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# TRIAL EVIDENCE

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# TRIAL EVIDENCE

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Fourth Edition

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AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

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Aspen Publishers  
Attn: Order Department  
PO Box 990  
Frederick, MD 21705

Printed in the United States of America.

2 3 4 5 6 7 8 9 0

ISBN 978-0-7355-7723-7

**Library of Congress Cataloging-in-Publication Data**

Mauet, Thomas A.

Trial evidence / Thomas A. Mauet and Warren D. Wolfson. — 4th ed.  
p. cm.

ISBN-13: 978-0-7355-7723-7

ISBN-10: 0-7355-7723-4

1. Evidence (Law)—United States. I. Wolfson, Warren D. II. Title.

KF8935.M28 2009  
347.73'6—dc22

2008052673

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# PREFACE

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Why *Trial Evidence*? The present legal landscape has numerous evidence hornbooks and treatises, many of which are authoritative and longstanding. What are the gaps in the existing literature that this book seeks to fill?

This book is different from existing ones in several ways. First, it reflects the way judges and trial lawyers in the real world of trials think, or should think, about evidence, using the “three Rs” — relevant, reliable, and right — as its analytical framework. Second, it is structured around the sequential components of a trial — beginning with opening statements and ending with closing arguments — rather than the numerical structure of the Federal Rules of Evidence. Third, it allocates space according to how important the topic is to judges and trial lawyers in the real world of trials, rather than according to the interest level of academicians. For example, party admissions and business records are important topics to trial lawyers, judicial notice and presumptions less so, and the book reflects these realities. Fourth, and most important, the book bridges the gap between evidence as an academic subject in the classroom and evidence as a functional tool in the courtroom. It shows where the evidence rules are commonly used in the real world of trials and how the effective trial lawyer uses them to persuade the judge deciding evidentiary issues.

This book does not claim to do some things. It does not approach evidence from a historical development, social policy, or comparative law perspective. It is neither a critical analysis of the existing rules nor a critique of interpretative case law. It accepts the present evidence rules, the ones lawyers and judges deal with on a daily basis, and analyzes them functionally. It shows how those rules apply in the daily life of the courtroom and how a lawyer can and should use the law as a functional tool to persuade the judge making the evidentiary rulings.

We have not attempted to duplicate the research done by the leading treatises. Instead, we rely on them. The book is principally footnoted to McCormick on Evidence, Weinstein’s Federal Evidence, and Wigmore on Evidence, the three leading treatises on evidence, and to Evidence by Mueller and Kirkpatrick, which is quickly joining the others. The citations to these treatises will be much more useful than individual case citations in researching evidentiary issues that arise.

The chapters in the book have law and practice sections. The law sections contain functional overviews of the Federal Rules of Evidence, footnoted to the major treatises. We have relied on these and other treatises as well as the Advisory Committee’s Notes. The practice sections contain realistic examples, in commonly recurring fact settings, of how particular rules are used before and during trials, how lawyers should (and sometimes fail to) make proper

evidentiary objections, and how judges make rulings. These examples are based on actual federal and state cases. The examples get into the mind of the judge by noting the judge's thoughts, concerns, and reasoning when ruling on objections. We believe this approach is what inexperienced trial lawyers need to learn when bridging the gap between evidence rules as academic subjects and evidence rules as courtroom tools.

Why us? Each of us has been a trial lawyer, professor, and judge. Collectively we have over 25 years of experience as trial lawyers, over 50 years as professors teaching and writing about evidence and trial advocacy, and over 30 years as civil and criminal trial judges. During these years, we have noted a disturbing, recurring fact: Many lawyers, while "knowing" evidence rules, are less capable of using those rules as functional tools to persuade trial judges to rule in their favor. Since we have lived in both the world of academe and the world of trials, we hope that our collective experiences will be useful to those who will, and those who do, use the Federal Rules of Evidence or their state counterparts on a regular basis in the courtroom.

Throughout the book, we have used masculine pronouns to refer to the judges and lawyers. We did this for the sake of simplicity and consistency, and for no other reason.

A book is always the result of more than the efforts of its authors. Our spouses, Gloria Torres Mauet and Hon. Laretta Higgins Wolfson, have been patient supporters of this effort from its inception. They are both trial lawyers, and their thoughtful suggestions have influenced the book in numerous ways. To our students and staff who have worked with us, we say thanks.

We have made several additions and changes to this fourth edition. First, we have updated Sec. 7.1 and other sections dealing with the Sixth Amendment Confrontation Clause to include all Supreme Court cases interpreting *Crawford v. Washington*.

Second, we have added a new section, Sec. 10.11, which discusses common evidentiary issues that apply to the admissibility of electronic evidence such as e-mail, web pages and postings, and digital photographs. Such evidence is increasingly common and important in current litigation.

Third, FRE 404(a), 408, 606(b), and 609(a)(2) were amended in 2006, FRE 502 was adopted in 2008, and the text incorporates these changes.

Fourth, the text incorporates all Supreme Court decisions through November 2008 that affect the Rules.

Finally, the accompanying problem CD, located on the inside back cover, has a number of new problems, principally dealing with *Crawford* Confrontation Clause issues and electronic evidence admissibility issues. The new problems have been added to the end of each of the chapters, so the existing problems have the same numbers they had in the previous edition.

We hope you will find the additions to this fourth edition valuable.

Thomas A. Mauet  
Tucson, Arizona

Warren D. Wolfson  
Chicago, Illinois

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# CITATIONS

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For ease in citing, the text uses the following abbreviated citations:

**McCormick**

McCormick on Evidence, Kenneth S. Brown, General Editor (6th ed., Practitioner Treatise Series, 2006)

**Mueller & Kirkpatrick**

Evidence, Christopher B. Mueller & Laird C. Kirkpatrick (3d ed. 2003)

**Weinstein**

Weinstein's Federal Evidence, Joseph M. McLaughlin, Editorial Consultant (2d ed. 1997)

**Wigmore**

Wigmore on Evidence, John Henry Wigmore (Tillers rev. 1983)

## TRIAL EVIDENCE

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