

PREFACE

The Tenth Edition of the Handbook of Federal Evidence (“Handbook”), now nine volumes, consists primarily of the Federal Rules of Evidence, enacted July 1975, and materials designed to aid in understanding, construing, and applying them along with, very importantly, “Advocacy Notes” reference to state authority described fully below.

The Tenth Edition continues to strive to fulfill the Handbook’s principal objective of providing to the trial attorney and presiding judge—whether in court, in chambers, or in the office—a clear, precise, and, where possible, concise statement of what the law of evidence is pursuant to the Federal Rules of Evidence in a convenient-to-use format.

To better accomplish this objective, a softbound volume called “Ready Access” is once again incorporated.

“Ready Access” is designed to give the user, whether trial attorney or presiding judge, a means to access readily the voluminous evidence materials contained within the Handbook. The Tenth Edition possesses seven substantive volumes, over 9,000 pages of the Federal Rules of Evidence, explanative Commentary, footnotes and Advocacy Notes, see *infra*.

“Ready Access” contains the Federal Rules of Evidence and explanative Commentary from each substantive volume, verbatim, with footnote numbers. Only a limited number of footnotes themselves are included, mostly either citations to important cases discussed in the Commentary or citations to recent particularly useful cases. The comprehensive Table of Contents and Index of the Handbook are also repeated verbatim.

“Ready Access” permits the user to quickly and easily locate the relevant explanative text. Once ascertained, the user can once again quickly and easily either access the corresponding footnote material by clicking on the footnote number on Westlaw or by locating the corresponding footnote quickly and easily in a hard copy of the Handbook.

Not only is “Ready Access” extremely useful in the office, “Ready Access” is a wonderful tool for use by trial attorneys and the presiding judge in court, or otherwise away from the office or chambers. Simply use the thorough Table of Contents and/or Index to locate the Commentary discussion addressing to the evidence issue under consideration. If more information or citations to the relevant cases is required, simply employ Westlaw clicking on the corresponding footnote(s).

“Ready Access” contains two unique features.

First, “Ready Access” contains many illustrations, presented in problem and answer form, designed to explore the operation of a particular Federal Rule of Evidence or evidence concept in practice. The illustrations, presented prior to the explanative Commentary, were chosen to provide oversight to complex areas, such as multiple level business medical records and accident reports, judicial notice in criminal cases, instructed criminal inference, and chain of custody in both civil and criminal cases.

Second, at the conclusion of a very limited number of sections, material denominated “Perspectives” is presented. Each “Perspective” explores an area of evidence law where lack of clarity if not conflict or confusion exists, i.e., areas often more difficult to accurately grasp. For example, “Perspectives” explains the relationship between “harmless”, “reversible”, “plain”, “structured” error and “substantial right”. Other topics addressed are: contemporaneous introduction, minimal logical relevancy, the conduct of Rule 403 balancing, “inextricably intertwined/intricately related”, link plan intention—preparation and plan, “motive” and “intention” to act in the future, third party culpability, actual juror bias, scope of lay witness testimony, “mere conduct”, investigatory background, “objective witness” mischief, lack of recollection—general overview, and counterparts and facsimile copies. Perspectives appear in the main volume as well.

“Ready Access” is softbound to facilitate convenient supplementation thereby maintaining the volumes’ significant utility.

Section 808:1 presents an overview discussion of the elements of the Confrontation Clause including an extended discussion of the criminal defendant’s right to face-to-face confrontation. Section 808:2 explores in great detail the right of the criminal defendant to cross-examine witnesses against him. Section 808:2.1 presents an historical view of the Roberts reliability approach while § 802:2.2 details the development of the “testimonial” versus “nontestimonial” approach of Crawford and its progeny to the admissibility of out-of-court hearsay statements. Section 802:3 offers a comprehensive definition of “testimonial” while § 808:4 concludes that the confrontation clause does not apply to “nontestimonial” out-of-court hearsay statements. Specific application of the “testimonial” versus “nontestimonial” distinction to forensic reports is contained in § 808:5. Section 808:6 provides an assessment, critique, and prediction of the future as to the Crawford and progeny “testimonial” versus “nontestimonial” approach to the confrontation clause. Finally, § 808:7 contains an extremely detailed and thorough “Application Summary” of the Crawford and progeny understanding of the confrontation clause.

Every citation appearing in reported federal decisions to the Federal Rules of Evidence during the last 45 years has been

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thoroughly analyzed. The resulting interpretive authority with respect to each rule appears in the form of Commentary following presentation of the text of the Rule. Citations in support of Commentary refer overwhelmingly to reported federal decisions; secondary sources are referred to only where particularly cogent.

Several sections in the Tenth Edition have been reorganized with subsections being added to facilitate quick access. New sections have been added. In several instances, complex analyses previously contained in the footnotes has been moved to the text.

To make the Handbook as self-contained as is possible, numerous quotations from reported decisions are included. As new quotations have been added, many older quotations have been removed. Sometimes only a few words are quoted. On other occasions where the court engaged in a more detailed discussion of applicable principles, the entire segment is included. The object in all cases is to present the law of evidence applicable in federal courts as it is today.

Particular attention has been given to presenting in text and footnotes a complete exploration of each of many areas that have proven the subject of considerable controversy over the years, including among numerous others *Daubert/Kumho*/Rule 702, reasonable reliance by an expert, proper subjects for expert testimony, similar accidents, all aspects of business records, the coconspirator's hearsay exception, the residual hearsay exception, other crimes, wrongs, or acts, bolstering on direct, and the operation of Rule 403.

Following most sections in the treatise are "Advocacy Notes." These Advocacy Notes consist of references to state authority, frequently conflicting, representing areas of the law of evidence either not explored or incompletely explored by federal case law. Well over 40 jurisdictions have adopted evidence rules modeled upon but not identical to the Federal Rules of Evidence.

The concept underlying "Advocacy Notes" is that many quality attorneys employ evidence arguments, some weak, some strong, in the course of litigation to get evidence admitted or keep evidence out. Often the real objective is to force the opponent to deal with the evidentiary issues themselves as a trial strategy. Creative motions put pressure on less well qualified attorneys who often won't or can't properly respond to such motions as they arise under the pressure of trial. In fact, it is common for trial attorneys to hire other attorneys, usually appellate specialists, to do "trial support," i.e. handle all evidence motions at trial. What "Advocacy Notes" does is provide the quality attorney with the ammunition necessary to employ the law of evidence to his or her advantage. "Advocacy Notes" provides evidentiary arguments that have found support somewhere in reported state authority.

In many cases the quality attorney will be aware of that an argument is possibly available that might prove of assistance in

the matter at hand. On other occasions, your author can guarantee that the availability of a potentially useful argument, supported by state authority, will come as a total shock to the quality attorney. After over 45 years of research and writing on the law of evidence, I am still constantly amazed as on how many occasions “Advocacy Notes” preparation reveals evidentiary arguments recognized by a state authority that I had never encountered or even contemplated.

Please note that unlike the Commentary to the Federal Rules of Evidence contained in this Handbook where your author’s view on the merits of many contentions are expressed, no indication is provided as to your author’s view as to the merits of the state evidentiary arguments represented in the “Advocacy Notes.”

In the interest of making the consequences of the foregoing perfectly clear, the quality trial attorney is hereby specifically cautioned that inclusion as part of “Advocacy Notes” of a position adopted by a state court somewhere is not a statement that your author believes the position to be “right” or “correct” in any sense of either term. It will be the decision of each trial lawyer as to whether or not to make an argument based upon the particular authority, including possibly a decision to argue a position the quality trial lawyer believes could be or would be rejected upon appeal even if accepted by the trial court. Whether a particular position adopted by a court somewhere in fact passes the “laugh test,” i.e., is so obviously “wrong” and “incorrect” as to cause one to laugh in asserting the position, is once again a decision left to each individual quality trial lawyer.

Various hypothetical illustrations introduced over the years to the Handbook have been retained. New illustrations have been added. The utility of these illustrations in bringing to life the particularly difficult evidentiary concepts explored warrants their appearance in the Tenth Edition.

To facilitate access to the information contained in the Handbook, in addition to the newly incorporated “Ready Access” softbound Volume 1 discussed *supra*, a detailed Table of Contents, Table of Cases, Table of Statutes, Table of Rules and Standards, and comprehensive subject matter Index are provided in Volume 9. Numerous cross-references are provided in the footnotes. A Table of Commentary Sections is also presented immediately following each Rule. In addition, the text of the Federal Rules of Evidence is presented altogether in one location at the front of Volume 9, together with supporting Notes by the Federal Judicial Center, Advisory Committee’s Notes and Legislative History.

The bound volumes of this Handbook is current through the restyling amendments to the Federal Rules of Evidence effective December 1, 2024, the 2023–2024 term of the United States Supreme Court, the Federal Reporter, Fourth Series, through

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volume 94, the Federal Supplement Third through volume 676, and the Federal Rules Decisions through volume 345, and the Illinois Decisions through Volume 470.

The Tenth Edition of the Handbook of Federal Evidence will be updated each year by means of Pocket Parts to bound Volumes 2-8. "Ready Access" will appear as a new soft cover Volume 1 each year. Soft cover Volume 9, presenting the Appendices, Tables, and Index in an integrated form, will be recompiled annually as well.

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