Contents

Dedication........................................................................................................ vi

About the Author ....................................................................................... xvii

Acknowledgments .................................................................................. xix

Foreword.................................................................................................... xxi

Preface ....................................................................................................... xxv
  A Note about Primary Sources ......................................................... xxvi

Chapter 1 Trial Process and Procedure ................................................. 1
  The Role of the Trial Judge in a Family Law Proceeding ................ 1
  Format of a Family Law Trial ......................................................... 3
  Theories and Themes ....................................................................... 4
  Opening Statement ......................................................................... 5
  Direct Examination ....................................................................... 6
  Cross-Examination ....................................................................... 7
  Closing Argument ....................................................................... 9
  Ethical Considerations ............................................................. 10

Chapter 2 The Fundamentals of Evidence ........................................... 13
  What Is Evidence? .......................................................................... 13
  History of the Federal Rules of Evidence .................................... 14
  Purpose of the Rules .................................................................... 15
  Rules of Admissibility ............................................................... 16
Direct versus Circumstantial Evidence ............................. 17
Relevance ........................................................................ 17
Reliability of the Evidence ............................................... 18
Witness Testimony ........................................................... 18
Tangible Evidence (Exhibits) ........................................... 19
Other Considerations of Admissibility: Hearsay .......... 19
Privilege .......................................................................... 20
Original Writing Rule ..................................................... 21
Objections to Evidence .................................................... 21
Effective Use of Evidence ............................................... 22
Planning .......................................................................... 23
Use of a Proof Chart ........................................................ 25

Chapter 3 Relevance .......................................................... 27
Rule 401. Test for Relevant Evidence .............................. 27
Rule 104. Preliminary Questions ..................................... 28
Circumstantial Evidence .................................................. 31
Conditional Relevance of Circumstantial Evidence ....... 33
Relevance of Background Information ......................... 34
The Relevancy-Balancing Test ......................................... 34
Practice Points ................................................................ 35

Chapter 4 Evidence of Character and Habit .................. 37
Rule 404. Character Evidence; Crimes or Other Acts ....... 37
Character Evidence Defined ............................................ 39
Methods of Proving Character ........................................ 42
Admissibility of Habit Evidence ..................................... 43
Practice Points ................................................................. 45

Chapter 5 Other Miscellaneous Relevancy Issues .......... 47
Rule 408. Compromise Offers and Negotiations .......... 47
Permissible Uses of Settlement Negotiations ................. 51
Withdrawn Plea or Plea of No Contest ......................... 52
Contents

The Rape Shield Rule .............................................................. 53
Evidence of Sexual Misconduct in a Civil Proceeding...... 54
Practice Points ..................................................................... 55

Chapter 6 Hearsay ................................................................. 57
Rule 801. Definitions That Apply to This Article;
   Exclusions from Hearsay ................................................ 57
Rule 802. The Rule against Hearsay ................................ 59
Hearsay Defined .................................................................. 60
Nonverbal Communication as Hearsay ............................. 61
Who Is the Declarant? ....................................................... 62
Nonassertive Out-of-Court Statement ............................ 62
Prior Inconsistent Statement Made under Oath Is Not
   Hearsay .................................................................... 64
Prior Consistent Statement Admissible as Not Hearsay ... 64
Admissions of a Party Opponent ...................................... 65
Judicial Admissions Distinguished from Evidentiary
   Admissions .................................................................. 67
Testimonial Admissions by a Party Opponent ................. 68
Statement of Third Person Imputed to Party ................. 68
Adoptive Admissions .......................................................... 69
Admission by Silence .......................................................... 70
Admission by Conduct ....................................................... 71
Practice Points .................................................................. 73

Chapter 7 Hearsay Exceptions ............................................. 75
Rule 803. Exceptions to the Rule against Hearsay—
   Regardless of Whether the Declarant Is Available as a
   Witness ........................................................................ 75
Rule 806. Attacking and Supporting the Declarant’s
   Credibility ................................................................. 83
Rule 807. Residual Exception ............................................. 84
Present Sense Impression ................................................... 85
Contents

Excited Utterance ............................................................ 87
Then-Existing Mental, Emotional, or Physical Condition (the “State of Mind Exception”) ......................... 90
Statement Made for Medical Diagnosis or Treatment ...... 91
Recorded Recollection..................................................... 92
Records of Regularly Conducted Activity (Business Records Exception) ..................................................... 94
Computer-Generated Business Records ........................... 99
Religious and Family Records ................................. 103
Records of Documents Affecting an Interest in Property 104
Ancient Documents ....................................................... 104
Market Reports and Similar Commercial Publications .. 105
Learned Treatises.......................................................... 108
Reputation Evidence .................................................... 110
Judgments ..................................................................... 111
FRE 804—Hearsay Exceptions That Require Witness Unavailability ............................................................ 112
Exceptions—Prior Testimony ........................................ 115
Dying Declaration ......................................................... 116
Statements against Interest ............................................ 117
Admissions Distinguished from Declarations against Interest ...................................................................... 118
Statement of Personal or Family History ....................... 119
Forfeiture by Wrongdoing ............................................. 120
Hearsay within Hearsay: FRE 805 ................................. 121
Impeaching the Out-of-Court Declarant: FRE 806 ...... 122
The Residual Exception: FRE 807 ............................... 122
Expert Testimony—Rule 703 ........................................ 126
Practice Points............................................................... 126

Chapter 8 Judicial Notice and Presumptions ............... 127
Rule 201. Judicial Notice of Adjudicative Facts ............ 127
Rule 302. Applying State Law to Presumptions in Civil Cases ........................................................................................................... 128
Judicial Notice Defined ........................................................................ 129
Presumptions ......................................................................................... 132
Burden of Proof ..................................................................................... 133
Presumption Distinguished from Burden of Proof ................................ 134
Practice Points ......................................................................................... 135

Chapter 9 Authentication of Writings and Other Tangible Evidence .......................................................... 137
Rule 901. Authenticating or Identifying Evidence ........................................ 137
Rule 902. Evidence That Is Self-Authenticating ...................................... 139
Authentication of Real Evidence ............................................................. 142
Authenticating Photographs ................................................................. 144
Authentication of Writings ...................................................................... 149
Authentication by Identification of Handwriting ................................... 150
Authentication of Writings by Other Means ........................................... 150
Authentication of Electronic Communications .................................... 151
Websites and Social Media ................................................................. 162
Computer-Generated Documents ......................................................... 168
Demonstrative Aids ............................................................................... 171
Summaries ............................................................................................. 172
Public Records or Reports ................................................................. 174
Ancient Documents ............................................................................... 174
Self-Authentication of Real Evidence .................................................. 175
Necessity of Subscribing Witness ......................................................... 177
Practice Points ......................................................................................... 177

Chapter 10 Original Writing Rule and the Rule of Completeness .......................................................... 179
Rule 1001. Definitions That Apply to This Article ................................... 179
Rule 1003. Admissibility of Duplicates .................................................. 180
Rule 1004. Admissibility of Other Evidence of Content ......................... 181
Rule 1006. Remainder of or Related Writings or
   Recorded Statements ................................................. 182
Rule 1007. Testimony or Statement of a Party to Prove
   Content ..................................................................... 182
Original Writing Rule .................................................... 182
Use of Duplicates .......................................................... 185
Exceptions to the Requirement for Introduction of
   Original Document .......................................................... 186
Secondary Evidence Defined .......................................... 189
Collateral Writings ........................................................ 190
Public Records .............................................................. 192
Use of an Admission to Prove Content of a Writing...... 192
The Rule of Completeness ............................................. 192
Practice Points ............................................................... 193

Chapter 11 Competency of Witnesses.............................. 195
   Rule 601. Competency to Testify in General ............... 195
   Rule 104. Preliminary Questions ................................... 196
   Rule 603. Oath or Affirmation to Testify Truthfully ...... 196
   Rule 701. Opinion Testimony by Lay Witnesses .......... 196
   Rule 605. Judge’s Competency as a Witness ............... 197
   Questions of Witness Competency .............................. 197
   In-Camera Proceedings ............................................. 199
   Oath or Affirmation .................................................... 199
   Requirement of Firsthand Knowledge of the Witness ... 200
   Lay Opinion Testimony ............................................. 201
   Expert Opinion Differentiated .................................... 204
   Opinion on the Ultimate Issue .................................... 205
   Use of Interpreters ...................................................... 205
   Competency of the Judge or Lawyer as Witness ......... 206
   Practice Points ............................................................... 207
Chapter 12 Evidentiary Privileges

Rule 501. Privileges in General

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

Privilege against Self-Incrimination

Remedies for Opposing Party Invoking the Fifth Amendment Privilege

Waiver of the Privilege

Attorney-Client Privilege

Professional Relationship Defined

Production of Documents Containing Privileged Communications

Impact of the Presence of a Third Party on the Privilege

Waiver of Attorney-Client Privilege

Inadvertent Waiver

Intercepted Correspondence and Privilege

Disclosures in Fee Petition

Matters to Which the Attorney-Client Privilege Does Not Apply

Work-Product Doctrine

Physician-Patient Privilege

Patient Privacy and HIPAA

Waiver of Physician-Patient Privilege

Marital Privileges

Practice Points

Chapter 13 Expert Witnesses

Rule 702. Testimony by Expert Witnesses

Rule 704. Opinion on an Ultimate Issue

Rule 706. Court-Appointed Expert Witnesses

Subject Matter of Expert Testimony

The Role of the Expert

The Expert’s Assignment
<table>
<thead>
<tr>
<th>Chapter 14 Examination of Witnesses</th>
<th>263</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rule 607. Who May Impeach a Witness</td>
<td>263</td>
</tr>
<tr>
<td>Rule 608. A Witness’s Character for Truthfulness or Untruthfulness</td>
<td>263</td>
</tr>
<tr>
<td>Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence</td>
<td>266</td>
</tr>
<tr>
<td>Leading Questions</td>
<td>271</td>
</tr>
<tr>
<td>Foundation for Testimony</td>
<td>271</td>
</tr>
<tr>
<td>Refreshing Recollection</td>
<td>273</td>
</tr>
<tr>
<td>Use of Nonadmitted Documents</td>
<td>275</td>
</tr>
<tr>
<td>Cross-Examination Generally</td>
<td>276</td>
</tr>
<tr>
<td>Scope of Cross-Examination</td>
<td>277</td>
</tr>
<tr>
<td>Request to Examine a Witness for Voir Dire</td>
<td>277</td>
</tr>
<tr>
<td>Impeachment of Witnesses</td>
<td>278</td>
</tr>
<tr>
<td>Scope of Redirect and Re-Cross Examination</td>
<td>292</td>
</tr>
<tr>
<td>Judicial Questioning of Witnesses</td>
<td>293</td>
</tr>
<tr>
<td>Exclusion of Witnesses</td>
<td>293</td>
</tr>
<tr>
<td>Practice Points</td>
<td>294</td>
</tr>
</tbody>
</table>

Chapter 15 Tendering Exhibits, Objections, and Offers of Proof

Rule 103. Rulings on Evidence

<p>| 297 | 298 |</p>
<table>
<thead>
<tr>
<th>Contents</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Objections to Exhibits</td>
<td>300</td>
</tr>
<tr>
<td>Objections Generally</td>
<td>300</td>
</tr>
<tr>
<td>Responding to Objections</td>
<td>305</td>
</tr>
<tr>
<td>Timing of Objections</td>
<td>306</td>
</tr>
<tr>
<td>Objections during Opening Statement or Closing</td>
<td>307</td>
</tr>
<tr>
<td>Offers of Proof</td>
<td>308</td>
</tr>
<tr>
<td>Plain Error Rule; Harmless Error Rule</td>
<td>309</td>
</tr>
<tr>
<td>Practice Points</td>
<td>309</td>
</tr>
<tr>
<td>Chapter 16 Procedures for Streamlining Admission of Evidence</td>
<td>311</td>
</tr>
<tr>
<td>Requests to Admit Facts and Genuineness of Documents</td>
<td>311</td>
</tr>
<tr>
<td>Concluding Comments</td>
<td>314</td>
</tr>
<tr>
<td>Appendix</td>
<td>315</td>
</tr>
<tr>
<td>The Federal Rules of Evidence</td>
<td>315</td>
</tr>
<tr>
<td>Article II. Judicial Notice</td>
<td>318</td>
</tr>
<tr>
<td>Article IV. Relevance and Its Limits</td>
<td>319</td>
</tr>
<tr>
<td>Article X. Contents of Writings, Recordings and Photographs</td>
<td>353</td>
</tr>
<tr>
<td>Foundations</td>
<td>357</td>
</tr>
</tbody>
</table>