Based on Scientific, Technical, or Other Specialized Knowledge	479
(b) Helpful to the Trier of Fact	481
2. Qualifications of the Expert	482
3. Proper Basis for Expert Opinion Testimony	484
(a) Factual Basis for the Expert’s Opinion	484
(i) Which “facts and data” may an expert witness <i>rely</i> on?	484
(ii) Which “facts and data” may an expert witness <i>relay</i> to the trier of fact?	485
(b) Methodological Basis for the Expert’s Opinion	489
(i) Expert testimony based on scientific knowledge	490
(ii) Expert testimony based on nonscientific knowledge (that is, based on technical or other specialized knowledge)	500
(iii) New frontiers in expert testimony	505

Contents	xxiii
(A) Eyewitness identification experts	505
(B) Brain scan experts	506
4. Additional Rules Governing Experts	506
(a) Opinions on Ultimate Issues	506
(b) Court-Appointed Experts	510
Chapter 13 Authentication, the Best Evidence Rule, and Demonstrative Evidence	515
Part A: Authentication	516
1. General Principles	516
2. Authenticating Documentary Evidence	520
(a) Self-Authenticating Documents	520
(b) Authenticating Documents with Proof	523
(i) Testimony by someone who is familiar with the document	523
(ii) Circumstantial evidence of authenticity	524
(iii) Handwriting match	524
(iv) Ancient documents	524
(v) Public records	524
(vi) Documents produced by a system or process	525
(vii) Other statutes or rules authorizing authentication	525
(viii) Electronically stored documents	525
(ix) Documents pulled from the Internet	528
3. Authenticating Evidence (Other Than Documents)	529
(a) Physical Evidence (That Is, Objects)	529
(b) Mechanical/Computer/System Processes	530
(c) Telephone Calls and Other Voice Identifications	531
(d) Photographs and Sketches	532
(e) Transcripts	534
Part B: The Best Evidence Rule	535
1. The Rule Itself	536
(a) Prerequisites	537
(b) The Original Is Required	542
2. Exceptions to the Best Evidence Rule	544
(a) When Documents Other Than the “Original” May Be Used	544
(b) When Testimonial Evidence or Other Evidence Aside from Duplicates and Copies May Be Used	546
(i) When all the originals are lost or destroyed	547
(ii) When the original is beyond the reach of the court’s process	548

(iii) When the evidence is to be admitted against a party who had control over the original	548
(iv) When the evidence is pertinent only to a “collateral” issue	548
(v) Summaries of voluminous writings, recordings, or photographs	549
(vi) “Eat your words” exception	550
Part C: Demonstrative Evidence	551
1. Requirements for Demonstrative Evidence in General	554
2. Specific Types of Demonstrative Evidence	554
(a) Experiments	554
(b) Jury Views	557
(c) Scientific Demonstrations	557
Chapter 14 Burdens of Proof, Presumptions, and Judicial Notice	559
Part A: Burdens of Proof	560
1. Burden of Production	560
2. Burden of Persuasion	561
3. Standards of Proof	561
Part B: Inferences and Presumptions	563
1. Inferences	563
2. Presumptions	564
(a) Conclusive (or Mandatory) Presumptions	568
(b) Rebuttable (or Permissive) Presumptions	569
(i) Affecting the burden of production (“bursting-bubble” presumptions)	569
(ii) Affecting the burden of persuasion	573
Part C: Judicial Notice	575
1. To What Types of Facts Does the Mechanism of Judicial Notice Apply?	577
2. What Showing Does FRE 201 Require Before a Court May Judicially Notice an Adjudicative Fact?	577
3. What Procedures Must a Trial Judge Follow Before Taking Judicial Notice?	581
4. What Is the Effect of Taking Judicial Notice?	581
Chapter 15 Privileges	583
Part A: The Mechanics of Privileges	585
1. Choice of Law	585
2. FRE 501 and the Common Law of Privileges	586

Contents	xxv
3. Prerequisites/Elements, Assertion, and Waiver of Privileges	586
4. The Constitutional Override	589
Part B: Lawyer-Related Privileges	590
1. Attorney-Client Privilege	590
(a) Prerequisites/Elements	592
(i) Confidential communications	592
(ii) Between a lawyer and a client	594
(b) Mechanics	598
(i) Holder	598
(ii) Failure to assert/waiver	598
(iii) Exceptions	599
2. Work Product “Privilege”	601
Part C: The Spousal Privileges	602
1. The Spousal Testimonial Privilege	602
(a) Prerequisites/Elements	603
(b) Mechanics	603
(i) Holder	603
(ii) Exceptions	605
2. The Spousal Communications Privilege	605
(a) Prerequisites/Elements	606
(b) Mechanics	606
(i) Holder(s)	606
(ii) Exceptions	606
Part D: The Psychotherapist-Patient Privilege	607
1. Prerequisites/Elements	607
2. Mechanics	607
(a) Holder	607
(b) Exceptions	608
Part E: Other Commonly Encountered Privileges	609
1. The Clergy-Penitent Privilege	609
2. The Physician-Patient Privilege	610
3. The Journalist–Confidential Source Privilege	610
4. Governmental Privileges	610
5. The Official Information/Informant’s Identity Privileges	611
Part F: The Privilege Against Self-Incrimination	611
1. The Testimonial Privilege	612
(a) Prerequisites/Elements	612
(b) Mechanics	612

2. The Evidentiary Privilege	613
(a) Prerequisites/Elements	613
(i) “Testimonial”	613
(ii) “Compelled”	614
(iii) “Incriminating”	614
(b) Mechanics	615
(i) Holder	615
(ii) Failure to assert and waiver	619
Chapter 16 Pulling It All Together	623
Table of Authorities	625
Table of Cases	627
Table of Rules, Statutes, and Constitutional Provisions	635
Index	641