

# Evidence

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# Evidence

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## A Problem-Based and Comparative Approach

THIRD EDITION

**Peter Nicolas**

JEFFREY & SUSAN BROTMAN PROFESSOR OF LAW  
UNIVERSITY OF WASHINGTON SCHOOL OF LAW

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*To my family—  
Mom, Dad, Mike & Alex*



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# Preface to the Third Edition

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In the three years since the second edition of this textbook went to press, two key developments—the restyling of the Federal Rules of Evidence and a series of U.S. Supreme Court decisions clarifying the relationship between the Confrontation Clause and the admission of hearsay evidence against criminal defendants—compelled me to produce a new edition of the textbook and its accompanying statutory supplement.

On December 1, 2011, a restyled version of the Federal Rules of Evidence went into effect. The purpose of the restyling of the rules was both to make them easier to understand and to ensure consistent style and terminology throughout. According to the Advisory Committee Notes, the changes are intended to be stylistic only, and are not intended to make any substantive changes.

In addition to revising the text of the rules in the statutory supplement to reflect these changes, all references to the rules have been updated throughout the textbook to be consistent with the new language. Pre-restyling cases have been annotated (with a combination of brackets and editorial footnotes), as have references to the pre-restyling rule numbers and sub-sections in cases in the textbook as well as in the Advisory Committee Notes and legislative history in the statutory supplement.

This new edition of the textbook contains a completely overhauled section on the Confrontation Clause that incorporates edited versions of the U.S. Supreme Court’s most recent decisions—*Melendez-Diaz v. Massachusetts*, *Michigan v. Bryant*, and *Bullcoming v. New Mexico*—as well as in-depth coverage of lower court decisions grappling with the many open questions that the Supreme Court has yet to answer.

This new edition also expands on the second edition’s inclusion of state rules of evidence (and cases interpreting the same) that differ significantly from the federal rules. The expansion is both in terms of the number of rules for which comparative materials are included, as well as the number of states whose rules are included. These materials greatly facilitate discussion of the policies underlying the rules of evidence, and also take on greater importance with the restyling of the federal rules, since virtually no state rule now tracks the language of the restyled federal rules.

In addition, this textbook has been updated throughout to include recent cases grappling with a number of modern social and technological issues that arise in applying the rules of evidence. Examples include edited cases addressing such questions as:

- The admissibility of evidence that the accused is in a same-sex relationship when challenged on Rule 403 grounds;
- The admissibility of electronic evidence—including evidence found on social networking websites—when challenged on authentication or best evidence grounds; and
- The admissibility of evidence that a juror made racially biased comments when challenged on Rule 606 grounds.

Finally, in an effort to lighten things up just a little bit, this new edition contains a series of cartoons by cartoonist-attorney Stu Rees that illustrate a number of the cases and doctrines. The cartoons are not only funny, but sufficiently memorable to help students commit certain doctrines to memory.

In making all of these changes, I was guided by one of the reasons that I decided to write an evidence textbook in the first place: the desire to have a textbook that was short enough to teach from cover-to-cover in a typical evidence course. Accordingly, rather than simply adding the new materials (which would have expanded the book by almost 200 pages in length), I generally followed a rule of “one in, one out.” In other words, for every new page of material added, a page of old material was removed. The result is not only a textbook that continues to be manageable in length, but also one in which all included materials have survived a “hard look” review.

In putting this new edition of the textbook and its accompanying statutory supplement together, I am indebted to my student assistants—Erin Adam, Amy Alexander, Chris Olah, and Walter Smith—who meticulously proofread them from cover-to-cover. I also wish to thank the many students and faculty that use the textbook at law schools throughout the country who have contacted me with helpful suggestions. Finally, I wish to thank the students to whom I teach evidence each year at the University of Washington, upon whom I rely to test out new materials before incorporating them into new editions of the textbook.

Peter Nicolas  
Seattle, Washington  
December 2011

# Preface to the Second Edition

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There have been a number of important developments in the law of evidence since the first edition of this textbook was published in 2005. This new edition incorporates these changes while at the same time adding several new features.

When the first edition of this book went to press, the United States Supreme Court had just issued its landmark decision in *Crawford v. Washington*, which completely re-theorized the relationship between hearsay evidence and the Confrontation Clause. This new edition incorporates key post-*Crawford* decisions, including the Supreme Court's 2006 decision in *Davis v. Washington* and its 2008 decision in *Giles v. California*, as well as several new problems designed to help students navigate the nuances of these decisions.

Since the first edition was published, Federal Rules of Evidence 404, 408, 606, and 609 have been amended, Federal Rule 502 (addressing waiver of the attorney-client privilege and the work-product doctrine) has been enacted into law, and an amendment to Federal Rule 804(b)(3) has been proposed. All of these changes have been incorporated into this new edition of the textbook.

This new edition of the textbook also explores in greater depth the application of the rules of evidence in the modern era in which much evidence is in an electronic form. Accordingly, many of the cases and problems involve the application of the rules of evidence to e-mail messages, chat room conversations, information contained on personal digital assistants (PDAs), and the like.

The problem-based approach of the first edition is not only maintained, but expanded, in this new edition. Twenty-four new in-depth problems have been added, bringing the total number of problems in the book to 114.

A key feature of this new edition is the inclusion of selected state rules of evidence and cases interpreting the same that differ significantly from the Federal Rules of Evidence. These comparative materials are focused on those Federal Rules of Evidence and decisions interpreting the same that are viewed by many commentators as resting on questionable rationales or policies, and are designed to facilitate class discussion about those underlying rationales and policies.

With these changes comes a new title designed to reflect them, with the new edition of the textbook being *Evidence: A Problem-Based and Comparative Approach*.

In putting this new edition of the textbook together, I am indebted to my student assistants, La Rond Baker, Alexander Casey, Blythe Chandler, Jason Voss, and Jennifer Heidt White, who meticulously proofread the new edition from cover-to-cover. I also wish to thank the students in my Autumn 2008 evidence course, who gave these new mate-

rials a trial run and provided me with valuable feedback as I prepared the materials for press.

Peter Nicolas  
Seattle, Washington  
January 2009

# Preface to the First Edition

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One of the biggest challenges facing those who teach the rules of evidence—and by extension those who write textbooks on the subject—is striking the proper balance between the amount of reading assigned to students and the breadth and depth of coverage. The Federal Rules of Evidence—around which this textbook is organized—consist of 67 separate rules, most of which contain multiple sub-rules as well as interpretive ambiguities. While devoting a large number of credit hours to the course in evidence might be the ideal solution for some, the reality is that at most American law schools, no more than three or four credit hours are devoted to the subject. Thus, a major goal of mine in undertaking this project was to provide teachers and students of evidence with a book that comprehensively covers the rules of evidence yet is short enough that it can realistically be taught in three semester hours.

This textbook is comprehensive in that it covers virtually every single one of the federal rules of evidence. Some textbooks attempt to solve the length-coverage dilemma by omitting coverage of those rules deemed to be “less important.” Yet what may as a general matter be unimportant may be of critical importance in any given case that a student may encounter in the future, and lack of exposure to those rules when learning the rules of evidence as a student is likely to translate into lack of awareness when practicing. Accordingly, in my evidence course as well as in this textbook, I cover rules that are typically neglected, such as the so-called “minor” exceptions to the hearsay rule, the rules governing the calling and interrogation of witnesses by judges, and the parent-child and clergy-communicant privileges. My decision to do so is reinforced by stories from former students who have surprised opposing counsel and judges alike by successfully invoking such often-ignored rules.

Yet in providing broad coverage, I did not want to sacrifice depth of coverage. Thus, the textbook digs deep into the nuances of the rules of evidence, raising and attempting to answer such questions as: How does one authenticate an e-mail message? Is a remedial measure undertaken by a third party subject to exclusion under Rule 407? Does the adverse spousal testimony privilege apply in civil cases? When a rule of evidence references state law in cases with multi-state contacts, to *which* state’s law is it referring? Does forensic handwriting analysis satisfy *Daubert*? Is a billboard a “writing” subject to the strictures of the best evidence rule? Can the dying declaration exception to the hearsay rule be invoked in *attempted* murder cases?

By using a balanced mix of cases, problems, textual narrative, and explanatory notes, the textbook is able to provide broad and deep coverage of the rules of evidence without sacrificing brevity. Chapter 1, as an example, contains just six edited cases but has eleven problems, forty-three explanatory notes, and several pages of textual narrative. Learning to read judicial decisions is an important skill, which is why there are several edited cases in each chapter, yet it is but one of many skills that students must master. Moreover, cases are an inefficient vehicle for conveying large amounts of information. Accordingly, cases are used sparingly, and when used, are carefully chosen and rigorously edited.

The approach used in most sections of the textbook thus proceeds as follows. First, students are given several pages of introductory narrative designed to introduce them to the rule covered in that section, including its history and underlying policy justifications. That narrative is followed by a problem or series of problems, designed for use in class as a vehicle for raising and addressing the conceptual ambiguities that arise in interpreting and applying the rule. Resources for answering those questions are provided by the materials following the problems, usually a case or two followed by a series of explanatory notes.

The extensive use of problems throughout the textbook—ninety in-depth problems in all, or on average about two or three for each class hour—allows students to master the *application* of the rules of evidence. By the time law students take the course in evidence, most of them have learned how to read cases and to recite the holdings of those cases. Yet many students find it difficult to apply those principles when presented with alternative factual scenarios. These problems thus provide students with ample opportunity to hone their skills in applying the rules of evidence and to receive feedback on the same.

The topics in the textbook are organized in the order in which I normally teach them, but the chapters are sufficiently independent of one another that they can be taught in a different sequence without difficulty. Chapter 1 introduces the basic concepts of relevance and prejudice. Chapter 2, which covers the rules governing authentication of evidence, logically follows from Chapter 1's discussion of conditional relevance. Chapter 3 then introduces the categorical rules—such as those addressing character evidence, subsequent remedial measures, and the like—that refine the concepts of relevance and prejudice introduced in Chapter 1. The focus of Chapter 4 is on witnesses, examining the rules governing their competency, qualification, and examination. Chapter 5 turns to privileges, with a focus on the attorney-client, spousal, psychotherapist-patient, parent-child, and clergy-communicant privileges. The next two chapters cover the two sets of rules that express a preference for what is thought to be superior evidence, the best evidence rule in Chapter 6 followed by the hearsay rule, its exceptions, and the Confrontation Clause in Chapter 7. The following two chapters examine two methods of shortcutting normal methods of proof, with Chapter 8 focusing on the rules governing judicial notice and Chapter 9 examining evidentiary presumptions. Chapter 10 examines the various methods of impeaching and rehabilitating witnesses, and finally, Chapter 11 examines the rules governing appellate review of evidentiary rulings.

Throughout, the textbook incorporates recent changes in substantive law as well as changes in technology that raise special challenges in applying the rules of evidence. The book includes the Supreme Court's 2004 decision in *Crawford v. Washington*, which redefined the relationship between the hearsay rule and the Confrontation Clause, as well as notes on post-*Crawford* developments in the lower courts. The book also examines proposed changes to Rules 404, 408, 606, and 609 that are being considered as this book goes to press in early 2005. The book includes an enriched section on scientific evidence that considers the application of the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* to a variety of forms of expert testimony, including DNA analysis, fingerprint analysis, handwriting analysis, and polygraph testing, as well as to expert testimony on eyewitness reliability and battered woman syndrome. In addition, the textbook considers the rules of evidence in a modern context by considering their application to electronic evidence, such as e-mail messages, postings on the Internet, and output generated by global positioning system devices and computers.

In putting this textbook together, I am indebted to several student assistants who provided extraordinary assistance in researching and proofreading the book. Two student assistants in particular—Matthew Koenigs and Elizabeth A. Tutmarc—were involved in the project from start to finish, each researching several chapters of the book and each meticulously proofreading the entire book. In addition, student assistants Matthew W. Daley, Kyla C.E. Grogan, and Sarah Shirey each played a key role in researching individual chapters of the book. I also wish to thank Ms. Tutmarc and my secretarial assistant, Wendy Condiotty, who together played a crucial role in researching and editing the separate statutory supplement for this textbook. Finally I wish to thank the students in my Autumn 2004 evidence course, who gave these materials a trial run and provided me with valuable feedback as I prepared the materials for press.

Peter Nicolas  
Seattle, Washington  
January 2005





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