FEDERAL EVIDENCE

Fourth Edition

By

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PREFACE TO THE FOURTH EDITION

ABOUT THE AUTHORS

Christopher Mueller is the Henry S. Lindsley Professor of Procedure and Trial Advocacy at the University of Colorado Law School, where he has taught since 1985. His areas of concentration are Evidence, Civil Procedure and Complex Civil Litigation. His main area of scholarly research has been Evidence, and he has written widely on topics associated with that subject throughout the last 40 years. His articles deal with privileges, hearsay, character evidence, cross-examination, presumptions, and impeachment of jury verdicts. Mueller has given many presentations to state and federal judges and practitioners in Colorado and elsewhere.

Professor Mueller began the first edition of *Federal Evidence* in 1975, working on that project with his colleague David Louisell, the late Elizabeth Josselyn Boalt Professor of law at Berkeley. David Louisell was also Professor Mueller's teacher and mentor when Mueller studied at Berkeley. The first edition of that book was completed in 1979, several years after Professor Louisell died suddenly. *Federal Evidence* was revised and published in a second edition when Professor Laird C. Kirkpatrick, then of the University of Oregon and now at George Washington University, joined Mueller in this and other projects in 1994. This fourth edition, appearing in 2013, is the product of more than a year of concentrated work by both authors.

Mueller serves on the Colorado Civil Rules Committee and the Colorado Evidence Rules Committee, and is an elected member of the American Law Institute. He is a former chair of the Evidence Section of the American Association of Law Schools. He commented regularly on NPR and other media during the trials of O.J. Simpson and Timothy McVeigh, and the Ramsey investigation in Boulder. He has also served on the faculty of the National Judicial College, where he taught advanced evidence courses to judges. Mueller is a graduate of Haverford College and holds a law degree from the University of California at Berkeley (Boalt Hall). Mueller has also taught in the law schools of the University of Wyoming (1972-1981), Emory University (1981-1982), and the University of Illinois (1982-1985). After law school he practiced law for Pillsbury, Madison & Sutro in San Francisco (1969-1973).

Laird C. Kirkpatrick is the Louis Harkey Mayo Research Professor of Law at the George Washington University Law School in Washington, D.C. He is the former Philip H. Knight Dean of the University of Oregon Law School, where he

was also the Hershner Professor of Jurisprudence for many years. He previously served as Counsel to the head of the Criminal Division, U.S. Department of Justice, as a Commissioner ex officio on the United States Sentencing Commission, and as an Assistant United States Attorney.

Professor Kirkpatrick is an elected member of the American Law Institute, a Life Fellow of the American Bar Foundation, a former delegate to the American Bar Association House of Delegates, and former chair of the Evidence Section of the American Association of Law Schools. He has served on both the Evidence Rules Committee and the Criminal Rules Committee of the United States Judicial Conference.

He a former member of the Board of Directors of the American Judicature Society and was a Master in the American Inns of Court. He has given numerous presentations at conferences or symposia sponsored by various legal organizations, including the American Bar Association, the Ninth Circuit Judicial Conference, the U.S. Sentencing Commission, and the Attorney General's Advocacy Institute.

Prior to entering law teaching, he served as a trial lawyer in private practice and as director of litigation for a major legal services program. He has previously taught at the University of Michigan, University of London, University of Maryland, Suffolk University, and the University of California, Hastings College of Law.

Other books by these authors. In addition to Federal Evidence 4th, Professors Mueller and Kirkpatrick have collaborated in writing a coursebook entitled *Evidence Under the Rules* (Wolters Kluwer, Aspen Casebook Series 7th ed. 2011) that is in wide use in law schools across the country. They are also the authors of a hornbook for law students and lawyers entitled *Evidence* (Wolters Kluwer, 5th ed. 2011), and they are the authors of a one volume treatise for lawyers entitled *Evidence: Practice Under the Rules* (Wolters Kluwer Law & Business, 4th ed. 2011), where they are joined in their efforts by their colleague Charles H. Rose III (Stetson University Law School).

Preface to the Fourth Edition

Evidence law in 2013 has changed in many ways from the way it looked in 2007, when the third edition of the present work was completed – and of course evidence law is vastly different from the way it looked in 1979 and 1994, when the first two editions appeared.

The electronic revolution that swept over the practice of law at the end of the last century and the first decade of the twenty-first century seems now complete, even though it will certainly evolve further and achieve even more multi-dimensionality. This Fourth Edition of Federal Evidence is as much an online product as a physical book, and of course the online version links directly to the cases that we cite and to the Rules themselves. Users of Westlaw can find this book in the "FEDEV" database, which appears in the Directory as "Federal Evidence (Mueller & Kirkpatrick)," and of course an advantage of this development is that the book, as we persist in calling it, becomes electronically searchable. One can look for words, phrases, casenames, topics, and lots of other things.

We remain pleased, as human users of books, that there is a print version of Federal Evidence (4th), and that the print version is a physical book that can be lifted from a shelf, opened, and perused in the old-fashioned way. The book has sewn bindings, buckram covers, and numbered paper pages with black ink on white paper. We don't want to make the mistake depicted in a wonderful cartoon, which shows two men in togas in front of a table with a opened scroll in front of them, bearing the caption "As long as people read, we'll have scrolls." Maybe we won't have books someday, and all reading that used to involve books will instead utilize electronic "tablets" that can also provide games, access to the internet and email and social media, and shared photographs or motion pictures and "virtual" conversations with friends. But we have books today, and even a few bookstores, and students still buy physical textbooks and may actually prefer them to electronic versions.

This book – Federal Evidence (4th) – looks different from prior editions. Even though the third edition was already changed by becoming an online as well as a printed book, the Fourth Edition is changed yet again – we hope in ways that make it more usable and less cluttered. But it is still the case that the printed pages of this book look as they do at least in part because a single mass of stored data serves both as the source for both the printed version and the electronic version.

Beyond these changes in *appearance* are more important changes of substance and actual content that we take up now under four major headings.

(1) Rules changes. In their first twenty years (1975-1995), the Rules changed hardly at all,[1] but the pace of change has accelerated, and the Fourth Edition of Federal Evidence reflects those changes. The acceleration reflects the coming in 1993 of the Evidence Rules Advisory Committee, which meets regularly and proposes changes to the Rules almost every year.[2]

One change, which grew out of the work of a special committee, was the addition of an entirely new provision (Rule 502), which governs waiver of attorney-client privilege. This Rule became law in 2008 through congressional enactment (privilege rules must be passed by Congress in order to take effect). Of course this Fourth Edition includes new coverage of this provision(§§5:33, 5:34, and 5:36).

The Fourth Edition of Federal Evidence also reflects the most noticeable and recent accomplishment in Rules revision, which was the 2011 "Restyling Project." This project changed the wording of nearly every provision in an effort, according to the Notes of the Revisers, "to make them more easily understood and to make style and terminology consistent throughout," with the assurance that the changes are intended to be "stylistic only," and with "no intent to change any result in any ruling on evidence admissibility."

There have been still other changes:

The exception in Rule 803(7) for proving the absence or nonexistence of a business record, and the exception in Rule 803(10) for proving the absence or nonexistence of a public record, were amended by adding "notice and demand" provisions under which prosecutors in criminal cases must notify defendants of intent to prove the absence or nonexistence of a business or public record by means of an affidavit or certificate. On receipt of notice, a defendant can object, in which case the prosecutor is expected to call the witness actually to testify and to be cross-examined. This change took effect December 1, 2013.

Pending in late 2013 were four changes expected to take effect on December 1, 2014. One amendment contains a catchall clause for Rule 801(d)(1)(B), which defines certain prior "consistent" statements by testifying witnesses as "not hearsay." Under the new catchall clause, nonhearsay treatment expands to include any prior consistent statement that can be used "to rehabilitate the declarant's

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[1] To be sure, there were some important changes in the first 20 years. Already in 1978, Congress adopted Rule 412 (the rape shield provision), and seventeen years later, in the twentieth year of the Federal Rules, Congress enacted Rules 413-415 (prior acts by persons charged with sexual assault or child molestation), and these provisions have changed since their original appearance.

[2] Originally under the leadership of the Honorable Ralph K. Winter of the Second Circuit, the Committee was chaired in 2012 by the Honorable Sidney A. Fitzwater, Chief District Judge for the Northern District of Texas, and Professor Daniel E. Capra of Fordham School of Law serves as Reporter.

credibility as a witness when attacked on another ground." Three further amendments affect the hearsay exceptions for business records in Rule 803(6), for the absence of a business record under Rule 803(7), and for public records under Rule 803(8). Each of these amendments makes it clear that the burden of proving "lack of trustworthiness" of material offered under those exceptions rests on the party opposing or objecting to the evidence. These expected changes are included in Federal Evidence (4th) as well.

(2) Selected revisions. In many places in this work, we have altered or expanded coverage. Thus we have included new material in the discussion of Rule 404(b) on proving other crimes and on difficult distinction between criminal acts that are "extrinsic" versus "intrinsic" with respect to the pending charges (§4:33). As noted above, our coverage of waiver issues relating to the attorney-client privilege under new Rule 502 is itself new (§§5:33, 5:34, and 5:36). We have expanded our discussion of expert versus lay testimony in relation to proof of patterns of drug operations and the code and jargon used by drug traffickers (§§7:3 and 7:9). We expanded our discussion of the use of prior consistent statements where these contain more information than the testimony of the declarant/witness (§8:38). We have completely rewritten the section on proving forensic laboratory reports in criminal cases, in light of the continuing evolution of the *Crawford* doctrine, and especially the decisions in the *Bullcoming* and *Williams* cases (§8:91).

(3) Exemplary rather than exhaustive citations. The Fourth Edition of this work covers and comments on issues affecting the law of evidence as it has grown and matured under the Rules, while seeking to reduce the bulk of material cited in the footnotes. Long ago it became impossible, and pointless as well, to cite and take into account every case that construes the Federal Rules of Evidence. What is useful is to provide a range of examples that illustrate application and meaning of the Rules, and the fourth edition of this work takes this idea to heart. We cite cases selectively, and try to be judicious so as to present an accurate picture of what courts are doing, while indicating points on which there are disagreements.

Also useful is recognition of the utility of state cases construing state counterparts of the Federal Rules. As of 2013, 44 out of the fifty states have adopted the Rules themselves (often with only the most minor changes), or codes or rules modeled on the federal counterpart. It is now actually easier to name the states that *don't* have the Rules than to recite the far longer list of states that do have them.[3] The Fourth Edition of Federal Evidence increases the number of state

[3] Adopting States are Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island,

citations, as state courts have added decisions to the body of interpretive tradition relating to the Rules.

(4) Evolution of Crawford. Judges and lawyers involved in criminal trials know that the 2004 decision in *Crawford* brought a major change in the direction and content of confrontation jurisprudence. In its focus on protecting defendants from "testimonial" hearsay, *Crawford* put an end to the use by prosecutors of the against-interest exception to prove statements by colleagues of the defendant blaming him for various aspects of the crime, at least where the colleague was talking to police or allocuting in court proceedings and where he never testifies so as to be subject to cross-examination by the defense. *Crawford* also limits use of the excited utterance exception to prove criminal acts, at least where the declarant speaks with law enforcement officers, although the "emergency exception" to the *Crawford* doctrine permits even the use of such statements if the speaker is in immediate peril.

Since then, the Court has addressed major issues that *Crawford* brought in its wake, in a series of opinions. The "emergency" exception appeared in the *Davis* case in 2007 and more recently it was expanded in the *Bryant* case in 2011. In 2008 in the *Giles* case we learned that the forfeiture exception is constitutional, and that it requires a showing that the accused intended to make the declarant unavailable. In the *Melendez-Diaz* decision in 2009, and in the *Bullcoming* decision in 2011, we saw further refinement on the use of forensic lab reports, and in 2012 we saw the difficult decision in the *Williams* case, also dealing with this matter. All these decisions have had an impact on hearsay issues, and our coverage of confrontation in Federal Evidence (4th) has been much changed to reflect these developments (particularly §8:27).

Predictions that *Crawford* would have even more far-reaching effects were not borne out in its first decade, but we still see courts working out *Crawford's* impact on statements by child victims. *Crawford* also confirmed one aspect of prior doctrine, which is that the Confrontation Clause does not block the use of statements by declarants who can be cross-examined, either before trial or during trial, and the importance of this "exception" invites further examination of the question what an "adequate opportunity" to cross-examine really means. These developments too are reflected in these pages.

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South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. The states that have not adopted the Rules are California, Kansas, Missouri, New York, and Massachusetts.

and the understanding of the institutions and our colleagues when we were absorbed in this project.

At George Washington, Laird Kirkpatrick thanks his colleagues in evidence on the law faculty, and in particular Interim Dean Gregory Maggs. At Colorado, Christopher Mueller thanks his colleagues in evidence on the law faculty, and in particular he wishes to thank Dean Phil Weiser, who encouraged and supported this project. At Oregon, we both thank Melissa Aubin for her invaluable research assistance.

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Finally, we wish to thank our families. Christopher Mueller's wife Martha Whittaker has heard much about the issues in this book, and Laird Kirkpatrick's wife Lind has listened to him patiently. Our wives have given encouragement and understanding throughout the project. We couldn't have done it without them.

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Boulder Colorado
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