

SUMMARY OF CONTENTS

	<i>Contents</i>	<i>ix</i>
	<i>Preface</i>	<i>xxi</i>
Chapter 1:	The Process of Proof	1
Chapter 2:	Relevance	81
Chapter 3:	The Hearsay Rule	135
Chapter 4:	Evidence of Character, Uncharged Misconduct, and Similar Events	317
Chapter 5:	Exclusion of Other Relevant Evidence for Reasons of Policy	387
Chapter 6:	Examining Witnesses; Attacking and Supporting the Credibility of Witnesses	427
Chapter 7:	Lay and Expert Opinion Evidence	509
Chapter 8:	Privileges	557
Chapter 9:	Burdens of Proof and Presumptions	625
Appendix A:	The Federal Rules of Evidence	645
Appendix B:	Unadopted Federal Rules of Evidence	789
	<i>Table of Cases</i>	<i>799</i>
	<i>Table of Federal Rules of Evidence</i>	<i>803</i>
	<i>Table of Authorities</i>	<i>807</i>
	<i>Index</i>	<i>819</i>



CONTENTS

<i>Preface to the Second Edition</i>	xxi
<i>Preface to the First Edition</i>	xxiii
Chapter 1: The Process of Proof	1
A. The Trial: An Overview	1
1. Introduction	1
2. What Is “Evidence”?	4
3. The Rules of Evidence	5
4. The Stages of the Trial	7
a. Pretrial Motions	8
b. Jury Selection	9
c. Preliminary Jury Instructions	10
d. Opening Statements	10
e. Presentation of Evidence and Limiting Instructions	11
i. <i>Plaintiff’s or Prosecution’s Case-in-Chief</i>	14
ii. <i>Defendant’s Case-in-Chief</i>	15
iii. <i>Plaintiff’s or Prosecution’s Rebuttal Case and Defendant’s Surrebuttal</i>	15
f. Motions after the Presentation of Evidence	15
g. Closing Arguments	16
h. Jury Instructions	16
i. Jury Deliberation and Verdict	17
j. Post-trial Motions and Entry of Judgment	17
B. Appellate Review of Evidentiary Issues	18
C. Sources of Evidence and the Nature of Proof	25
1. Introduction	25
2. Witnesses: The Requirements of Competency, Personal Knowledge, and Oath or Affirmation	26
a. “Competent to Be a Witness”	26
b. Competency of Judge, Jurors, and Attorneys <i>Tanner v. United States</i>	28
c. The Competency of a Witness Whose Recollection Has Been Refreshed Through Hypnosis	33
<i>People v. Shirley</i>	35
<i>Rock v. Arkansas</i>	38
d. The “Personal Knowledge” Requirement	41
e. The “Oath or Affirmation” Requirement	45
3. Real Evidence: Authentication and the Best Evidence Rule	46

a.	Introduction: Tangible Evidence	46
b.	Authentication	47
i.	<i>Introduction</i>	48
ii.	<i>Authentication of Photographs</i>	50
iii.	<i>Authentication by Chain of Custody</i>	52
iv.	<i>Examples of Authentication under Rule 901(b)—Problems Posed by New Technologies</i>	55
United States v. Simpson	55	
United States v. Jackson	57	
v.	<i>Self-authentication</i>	59
c.	The Best Evidence Rule	63
i.	<i>The Basic Rule</i>	63
ii.	<i>Exceptions to the Best Evidence Rule</i>	65
4.	Judicial Notice	68
a.	Adjudicative Facts	69
Rae v. State	71	
b.	Judicial Notice of Law	74
c.	Judicial Notice of Legislative Facts	75
5.	Burdens of Proof and Presumptions: An Introduction	78
Chapter 2:	Relevance	81
A.	The Definition of Relevant Evidence	81
1.	The Basic Definition	81
2.	Relevance Distinguished from Probative Value	83
3.	Materiality	83
4.	A Closer Look at the Reasoning Process	84
State v. Jaeger	86	
B.	Balancing Probative Value Against Dangers	93
1.	Introduction	93
2.	The “Probative Value” Side of the Equation	94
3.	The “Dangers” Side of the Equation	94
4.	Conducting the Balance	96
Feaster v. United States	97	
C.	Undisputed Facts	101
Old Chief v. United States	102	
D.	Probabilistic Evidence	110
Adams v. Ameritech Services, Inc.	113	
David H. Kaye, Science in Evidence	117	
Richard E. Meyers II, Detector Dogs and Probable Cause	117	
United States v. Shonubi	119	
E.	A Special Application of Relevance Doctrine: Preliminary Questions of Fact	121
1.	Introduction: The Court’s Involvement in Fact-finding	121
2.	Preliminary Questions of Fact: General Doctrine	122
3.	Preliminary Questions of Fact: Conditional Relevancy	123

4. Comparing the Court's Role in Cases Falling into Rule 104(a) with Its Role in Cases Governed by Rule 104(b)	126
5. What If a Preliminary Fact Is the Same as an Ultimate Fact the Jury Must Decide?	128
6. Caveats	129
Chapter 3: The Hearsay Rule	135
A. Introduction: The Idea Behind the Hearsay Rule	135
B. The Rule	140
1. "Statement"	141
2. "Declarant"	142
3. Statement Made "Other Than While Testifying at the Trial or Hearing"	145
4. Statement "Offered in Evidence to Prove the Truth of the Matter Asserted"	146
C. Utterances and Conduct That Are Not Hearsay	149
1. Situations in Which the Utterance or Conduct Constitutes "Words of Independent Legal Significance" or "Verbal Acts"	150
2. Situations in Which the Value of the Evidence Derives from the Fact That Words Were Spoken, Not from the Truth of the Matter Asserted	152
3. Situations in Which the Words Are Being Offered to Show Their Effect on the Listener Rather Than to Prove the Truth of the Matter Asserted	153
4. Situations in Which the Words or Conduct Constitute Circumstantial Evidence of the Declarant's State of Mind	156
Shepard v. United States	160
5. Situations in Which Words or Conduct Are Not Assertive or Are Assertive of Something Other Than What They Are Offered to Prove	164
D. An Alternative Model of Hearsay	167
E. A Caveat: Other Statements That Are Not Hearsay under Rule 801	170
F. Hearsay within Hearsay	170
G. Hearsay versus Personal Knowledge Objections	173
H. Review: Hearsay or Not Hearsay	174
I. Rationales for Exceptions to and Exemptions from the Hearsay Rule	180
J. Exemptions from the Hearsay Rule: Party Admissions	181
1. Simple Party Admissions	182
2. Adoptive Admissions	185

3. Vicarious Party Admissions (Authorized and Agency Admissions)	189
4. Co-conspirator Statements	193
K. Exemptions from the Hearsay Rule: Prior Statements of Witnesses	196
1. Introduction	196
2. Prior Inconsistent and Prior Consistent Statements: A Primer	197
3. Statements of Prior Identification	200
L. Exceptions to the Hearsay Rule: Form and Structure	204
M. Exceptions to the Hearsay Rule: Availability of Declarant Immaterial	205
1. Time-Sensitive Statements (Rules 803(1) and (2))	205
a. Excited Utterances (Rule 803(2))	206
b. Present Sense Impressions (Rule 803(1))	207
2. Statements Concerning State of Mind and Physical Condition	212
a. Statements of Declarant's Then-existing State of Mind or Physical Condition (Rule 803(3))	212
Mutual Life Ins. Co. of New York v. Hillmon	215
b. Statements for Purposes of Medical Diagnosis or Treatment (Rule 803(4))	221
3. Recorded Recollection (Rule 803(5))	225
a. The Rule	225
b. Distinguishing Recorded Recollection from Refreshing a Witness's Recollection	227
4. Business and Public Records	232
a. Records of Regularly Conducted Activity (Rule 803(6))	233
b. Public Records and Reports (Rule 803(8))	239
c. Absence of Entry in Business or Public Record (Rules 803(7) and 803(10))	242
N. Exceptions to the Hearsay Rule: Unavailability of Declarant Required	244
1. Unavailability	244
2. The Former Testimony Exception (Rule 804(b)(1))	248
3. The Dying Declaration Exception (Rule 804(b)(2))	255
4. The Declaration Against Interest Exception (Rule 804(b)(3))	258
a. Rationale for the Exception	259
b. Nature of "Interests" Covered by the Exception	259
c. The Standard of the Rule	261
d. Applicability of the Exception to Neutral or Self-serving Statements	263
Williamson v. United States	264
e. Comparison to Party Admissions	269

5. The Forfeiture by Wrongdoing Exception (Rule 804(b)(6))	270
United States v. Cherry	271
O. The Residual Exception (Rule 807)	276
1. Background	277
2. Requirements for Application of the Residual Exception	280
3. The “Near Miss” Problem	282
4. Is the Residual Exception Party-neutral?	284
P. Miscellaneous Exceptions	286
1. Records of Vital Statistics (Rule 803(9)), Religious Organizations (Rule 803(11)), and Marriage, Baptismal, and Similar Certificates (Rule 803(12))	286
2. Family Records (Rule 803(13)) and Statements of Personal or Family History (Rule 804(b)(4))	287
3. Records of Documents Affecting an Interest in Property (Rule 803(14)) and Statements in Such Documents (Rule 803(15))	288
4. Statements in Ancient Documents (Rule 803(16))	289
5. Market Reports and Commercial Publications (Rule 803(17))	290
6. Learned Treatises (Rule 803(18))	290
7. Reputation (Rules 803(19), 803(20), and 803(21))	291
8. Judgment of Previous Conviction (Rule 803(22)) and Concerning Personal, Family, or General History, or Boundaries (Rule 803(23))	292
Q. The Hearsay Rule and the Constitution	293
1. Introduction	293
2. History and Purposes of the Right of Confrontation	295
3. Current Supreme Court Jurisprudence About the Relationship Between Hearsay and the Confrontation Clause	298
4. Constitutional Limits on the <i>Exclusion</i> of Hearsay	306
Chambers v. Mississippi	307
Chapter 4: Evidence of Character, Uncharged Misconduct, and Similar Events	317
A. Introduction	317
B. Character Evidence	318
1. Introduction	319
2. Character Evidence Offered for Non-credibility Purposes	321
a. Character Defined	321
b. Potential Uses of Character Evidence	323

c.	Methods of Proving Character: Rule 405	324
d.	Proving Character When Character Is “In Issue”	327
e.	Proving Character as Circumstantial Evidence of Out-of-court Conduct	329
i.	<i>The Basic Rule</i>	329
ii.	<i>Evidence of a Criminal Defendant’s Character</i>	331
(a)	In general	331
	Michelson v. United States	331
(b)	Sexual assault and child molestation cases	338
iii.	<i>Evidence of an Alleged Crime Victim’s Character</i>	342
(a)	Defendant’s proof of an alleged crime victim’s character	342
(b)	Special rule for rape victims	344
	Olden v. Kentucky	346
(c)	Additional exceptions to the exclusion of character evidence to prove conduct; special rule for homicide prosecutions	349
iv.	<i>Illustrating the Basic Rules</i>	350
C.	Other Crimes, Wrongs, or Acts	354
1.	Introduction	354
2.	The Basic Principle	355
	Robbins v. State	359
3.	What Is a “Crime, Wrong, or Act”?	365
4.	Timing of Uncharged Misconduct	366
5.	Degree of Required Similarity Between Charged and Uncharged Conduct	367
6.	Purposes for Which Evidence May Be Offered	370
7.	Procedure for Determining Admissibility	371
8.	Putting It All Together	373
9.	Judge/Jury Functions: Required Quantum of Proof of Uncharged Misconduct	374
	Huddleston v. United States	375
D.	Habit Evidence	380
E.	Evidence of Similar Events	382
Chapter 5:	Exclusion of Other Relevant Evidence for Reasons of Policy	387
A.	Introduction	387
B.	Subsequent Remedial Measures	388
1.	Rationale for the Rule	388
2.	Efficacy and Necessity of Exclusionary Rule	388
3.	Limited Exclusionary Principle	389
4.	Meaning of “Negligence [or] Culpable Conduct”	391
5.	What Is a “Subsequent Remedial Measure”?	391

6. Timing of Subsequent Remedial Measure	391
7. Admissibility to Prove “Feasibility of Precautionary Measures”	392
Tuer v. McDonald	393
8. Admissibility to Impeach	398
Tuer v. McDonald	399
9. Other Permissible Uses of Subsequent Remedial Measures Evidence; Viability of the Exclusionary Rule	400
C. Compromise and Payment of Medical and Similar Expenses	402
1. Introduction	402
2. Rationales for the Rule	404
3. Special Situation: The Biased Witness	404
D. Plea Evidence	410
1. Unwithdrawn Guilty Pleas	410
2. Withdrawn Guilty Pleas	411
3. Pleas of Nolo Contendere	412
4. Statements Made at Hearing to Enter Plea	412
5. Statements Made in the Course of Plea Bargaining	412
6. Exceptions to Rule Excluding Statements Made in Formal Plea Hearings or during Plea Bargaining	413
7. Impeachment Use of Plea Evidence	414
8. Waiver of the Rule’s Protections	414
United States v. Mezzanatto	415
E. Evidence of Liability Insurance	422
1. Rationale for the Rule	422
2. Limited Exclusionary Principle	423
Chapter 6: Examining Witnesses; Attacking and Supporting the Credibility of Witnesses	427
A. Mode of Witness Examination	427
1. Control over Mode and Order of Interrogating Witnesses and Presenting Evidence	427
2. Scope of Cross-examination	430
3. Leading Questions	431
B. Impeachment: Introduction	433
C. Who May Impeach	436
United States v. Hogan	437
D. Impeachment by Methods Not Covered by Specific Common Law or Statutory Rules	440
1. Introduction	440
2. Factors Affecting the Witness’s <i>Opportunity to Perceive</i>	441
3. Factors Affecting the Witness’s <i>Capacity to Perceive</i>	441

4. Factors Affecting the Witness's <i>Capacity to Recollect</i>	442
5. Factors Affecting the Witness's <i>Capacity to Narrate</i>	443
6. Appearance and Status Factors	443
7. Demeanor	443
8. Plausibility of the Witness's Testimony	444
9. Illustration	444
E. Witness's Character	448
1. Introduction	448
2. Reputation or Opinion Concerning Truthfulness	450
a. Reputation and Opinion	450
b. Character for Truthfulness or Untruthfulness	451
c. Evidence of Truthfulness Admissible Only after Attack on Character for Truthfulness	451
3. Conduct Probative of Truthfulness	452
a. Rationale for Admitting Evidence of Witness Conduct Probative of Truthfulness	453
b. Extrinsic Evidence Inadmissible	453
c. Discretion to Admit Specific Instances Probative of Truthfulness or Untruthfulness	454
4. Conviction of Crime	456
a. Rationale for Admitting Conviction Evidence to Impeach	457
b. Scope of Rule 609	458
c. Rule 609(a) — General Rule	459
d. Rule 609(b) — Old Convictions	461
e. Rule 609(c) — Effect of Pardon, Annulment, or Certificate of Rehabilitation	462
f. Rule 609(d) — Juvenile Adjudications	462
g. Rule 609(e) — Pendency of Appeal	462
h. Preserving the Right to Appeal under Rule 609 Luce v. United States	463
5. Religious Beliefs or Opinions	465
F. Bias, Motive, and Interest	467
1. Effects of Bias	467
2. Proving Bias	467
3. Admissibility of Bias Evidence	468
4. Admitting Extrinsic Evidence of a Witness's Prior Statements Revealing Bias United States v. Abel	469
G. Impeachment by Contradiction	474
1. Introduction	474
2. Common Law Rule Restricting Impeachment by Contradiction	475
3. Modern Treatment of the Rule	477
4. Overlap with Other Impeachment Methods	477
H. Prior Statements of Witnesses	479
1. Prior Inconsistent Statements	479
a. Introduction	480

b.	Substantive Use of Prior Inconsistent Statements	480
	United States v. Owens	482
c.	Impeachment Use of Prior Inconsistent Statements	484
d.	A Note about Limited Admissibility	487
2.	Prior Consistent Statements	490
a.	Introduction	490
b.	Foundation for Admission of Prior Consistent Statements	491
	Tome v. United States	493
c.	Purposes for Which Prior Consistent Statements May Be Offered; Comparing Prior Consistent and Prior Inconsistent Statements	496
3.	Illustrating the Use of Prior Consistent and Inconsistent Statements	498
I.	Transcript Exercise: Emphasis on Witness Impeachment	502
Chapter 7:	Lay and Expert Opinion Evidence	509
A.	Introduction	509
B.	Lay Opinion	510
1.	Function of Rule 701: Requiring the Witness to Be More Specific	510
2.	Who May Give Lay Opinions?	510
3.	What Is a Proper Basis for Lay Opinion Testimony?	511
4.	When Is Lay Opinion “Helpful”?	512
C.	Expert Opinion	518
1.	Introduction	518
2.	Expert Testimony Must “Assist the Trier of Fact”	519
3.	Expert Witnesses Must Be Qualified	521
4.	Expert Testimony Must Be Reliable: The <i>Daubert</i> Decision	522
	Daubert v. Merrell Dow Pharmaceuticals, Inc.	523
5.	Expert Testimony Must Be Reliable: The <i>Kumho Tire</i> Decision	525
6.	Expert Testimony Must Be Reliable: Problems Applying <i>Daubert/Kumho Tire</i>	526
	United States v. Llera Plaza	527
	Pipitone v. Biomatrix, Inc.	535
7.	Expert Testimony Must Be Reliable: Requirements of Rule 702	539
8.	Expert Testimony Must Have a Proper Basis	542
9.	Expert Testimony: Limits on Opinions Going to Ultimate Issues	547
10.	Expert Testimony: Disclosing Facts Underlying Opinion	551
11.	Expert Testimony: Court-appointed Experts	553

Chapter 8: Privileges	557
A. Introduction	557
B. The Federal Rule	559
C. General Principles	560
1. The Nature of Privileges	560
2. Covered Relationships	561
3. “Confidential Communications”	562
4. Who Can Participate in the Communication?	564
5. “Holder” of the Privilege	565
6. “Waiver” of the Privilege	566
D. The Attorney-Client Privilege	568
1. In General	568
2. Definition of <i>Client</i> and <i>Attorney</i>	569
Upjohn Co. v. United States	570
3. Survival of Attorney-Client Privilege after Death of Client	577
Swidler & Berlin v. United States	578
4. Exceptions to the Attorney-Client Privilege	581
United States v. Zolin	583
5. A Note about the Attorney’s Ethical Obligation of Confidentiality	590
6. A Note about the Attorney Work Product Doctrine	591
E. Medical Privileges	593
1. Physician-Patient Privilege	593
2. Psychotherapist-Patient Privilege	595
Jaffe v. Redmond	596
State v. Agacki	600
F. Clergy Privilege	605
1. In General	605
People v. Edwards	606
2. Exceptions	610
G. Spousal Privileges	612
1. In General	612
2. The Privilege for Confidential Communications between Spouses	612
3. The Adverse Testimony Privilege	613
Trammel v. United States	615
4. Exceptions to the Spousal Privileges	619
H. Miscellaneous Privileges	620
Monica S. Lewinsky, <i>Tell Mama All about It?</i> <i>Not Without a Lawyer: Parents and children</i> <i>shouldn’t be required to testify against</i> <i>each other</i>	621

Contents	xix
Chapter 9: Burdens of Proof and Presumptions	625
A. Burdens of Proof	625
1. Introduction	625
2. Burden of Persuasion	625
a. Specifying the Quantum of Evidence	625
b. Identifying Which Party Bears the Burden	626
3. Burden of Production	627
B. Presumptions	630
1. Inferences and Presumptions	631
2. A Word about “Conclusive” or “Irrebuttable” Presumptions	632
3. Why We Use Presumptions	632
4. How Presumptions Operate: Some Terminology	633
5. Causing a Presumption to Take Effect	633
6. Rebutting Presumptions	634
DeFeo v. Merchant	634
a. What If the Opponent Does Nothing?	636
b. What If the Opponent Only Challenges One or More of the Foundational Facts?	637
c. What If the Opponent Only Challenges the Presumed Fact?	637
d. What If the Opponent Challenges Both the Foundational and the Presumed Facts?	639
e. A Caveat	639
7. Conflicting Presumptions in the Same Case	640
8. Presumptions in Criminal Cases	641
9. Presumptions under the Federal Rules of Evidence	642
Appendix A: The Federal Rules of Evidence	645
Appendix B: Unadopted Federal Rules of Evidence	789
<i>Table of Cases</i>	799
<i>Table of Federal Rules of Evidence</i>	803
<i>Table of Authorities</i>	807
<i>Index</i>	819