Authors’ Introduction to the
2016 Supplement to
McCormick on Evidence 7th Edition

The strength of the effort to update McCormick on Evidence is the addition of new major cases and articles throughout the entire treatise. Hundreds of new authorities are added, which are not discussed here. Highlighted below are some of the notable developments discussed in the new material.

Chapter 3 revisits two of the most troublesome issues in the Opinion area. Section 11 discusses the distinction between lay and expert opinion testimony. The expert discovery provisions in Federal Rule of Civil Procedure 26 and the differing admissibility standards under Federal Rule of Evidence 701-02 have magnified the importance of the distinction at common law. Section 11 also sets out a proposal for drawing the line between the two types of opinion. Section 13 addresses one of the thorniest problems under Rule 702, namely, differentiating the foundation for validating a general theory or technique from the foundation for an opinion applying the theory or technique to specific facts—the so-called G2i (general to the individual) problem. Section 13 cites to an insightful 2014 University of Chicago Law Review article in point.

Chapter 4 updates the treatise on the evolving law governing the procedures for Cross-Examination. The wide array of procedures includes CC-TV, two-way teleconferencing, shields, support persons, support animals, and the use of pseudonyms and disguises. Section 19 of the supplement includes numerous citations to recent cases and law review articles analyzing the various procedures.

In Chapter 5, Section 41 presents an extended discussion of the new developments under Federal Rule of Evidence 608(b). On the one hand, Section 19 notes the Supreme Court’s 2013 decision in Nevada v. Jackson asserting that “[t]he constitutionality of this” ban on extrinsic evidence “cannot be seriously disputed.” On the other hand, the section points to the mounting evidence that there are serious misgivings about singling out 608(b) as the only impeach-
ment technique subject to a complete ban on extrinsic evidence. Section 19 observes that a growing number of decisions admit extrinsic evidence of judicial and jury findings, and that some jurisdictions have carved out an exception for extrinsic evidence of false accusations in sexual assault prosecutions.

Chapter 7 takes up Competency rules. Section 68 of the supplement discusses the Supreme Court's 2014 decision in Warger v. Shauers. Prior to Warger, despite the sweeping language of Rule 606(b), several lower courts had allowed litigants to offer jurors' statements about occurrences during deliberation to show that panelists had lied during voir dire as the basis for a new trial. The Warger Court construed 606(b) as barring such evidence. However, the supplement notes that in dictum the Court added that there could be a showing of “juror bias so extreme that . . . the [constitutional] jury trial right has been abridged.”

Chapter 14, on Confessions, notes some changes in state treatment of confessions, with one state eliminating the corroboration requirement and another finding merit in the trustworthiness approach to avoid errors based on false confessions. It also discusses the split between the Justices in the Supreme Court's 2013 decision in Salinas v. Texas regarding the constitutional limits on the use of pre-custody and pre-warning silence by a criminal suspect.

Chapter 17, on Character and Habit Evidence, and Chapter 18, on Similar Happenings, contain additional illustrations from both classic and recent cases.

Chapter 19, on Insurance Against Liability, includes some elaboration on the purposes for which proof of insurance is admissible and further analysis of when the connection of expert witnesses to insurers may be proved to impeach these witnesses.

Chapter 20, on Experimental and Scientific Evidence, is updated with:

- Description of general developments following Daubert v. Merrill Dow Pharmaceuticals
- Cases on special problems of interpreting mixed DNA samples and low-template DNA
- Recent literature on the accuracy of eyewitness identifications
- Cases on expert testimony about false confessions
• Notes on advances in fingerprint identification and concerns about hair comparisons.

In Chapter 22 on Authentication, cases involving the use of electronic messages and documents have substantially increased in recent years, due primarily to the increased use of text messages, social media and cell phone records in criminal prosecutions. Section 227 has been completely revised and updated to include separate analysis of the authentication of emails, text messages, website data and postings, chatroom communications, social media postings and messaging, as well as computer-generated documents.

In Chapter 23, recent cases involving the application of the “Best Evidence” rules to such messages and documents have also been incorporated throughout.

Chapter 24, which examines the definition of hearsay, discusses the change in Federal Rule of Evidence 802(d)(1)(B) to expand admission of prior inconsistent statements for their truth when they are properly admissible to rehabilitate credibility. Such rehabilitating statements are now admissible beyond those rebutting charges of recent fabrication or improper influence or motive examined in Tome v. United States. In Section 252 on Confrontation, the 2015 Supreme Court decision in Ohio v. Clark, which revisits the “ongoing emergency” situation in the context of child abuse, is examined. Its impact on Confrontation Clause analysis with regard to child abuse reporting laws, statements by children in general, and statements to private individuals is also noted.

Chapter 33, which examines the hearsay exception for Statements Against Interest, discusses statements that incriminate the declarant made to private individuals. The status of the “ear witness” generally liberates the statement from confrontation problems and has impact in multiple ways regarding admission under the hearsay exception.

Chapter 34, which includes the exception for Ancient Documents, discusses the Federal Rules Advisory Committee’s recommendation that this exception be eliminated largely because of its potential to admit unreliable hearsay stored in digital form.

Chapter 35 on Judicial Notice, includes discussion of the rapidly expanding use of online sources in judicial notice of adjudicative facts.