



INTERNATIONAL CONGRESS

**LEGAL EVIDENCE**

Barcelona, 19, 20 and 21 July 2010

**Universities making the call**

Universidad Pontificia Comillas (ICADE) – Faculty of Law  
Universidad de Deusto – Faculty of Law  
ESADE – Faculty of Law. Ramon Llull University

**Organising university**

ESADE – Faculty of Law. Ramon Llull University

**Date**

19, 20 and 21 July 2010

**Registration (except for Professors, Researchers and Students of the Universities making the call)**

General registration: €100  
Registration for those with papers accepted: €50

**Venue**

ESADEFORUM  
Av. Pedralbes, 60-62  
E-08034 Barcelona

**Organising Committee**

Chairman:  
Prof. Dr. Xavier Abel Lluch  
Director, Institute of Forensic Evidence and Probative Law, ESADE Faculty of Law

Members:  
Prof. Dr. Teresa Duplá Marín

ESADE. Faculty of Law. Vice-Dean, Academic Planning  
Prof. Dr. Sergio Llebaria Samper  
ESADE. Faculty of Law. Professor of Civil Law  
Prof. Dr. Pedro Miroso Martínez  
ESADE. Faculty of Law. Professor of Mercantile Law  
Prof. Dr. Sara Díez Riaza  
ICADE. Faculty of Law. Director, Department of Common Disciplines  
Prof. Dr. Marta Gisbert Pomarata  
ICADE. Faculty of Law. Director, CID: ICADE  
Prof. Dr. Cristina Carretero González  
ICADE. Faculty of Law. Prof. Division of Procedural Law  
Prof. Dr. Carmen Azcunaga Lucas  
DEUSTO. Faculty of Law. Professor of State Ecclesiastical Law

### **Scientific Committee**

Chairman:

Prof. Dr. Xavier Abel Lluch

Director, Institute of Forensic Evidence and Probative Law, ESADE Faculty of Law

Members:

Prof. Dr. Lluís Muñoz Sabaté

ESADE Institute of Forensic Evidence and Probative Law, Faculty of Law. Associate Professor of Procedural Law. Lawyer. Psychologist

Prof. Dr. Francisco Peláez Sanz

ESADE. Director, Division of Procedural Law, Faculty of Law. Lawyer of Vialegis

Prof. Dr. Joan Picó i Junoy

ESADE. Institute of Forensic Evidence and Probative Law, Faculty of Law. Professor of Procedural Law, URV

Prof. Dr. Manuel Richard González

Professor of Procedural Law

Prof. Dr. Sara Díez Riaza

ICADE. Faculty of Law. Director, Department of Common Disciplines

Prof. Dr. Marta Gisbert Pomarata

ICADE. Faculty of Law. Director, CID: ICADE

Prof. Cristina Carretero González

ICADE. Faculty of Law. Professor, Division of Procedural Law

Prof. Dr. Ainhoa Gutiérrez Barrenengoa

DEUSTO. Faculty of Law. Professor of Procedural Law

Prof. Dr. Javier Larena Beldarrain

DEUSTO. Faculty of Law. Professor of Procedural Law

### **Presentation**

The International Congress on 'Legal Evidence', organised by the Law Faculties of the Universities of Deusto, Pontificia de Comillas de Madrid and ESADE, is aimed at a broad examination of legal evidence, of a transversal nature, that looks at dogmatic matters dealing with evidence, the advances made in Probative Law in each jurisdiction with the specific theme of Forensic Evidence, in order to prove specific facts in a case.

Perhaps there is no concept in so-called 'law on a war footing' in which the requirements of jurists coincide more or end up causing more bitterness than the concept of evidence. Of significance in

this respect is the phrase '**o provare o soccombere**' (either show proof or withdraw) which carries the experience that no one accepts – without much frustration – being in the right but not being able to prove it.

In Spain, this concern, eminently one of praxis, has been reflected in a series of articles and books, all of which have been published in a geographical area which allows us to speak of the Barcelona School on judicial evidence, given an impulse by the works of professors CARRERAS LLANSANA (*La prueba de presunciones*, 1962), SERRA DOMÍNGUEZ (*La prueba de presunciones en el Código Civil*, 1963) and MUÑOZ SABATÉ (*Técnica probatoria*, 1967). In this tradition on evidence, the Faculty of Law at the University of Barcelona acted as a placenta where various post-graduate courses on forensic evidence were given while later on and at this time this has taken place at the ESADE Faculty of Law of the Ramon Llull University in Barcelona. In the latter case, we should point out the recent setting up of the Institute of Forensic Evidence and Probative Law in September 2008, the aim of which is the teaching, research and spread of matters dealing with forensic evidence and Probative Law.

Evidence and the art of proving evidence have a clearly lamentable weakness in view of the many forms adopted in human behaviour where conflict is involved and, as a result, we find the feeling shared by most jurists regarding the increasing drive from and the taking advantage of scientific advances, at times not entirely aimed at proving the facts during a trial; thus, a revision, even a radical revision, of the rules of proof involved in so-called *probative law*; and an application of logic and psychology with the subsequent development of a universal commonplace used to reinforce a new rhetoric dealing with the evidence of the facts.

If we do not fully devote ourselves to the study and solution of problems of evidence, it is very likely that illicit behaviour, often sheltered by those forms that declare the presumption of innocence and the charge of proof, end up obtaining impunity that is frankly damaging to law.

### **Presentation of papers**

Proposals for papers may be presented on the general matters and specific thematic blocks set out below or on any other topic related to the title of this Congress.

1. A proposal for a paper should be sent to the Congress Secretary (email: [unijes2010@esade.edu](mailto:unijes2010@esade.edu)) in the format shown at the end of this document. The deadline for receiving proposals is 1<sup>st</sup> March 2010.
2. The Scientific Committee will examine all proposals received and will select those that will form part of the program and advise all researchers who have sent in proposals before 15<sup>th</sup> March 2010.
3. The full text of papers accepted should be submitted before 1<sup>st</sup> June 2010.

### **Thematic blocks**

#### **BLOCK 1. GENERAL THOUGHTS ON EVIDENCE**

This block will attempt to deal with questions of Probative Law brought together in four large blocks. Some of this material will have been the subject of traditional thinking, such as evidence and truth, and evidence and legality; while other material has gained renewed interest with the promulgation of Law 1/2000, dated January 7, on Civil Lawsuits (*Ley de enjuiciamiento civil*, LEC), evidence and ideology with the aim of analysing the division of powers between the judge and the parties involved in terms of showing evidence. Another current topic is the growth of new

information and communications technology and the challenges this presents to Probative Law in terms of obtaining, challenging and evaluating the so-called electronic evidence, considered by some as a 'new frontier of the Probative Law'.

## 1.1. Evidence and the truth

- 1.1.1. The aim of the trial and the aim of evidence. Are they the same or different?
- 1.1.2. Probability as a virtual certainty.
- 1.1.3. The theory of two truths and their ability to be humanly assumed
- 1.1.4. Advances in scientific evidence
- 1.1.5. Logic, science and new rhetoric
- 1.1.6. Limitations on obtaining the truth

## 1.2. Evidence and ideology

- 1.2.1. Are we seeing a kind of 'hyperguaranteeism' in matters of evidence? Its effects and solutions
- 1.2.2. The intervention of the judge in evidence
  - The weight of evidence as a limit to expert evidence initiative
  - Expert evidence initiative and the principle of legal equality
  - Expert evidence initiative and the duty of the judge to be impartial
  - Judicial intervention in the various means of proof: judicial faculties
- 1.2.3. Process of evaluating evidence in the mind of the judge

## 1.3. Evidence and legality

- 1.3.1. The problem of the extent of illegal evidence
- 1.3.2. The psychological effect of illegal evidence
- 1.3.3. The doctrine of the 'fruit of the poisoned tree' and its perverse effects

## 1.4. Evidence and new technology

- 1.4.1. Toward a clear construction of electronic evidence
  - Document on paper, audiovisual or electronic: Are we moving toward a new clear concept of documentary evidence?
  - Do we need a concept of electronic evidence? Should it be national, European or international?
  - Access to the process of proof arising from new technology: specifically, cyber-navigation
- 1.4.2. Judicial system of electronic evidence
  - Ensuring electronic evidence: the chain of custody and the 'obtaining' of copies
  - The contribution of electronic evidence:
    - The 'test of admissibility' of electronic evidence: integrity, lawfulness and authenticity
    - Challenging electronic evidence: Is it possible to demonstrate the lack of authenticity of an email?
  - Free or limited evaluation of electronic evidence
- 1.4.3. Technological investigation of a crime
  - The intervention of electronic communications
  - Electronic recording as a means of investigation
  - Closed-circuit television recording and video-conferences as a means of proof

## BLOCK 2. ADVANCES IN PROBATIVE LAW

In this block the aim is to analyse the advances in Probative Law, both in its general aspects and in the newer matters in each jurisdiction (civil, criminal, public administration suits and labour matters) which are currently undergoing a doctrinal debate and much scientific thought.

### 2.1. General aspects

- 2.1.1. Rethinking of rules on admissibility of evidence
- 2.1.2. Rethinking instruments of proposition, practice and conclusions
- 2.1.3. New trends in the weight of evidence
- 2.1.4. Weight of evidence and a society of risk
- 2.1.5. Evidence of foreign and Common Law: weight of parties involved or judicial duty?
- 2.1.6. Proof of evidence obtained from the procedural conduct of the parties involved: endo-procedural evidence
- 2.1.7. Judicial scheme for 'new' evidence under LEC
  - Report of private detective (Art. 265.1.5 LEC)
  - Declaration of professional witness (Art. 370.4 LEC)
  - 'Witness' of judicial persons (Art. 381 LEC)
- 2.1.8. On measures to better provide final proceedings. Can we go back to proceedings until further enquiries have been made?

### 2.2. Questions of interest in civil process

- 2.2.1. Proof of *lucrum cessans* in civil and/or mercantile activities. Expert accounting evidence
- 2.2.2. Legal investment of probative weight: proceedings dealing with civil responsibility resulting from damages from defective products
- 2.2.3. Expert evidence in suits arising under the law on building regulations

### 2.3. Questions of interest in criminal proceedings

- 2.3.1. Modern techniques of identifying an accused
  - The taking of samples to check DNA
  - Comparison of DNA profiles
  - Creation and custody of data-bases in Spain and Europe
- 2.3.2. Computer crimes
  - Computer crimes as presumption of crime
  - Warrant for affirmation of evidence (Art.2.3 Law 18/2006, June 5)
  - Evidence of computer crime in cyberspace
  - Judicial authorisation for intercepting electronic evidence
- 2.3.3. Environmental crimes
- 2.3.4. Admissibility and efficacy of expert evidence in environmental crimes
- 2.3.5. Investigation and evidence
- 2.3.6. Placing of public or private cameras in public or private areas and the recording of sound: evidence of constitutional legality

### 2.4. Questions of interest in proceedings involving public administrations

- 2.4.1. Evidence of environmental pollution: noise, lighting, soil, below ground
- 2.4.2. Value of location in proof of appraisal in expropriation cases
- 2.4.3. Evidence of causal relation in cases involving normal operation of the Administration
- 2.4.4. Evidence of establishment in cases of supposed alienation

- 2.4.5. Specialties of Probative Law in cases involving the public administration in view of supplementary nature of the Law on Civil Proceedings. Is this a forced application?
- 2.5. Questions of interest in labour proceedings
  - 2.5.1. Evidence of unauthorised use of email as a reason for firing
  - 2.5.2. Statistical evidence in labour cases involving protection of fundamental rights
  - 2.5.3. Evidence of infraction of contractual good faith aimed at firing
  - 2.5.4. Presumption of work nature of accidents occurring during working time and at workplace (Art. 115.3 LGSS): inverting of weight of evidence and difficulties
  - 2.5.5. Evidence of damages caused as result of infringement of fundamental rights in especially complex cases (for example, infringement of right to strike or to belong to a trade union) and establishing degree of those damages in terms of indemnities.
  - 2.5.6. Evidence of general affectation for purposes of appeal recourse (Art-189.1.b and 85.4 LPL)
  - 2.5.7. Special features of appeal law in labour cases in view of the supplementary nature of the Law on Civil Proceedings: particularly, the ability to appeal before the trial for those evidence that, having to be done at the time, require inquiry by citation or demand (Art. 90.2 LPL): the petition that the opposing party produce documents before the trial. The possibility in this case of applying that laid down in Art.78 LPL and the distinction between this assumption and the petition of preparatory sessions as referred to in Art.77 LPL

### BLOCK 3. FORENSIC EVIDENCE AND THE ART OF PROVING

Forensic evidence is a science applied to proving the facts in a case. Its aim is to show how to prove the facts in a trial while at the same time observing, describing and classifying the facts and phenomena being handled. It belongs to the so-called praxiological sciences, which study the process of decision-making, selection and evaluation of the pertinence of available knowledge to the solution of a specific problem. Within this block, they are presented in thematic blocks, such as how to prove various facts in a civil case.

- 3.1. The entry of the science of forensic evidence into the field of law. Methodological and systematic presentation of the discipline
- 3.2. How can we prove medical malpractice?
  - 3.2.1. Hospital infections
  - 3.2.2. Anomalies and malformations from labour
  - 3.2.3. Wrong diagnosis
  - 3.2.4. Anaesthesia
  - 3.2.5. Informed consent
  - 3.2.6. Ownership of medical history
- 3.3. How do we prove poor workmanship in construction?
  - 3.3.1. Foundations
  - 3.3.2. Reinforcing
  - 3.3.3. Humidity
  - 3.3.4. Collapse of a dam
- 3.4. How do we prove professional malpractice?
  - 3.4.1. Lawyers

- 3.4.2. Attorneys
- 3.4.3. Experts
- 3.4.4. Public notaries
  
- 3.5. Evidence and insurance
  - 3.5.1. *Ex post* accident contract
  - 3.5.2. Pre-existence of insured objects
  - 3.5.3. Hiding of illness
  - 3.5.4. Intentional fires
  
- 3.6. Evidence and inheritances
  - 3.6.1. Psychological capacity of witness
  - 3.6.2. Desire to confer donations
  - 3.6.3. Pretence of donations to prejudice of apparent heirs
  
- 3.7. How can we prove ill-treatment or 'mobbing'?
  - 3.7.1. By family
  - 3.7.2. By police
  - 3.7.3. Hounding at work
  - 3.7.4. Annoying at residence
  
- 3.8. Proof of bankruptcy
  - 3.8.1. Classical simulation and new types of simulation
  - 3.8.2. Classical hiding of facts and new ways of hiding
  - 3.8.3. Evidence from books of accounts
  - 3.8.4. Function of a detective
  
- 3.9. Evidence and the economy
  - 3.9.2. Fault of a financial house
  - 3.9.3. Determining indemnity for infraction of event agreement
  - 3.9.4. Proof of disloyalty of a manager: creation of a parallel company
  - 3.9.5. Proof of malpractice and disloyalty of a manager: managers taking advantage of business opportunities of a company being managed
  
- 3.10. Evidence, environment and town-planning
  - 3.10.1. Attributing of pollution
  - 3.10.2. Municipal bribery
  - 3.10.3. Value of a building under expropriation
  
- 3.11. Evidence and the family
  - 3.11.1. Opinion of experts and attribution of care and custody
  - 3.11.2. Economic ability of spouse obliged to pay food costs
  - 3.11.3. Affiliation in absence of DNA evidence
  
- 3.12. Evidence and labour relations

- 3.12.1. Proof of economic causes for ending contract for objective reasons (Art. 52.c ET)
- 3.12.2. Proof of voluntary and continuing decrease in output in disciplinary firing (Art. 54.2.e ET)
- 3.12.3. Proof of habitual drunkenness or use of drugs having negative effect on work, for purpose of disciplinary firing (Art. 54.2.f ET)
- 3.12.4. Proof of indirect discrimination in labour relations for reasons of sex
  
- 3.13. Evidence and lawsuits involving intellectual or industrial property
  - 3.13.1. Material seized by the police as means of evidence: their custody and preservation
  - 3.13.2. Expert report as means of proof: scientific police report, report by accused; difference between falsified goods and illegal goods
  - 3.13.3. Inquiries for proving the facts
  - 3.13.4. Means of obtaining evidence in civil suits dealing with infraction of intellectual property through interchange of archives
  - 3.13.5. How to take into account fraud in crimes involving intellectual or industrial property
  - 3.13.6. Evidence related to accreditation of indemnities for damages in intellectual or industrial property
  - 3.13.7. The role of technical evidence in lawsuits dealing with the nullity or infraction of a patent

### **Proposal for paper**

**Title:**

**Thematic block:**

**Name and surname of author:**

**Address:**

**Email address:**

**Telephone:**

**Abstract of proposed paper (200 words)**

**With the collaboration of:**