Appendix B: Introduction to the Study of Evidence

1. INTRODUCTION

How to Use The Textbook. Your textbook uses the problem method. We present the evidence rules and explain them in straightforward text, somewhat like a treatise or hornbook, rather than by requiring you to extract doctrinal points from judicial opinions. To enable you to put the rules into practice, and explore their limits and applications, we rely on realistic hypothetical problems. Our approach reflects our considered judgment that the problem method is preferable to the case method for studying evidence. Since your professor assigned this book, undoubtedly she or he agrees. We include just a handful of case excerpts in this book, doing so only where a case is critical to fully presenting a significant doctrine, or where the fact pattern is particularly useful to demonstrating a particular application of the rule.

We cover most of the Federal Rules of Evidence in this book, but have been selective, omitting some of the less important ones. Our general approach is to start by reproducing the text of the rule, and in the next section, explaining its core meaning and application. In sections after that, where the rule warrants it, we discuss more difficult applications of the rule, problems and doubts surrounding the rule, its underlying policies, and practice-related issues. After each significant chunk of rule-explanation material (typically around five to 12 pages), we summarize the material in “Key Points,” and the present the hypothetical problems. These problems are interspersed throughout the book, starting in Chapter 3. At the end of each Chapter (again, starting with Chapter 3), we offer “assessments,” typically multiple choice or true/false questions testing a core application of the rule. Answers to all the assessment questions are found in the back of the book.

Studying Evidence. Techniques for studying the law of evidence depend heavily on how your professor teaches the course. But we can offer some general ideas that are likely to work in most classes. Law students tend to rely heavily on course outlines as a study tool, whether commercially prepared or prepared by themselves or classmates. While commercial outlines may be helpful for casebooks, where the doctrinal takeaway from a given case may be unclear, we think they are less useful in connection with this book. We don’t hide the ball in presenting black letter doctrine; it’s challenging enough to apply the rule to the problems.

As for an outline you prepare yourself, our suggestion is that you be strategic. If you write an outline that simply summarizes black letter evidence law, you may gain something from your efforts, but it may inefficient. You’ll wind up with something that looks a lot like a slightly annotated copy of the Federal Rules of Evidence themselves. Instead, consider the following approach. For each 1-hour assignment, write the number of the rule you studied (e.g., FRE 602) and a short phrase identifying its gist (e.g., “firsthand knowledge”). Copy a bullet point version of the rule if you like—we do this in the book, and the formatting of the many rules in the FRE is pretty much bullet-pointed. More important is to bullet point any doctrinal points that are not obvious from the text of the rule—that have been added by judicial interpretation, for
example.

So far, we’ve suggested nothing different from a normal outline. Here’s where our suggestion differs, and ties into the problem method. For each rule, you should do two additional things. First, write up a short fact pattern that captures your understanding of the core application of the rule. Then write up at least 1-2 fact patterns that illustrate problematic or uncertain applications of the rule. You can draw these fact patterns from the problems in the book, from problems supplied by your professor, or (even better) from problems you make up yourself. When you write up the fact pattern, the key point is that you write in your own words how the rule applies, or the arguments for and against applying the rule to the fact pattern. This approach will help your learning and your exam preparation.

**Reading the “Restyled” FRE.** While the Federal Rules of Evidence are by no means perfect in the way they’re written, they are more compact and well-organized than many other federal codes and rules regulating some aspect of litigation. To give yourself an overview, you should try to become familiar with the FRE’s table of contents. There are eleven main sections (called “Articles”), each dealing with a separate subject matter. The rules for the most part attempt to explain themselves in straightforward language, giving you a good starting point to study their applications and difficulties.

Another thing you should know is that at the end of 2011, the FRE were “restyled.” That is to say, the pre-2011 version of the FRE was edited to express the rules in plainer language. In addition, some subsection numbering within each of several rules was changed in the hope of making them clearer and more bullet-pointed. These changes necessarily had to go through the amendment process: the rules Advisory Committee proposes changes to the Supreme Court, which reviews and approves them before sending them to Congress for final approval. However, the revisions are called a “restyling” to make clear that the intention was not to make substantive changes to the meaning or interpretation of any rule, but rather to make them easier to read and understand. In a few cases, the restyling attempted to clarify a formerly ambiguous wording by conforming the rule’s new wording to a dominant judicial interpretation.

In this book, we of course reproduce the FRE in their current, “restyled” form. Our explanations and discussions use the current wording and subsection numbering. The reason we bring all this up is to alert you to the fact of the change. Cases decided under the pre-2011 (that is, pre-restyled) rules may have slightly different language and subsection numbering, so we want to make sure you’re not thrown off by this. And you can now understand what we mean later in the text when, on occasion, we explicitly mention the “restyling.”

2. **ADVERSARIAL PRESENTATION OF PROOF: THE IDEA OF COMPETING NARRATIVES AND “THEORY OF THE CASE”**

In the adversary system of trials, the opposing parties each present a narrative or story of civil liability or criminal guilt, or their negations (non-liability or not-guilt). As
Professor Thomas Mauet says, “A jury trial is essentially a competition to see which party’s theory of the case the jury will select as more probably true.” Thomas A. Mauet, Trial Techniques 62 (8th ed. 2010). Trials (1) render a final and binding decision that leads to imposition of the coercive power of the state, and (2) gather facts exclusively from the presentations of adverse parties. Consider how this differs from the many other forms of investigative fact-finding inquiry. Many investigatory processes, like trials, attempt to reconstruct past events. But investigations take a different approach to facts. Investigators examine plausible hypotheses, consider “leads” that are deemed possibly true but that may not be probably true (at least at early stages). In investigations, speculation is a useful tool to generate leads and possible avenues of further inquiry. Investigations need not come to a conclusion. A congressional committee may fail to reach a conclusion or recommend legislation; a police detective may fail to identify a suspect, and leave the case classified as “unsolved.”

Trials thus differ from investigations in two significant ways. First, trials must come to a conclusion. Second, evidence is presented, rather than gathered. This means that the parties are not inquiring into what the facts may be, but claiming what the facts are.

From what may have been several plausible hypotheses in an investigatory stage, parties to a trial are required to have committed themselves to a specific version of events. It is axiomatic in our justice system that a claim is entitled to a remedy only if it is true. While our system of trial and evidence is designed to accommodate the uncertainty inherent in reconstructing past events, it does so by allowing parties to base their claims on proof of what probably happened; but it does not permit parties to assert “possibly-true” alternative claims. [David S. Schwartz, A Foundation Theory of Evidence, 100 Geo. L. J. 95, 126 (2011).]

To see this point, consider an opening statement in a medical malpractice trial in the absence of such a principle:

The defendant may have left a surgical sponge in the plaintiff’s body when the incision was re-sewn—we’re not sure. If he did not, it’s possible that he injured the plaintiff by cutting a nerve. Or maybe it wasn’t a surgery at all; maybe he prescribed unnecessary heart medication. All we know is that he was negligent in some way.

This example is extreme, but you can see the point. If a party “may rely on ways in which the litigated event could have happened . . . , the task becomes one of establishing a probability conditioned on all conceivable evidence. This is obviously a burden that neither party could bear[,]” Ronald J. Allen, The Nature of Juridical Proof, 13 Cardozo L. Rev. 373, 378 (1991). If the claiming party doesn’t know what happened to him, he can’t claim entitlement to a remedy.

The story told by a claiming party at trial must do two things. First, it must commit to a specific, detailed and unique version of events. That doesn’t mean a story that is unusual or unprecedented; nor does it mean that every last detail must be known. Rather it means a showing that the past events allegedly giving rise to guilt or liability occurred in a specific way. It is not enough to have a witness say “the defendant committed robbery” and then rest the case. There must be evidence of a specific robbery that occurred in a specific way on a specific occasion.
Second, the story has to follow a certain structure: it must contain “elements” prescribed by the substantive law. For example, the elements of a contract claim are (1) a contract (consisting of offer, acceptance and consideration), (2) a breach, (3) causation and (4) damages. A good way to think of such legally-required elements is to think of legal claims as recurring genres or types of story. The way that you can recognize a case as a “negligence case” is analogous to the way that you can recognize a movie as a romantic comedy. A movie is a Rom Com if it has the following elements: (1) boy meets girl, (2) the couple falls in love and starts a relationship, (3) the couple has a falling out, and (4) the couple winds up together – typically after a montage set to music of their poignant together moments, followed by a scene in which the boy runs through city streets or drives at great speed to stop the girl from doing the thing that will break them up irrevocably. The details of the story differ, but the presence of those elements defines it as a romantic comedy. Same for negligence, breach of contract, or what have you. The story of negligence, breach of contract, armed robbery, or whatever, must contain facts that establish each of the elements the substantive law requires for that type of legal claim (that genre, if you will). Establishing an element in the previous sentence means meeting the burden of proof. The case-specific facts have to be weighty and detailed enough that a fact-finder could be persuaded that the generic element is probably true. The degree of probability depends on the applicable burden of persuasion.

The story told by the claiming party that meets these two criteria is called the “theory of the case.” A theory of the case “is your side’s version of ‘what really happened.’ ... It must be logical, fit the legal requirements of the claims or defenses, be simple to understand, and be consistent with the jurors’ common sense[.]” Mauet, supra, at 62. Some trial practitioners and practice manuals refer to “theory of the case” in a looser sense, referring to trial tactics and persuasive story-telling. We use it in a more rigorous sense to refer to an implicit requirement. It is a narrative containing all the facts necessary to establish the probable truth of the essential elements of the claim. Viewed this way, the theory of the case is also essential to determine relevance: a relevance argument shows how an item of evidence fits into the offering party’s theory of the case.

Thus far, we’ve been defining “theory of the case” with a focus on the claiming party (the plaintiff or prosecution). For civil defendants, the points made about theory of the case apply equally to their affirmative defenses (because the defendant’s bear the burden of proof). Theory of the case differs slightly for defendants, to the extent that they can claim non-liability or non-guilt based on casting doubt on the claimant’s case. For defendants in this sense, having a theory of the case may be more of a strategic imperative than a formal requirement. Nevertheless, if a defendant offers a counter-theory of the case that includes facts left out of the claimants’ theory of the case, the effect will be to expand the scope of what will be deemed relevant evidence in the litigation.