PROLOGUE

Every lawyer should be versed in the subject of evidence. We vigorously endorse this claim despite what might well seem like contrary evidence—the fact that the frequency of courtroom trials is decreasing so much that extensive training to prepare for them hardly seems worth the effort. Civil trials have long since become the exception rather than the rule, with the great majority of cases being settled, albeit often with extensive discovery and depositions having taken place. Even the incidence of criminal trials seems to be dramatically decreasing. See Benjamin Weiser, Trial by Jury, a Hallowed American Right, Is Vanishing, N.Y. Times, Aug. 8, 2016, http://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html?_r=0. Weiser reports that the number of criminal trials in several new york federal courthouses has been reduced by one half during the past decade. In the Southern District of New York, for example, only 50 trials took place in 2015, the lowest number since 2004, with judges lamenting this trend.

If trials are truly becoming almost a thing of the past, and, accordingly, courses that are geared to courtroom practice—knowing what objections to make and when, and the like—may seem less relevant and appropriate for the preparation of students for the practice of law, why do we maintain that Evidence remains a vital subject? What implications does the diminishment of trials and training for trials have for the course on Evidence and Evidence casebooks?

The exercise in analysis, an understanding of the theory and policies underwriting the reasons for the various evidentiary doctrines, and the development of the ability to think creatively about evidence issues, all of which would be needed were cases to go to trial, are also essential to the daily work of lawyers even in the absence of trials. To be equipped to deal with the kinds of matters that arise in the practice of law requires in-depth understanding of, and how to deal with, facts involved in the matter under consideration. Often the issues and requisite analyses in a situation involving lawyers representing clients are quite complex, and they require familiarity with and understanding of scientific, technological, economic, social, or political underpinnings of litigation. To a significant extent, this observation applies no matter the nature of the practice, whether private, personal injury, commercial, corporate, class action or criminal practice, or dealing with government agencies.

Training in Evidence for addressing any of these kinds of matters requires a comprehensive approach that blends theoretical and practical concerns and contains, for example, materials on new developments in scientific evidence, while also applying new insights from fields such as logic and probability. It requires a course, and teaching materials, that provides a deep, broadly applicable foundation in the process of "finding" and reasoning about the facts that are vital parts of legal analysis.

It is also the case that while fewer formal trials are occurring, other types of hearings and proceedings—arbitration, mediation, hearings before administrative agencies, as well as foreign, international tribunals, and military proceedings—still take place, some, possibly at an increased frequency. So formal and informal proceedings still play a role in the handling of disputes, just with fewer traditional trials before state or federal judges.

Thus, it is useful to know and understand the rules of evidence for at least two reasons. One may, in fact, end up in a formal or informal proceeding. But it is also the case that being familiar with the rules at a deeper level provides guidance for the kinds of issues that need to be addressed and the values that need to be applied in dealing with issues of fact even when the matter never reaches the stage of a proceeding.

Settlement negotiations take place, we may say, *in the shadow of litigation*—that is, with an awareness of the potentials and operations of litigation. Even when matters are settled before proceedings occur, legal counsel needs to prepare as if proceedings may occur, since one never can be sure that the matter will settle. And even were there a high degree of certainty that negotiation would lead to settlement, it is crucial that counsel take into account the kinds of issues that may arise, both factual and legal, in order to engage in a fully-informed negotiation. A full understanding of the facts and how they bear on and may be used in the matter is needed.

Indeed, further, standard legal advice also is and ought to be given in the shadow of litigation. Lawyers engage in functions and provide advice and counsel in many different contexts in which disputes may not (yet) have arisen, and the lawyer's task is to try to avoid disputes and anticipate, if they were to arise, how best to protect the interests of his or her client. Thus, knowledge and understanding of facts in light of the potential evidentiary issues is also an important foundation for drafting contracts or negotiating deals or advising clients on policy and actions to be taken based upon the likelihood of future events, including litigation.

Whatever the context in which lawyers function, there will always be a need to assess the facts or evaluate the evidence. The particular context will determine the standards and whether particular evidentiary doctrines are relevant. Lawyers should always try to be familiar with alternate ways for dealing with the matters at hand as well as with cutting edge developments where scientific or other bodies of learning are relevant.

The raison d'etre for, and the primary strength of, the course in Evidence these days, more than any other in the law school curriculum, should be to provide the foundation for fact-oriented legal analysis that takes account of the prospect of litigation, even though actual litigation may be unlikely to take place. A broad-gauge, comprehensive approach to the subject of Evidence will best prepare students for their post-law school professional careers and enable them to guide their clients through the often rough waters that are the stuff of the modern practice of law.