

ASPEN PUBLISHERS

NEW YORK EVIDENCE HANDBOOK

Second Edition

MICHAEL M. MARTIN
DANIEL J. CAPRA
FAUST F. ROSSI

Authentication and Identification	875
"Best Evidence" Rule	917
General Principles	1
Hearsay	639
Judicial Notice	27
Opinion Testimony	559
Presumptions	57
Privileges	277
Relevance	105
Witnesses	419



Wolters Kluwer
Law & Business

ASPEN PUBLISHERS

**NEW YORK EVIDENCE
HANDBOOK**

Rules, Theory, and Practice

Second Edition

Michael M. Martin

*Alpin J. Cameron Professor of Law
Fordham University School of Law*

Daniel J. Capra

*Philip D. Reed Professor of Law
Fordham University School of Law*

Faust F. Rossi

*Professor of Law and
Samuel S. Liebowitz Professor of Trial Techniques
Cornell Law School*



Wolters Kluwer

Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other professional assistance is required, the services of a competent professional person should be sought.

—From a *Declaration of Principles* jointly adopted
by a Committee of the American Bar Association
and Committee of Publishers and Associations

Copyright © 2003 by Michael M. Martin and Daniel J. Capra; copyright in Chapter 7
by Faust F. Rossi

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or any information storage and retrieval system, without permission in writing from the publisher. Requests for permission to make copies of any part of this publication should be mailed to:

Permissions
Aspen Publishers
76 Ninth Avenue
New York, NY 10011

Printed in the United States of America

5 6 7 8 9 0

Library of Congress Cataloging-in-Publication Data

Martin, Michael M., 1943-

New York evidence handbook: rules, theory, and practice/Michael M. Martin,
Daniel J. Capra, Faust F. Rossi—2nd ed.
p. cm.

Includes index.

ISBN 978-0-7355-2981-6 (hard cover)

I. Evidence (Law)—New York (State) I. Capra, Daniel J., 1953- II. Rossi, Faust F.
III. Title.

KFN6030.M37 2002
347.747'06—dc21

2002033274

About Wolters Kluwer Law & Business

Wolters Kluwer Law & Business is a leading provider of research information and workflow solutions in key specialty areas. The strengths of the individual brands of Aspen Publishers, CCH, Kluwer Law International and Loislaw are aligned within Wolters Kluwer Law & Business to provide comprehensive, in-depth solutions and expert-authored content for the legal, professional and education markets.

CCH was founded in 1913 and has served more than four generations of business professionals and their clients. The CCH products in the Wolters Kluwer Law & Business group are highly regarded electronic and print resources for legal, securities, antitrust and trade regulation, government contracting, banking, pension, payroll, employment and labor, and healthcare reimbursement and compliance professionals.

Aspen Publishers is a leading information provider for attorneys, business professionals and law students. Written by preeminent authorities, Aspen products offer analytical and practical information in a range of specialty practice areas from securities law and intellectual property to mergers and acquisitions and pension/benefits. Aspen's trusted legal education resources provide professors and students with high-quality, up-to-date and effective resources for successful instruction and study in all areas of the law.

Kluwer Law International supplies the global business community with comprehensive English-language international legal information. Legal practitioners, corporate counsel and business executives around the world rely on the Kluwer Law International journals, loose-leafs, books and electronic products for authoritative information in many areas of international legal practice.

Loislaw is a premier provider of digitized legal content to small law firm practitioners of various specializations. Loislaw provides attorneys with the ability to quickly and efficiently find the necessary legal information they need, when and where they need it, by facilitating access to primary law as well as state-specific law, records, forms and treatises.

Wolters Kluwer Law & Business, a unit of Wolters Kluwer, is headquartered in New York and Riverwoods, Illinois. Wolters Kluwer is a leading multinational publisher and information services company.

ASPEN PUBLISHERS SUBSCRIPTION NOTICE

This Aspen Publishers product is updated on a periodic basis with supplements to reflect important changes in the subject matter. If you purchased this product directly from Aspen Publishers, we have already recorded your subscription for the update service.

If, however, you purchased this product from a bookstore and wish to receive future updates and revised or related volumes billed separately with a 30-day examination review, please contact our Customer Service Department at 1-800-234-1660, or send your name, company name (if applicable), address, and the title of the product to:

**ASPEN PUBLISHERS
7201 McKinney Circle
Frederick, MD 21704**

Important Aspen Publishers Contact Information

- To order any Aspen Publishers title, go to *www.aspenpublishers.com* or call 1-800-638-8437.
- To reinstate your manual update service, call 1-800-638-8437.
- To contact Customer Care, e-mail *customer.care@aspenpublishers.com*, call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to Order Department, Aspen Publishers, PO Box 990, Frederick, MD 21705.
- To review your account history or pay an invoice online, visit *www.aspenpublishers.com/payinvoices*.



Wolters Kluwer
Law & Business

To Ellen and Andy
MMM

To Anne, Emily, and David
DJC

Preface

We have written this book to provide trial lawyers and judges with a clear, complete, and up-to-date treatment of the New York law of evidence as it applies in practice. We have provided comprehensive discussions of the principles, the leading decisions, and the significant statutes, with particular emphasis on explaining and illustrating commonly encountered but difficult evidentiary problems. All this is presented in a concise format, easy to use in case preparation and in the courtroom.

New York remains among the decreasing minority of American jurisdictions in which evidence law is largely uncodified. We have, therefore, ensured that the text is supported with ample case citations. To assist the reader in finding helpful authorities quickly, there are usually jump cites to specific pages and often descriptive or analytical parentheticals. At the same time, we have avoided citing unnecessary old cases and lower-court decisions that would only be redundant or of dubious precedential value. When they might be helpful, we have provided citations to the Proposed New York Code of Evidence, the Federal Rules of Evidence, and leading secondary authorities.

Our intent has been to make this a *modern* evidence text for New York. Thus, it is arranged like the Federal Rules of Evidence (for example, Relevance is covered in Chapter 4 and Hearsay in Chapter 8), which has become the standard way of organizing the subject. The discussions focus on legal rules and practical problems as they come up in New York courts in the new millennium. Extended treatment is therefore given to topics such as character and uncharged crimes, the

attorney-client privilege in the corporate setting, inadvertent or selective privilege waivers, impeachment by bad acts and prior convictions, scientific evidence, expert opinions based on facts not in evidence, hearsay included in business records, admissions by employees, and present sense impressions and excited utterances. Furthermore, the commentary reflects the latest scholarship in the field, as well as developments in other jurisdictions, and includes suggestions for changes in current New York law where it is outmoded, internally inconsistent, or unworkable.

Michael M. Martin
Daniel J. Capra

New York, New York
September 2002

Note on Sources

To conserve space, we have used the following short citation forms:

Civil Jury Instructions:

Comm. on Pattern Jury Instructions, Assn. of Supreme Court Justices, *New York Pattern Jury Instructions—Civil*
Vols. 1A & 1B (3d ed. 2002)
Vol. 2 (2d ed. 1974 & Cum. Supp. 2002)

Criminal Jury Instructions:

Office of Court Administration, *Criminal Jury Instructions—New York* (1st ed. 1983 & Supp. 1996)

Epstein & Martin, Attorney-Client and Work-Product:

Edna Selan Epstein & Michael M. Martin, *The Attorney-Client Privilege and the Work-Product Doctrine* (2d ed. 1989)

Evidence in America:

Gregory P. Joseph, Stephen A. Saltzburg & Trial Evid. Comm. of Am. Bar Assn. Litig. Section, *Evidence in America—The Federal Rules in the States* (1987 & Cum. Supp. 1992)

Federal Practice and Procedure:

Federal Practice and Procedure is cited by volume and author(s)' surname(s):

Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure

Vol. 21 (1977 & Supp. 2002)

Vol. 22 (1978 & Supp. 2002)

Vol. 23 (1980 & Supp. 2002)

Vol. 24 (1986 & Supp. 2002)

Vol. 25 (1989 & Supp. 2002)

Vol. 26 (1992 & Supp. 2002)

Vol. 26A (1992 & Supp. 2002)

Vol. 30 (1997 & Supp. 2002)

Vol. 30A (2000 & Supp. 2002)

Charles Alan Wright & Victor James Gold, Federal Practice and Procedure

Vol. 27 (1990 & Supp. 2002)

Vol. 28 (1990 & Supp. 2002)

Vol. 29 (1997 & Supp. 2002)

Vol. 31 (1997 & Supp. 2002)

Michael H. Graham, Federal Practice and Procedure

Vol. 30B (Interim ed. 2000 & Supp. 2002)

Fisch on New York Evidence:

Edith L. Fisch, *Fisch on New York Evidence* (2d ed. 1977 & Cum. Supp. 2002)

Martin, Basic Problems:

Michael M. Martin, *Basic Problems of Evidence* (6th ed. 1988)

McCormick:

McCormick on Evidence (John William Strong et al. eds., Practitioner 5th ed. 1999 & Supp. 2001)

Mueller & Kirkpatrick:

Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence—Practice Under the Rules* (2d ed. 1999)

Proposed Code Evid.:

The Proposed Code is cited to the appropriate draft, or with no date if there is no significant difference between the 1982 and 1991-1992 drafts:

Note on Sources

Proposed Code of Evidence for the State of New York (undated): this draft was prepared by the Consultants to the Law Revision Commission and circulated for public comment; it is cited as “(Consultants’ draft 1980)”

A Code of Evidence for the State of New York (undated): This draft was submitted by the Law Revision Commission to the 1982 Session of the Legislature; it is cited as “(1982)”

A Code of Evidence for the State of New York (undated): This draft was submitted by the Governor to the 1991-1992 Session of the Legislature; it is cited as “(1991-1992)”

Proposed Fed. R. Evid.:

Proposed Federal Rules of Evidence, as promulgated by the Supreme Court, 56 F.R.D. 183 (1972), effective date suspended by Congress, Pub. L. No. 93-12 (1973)

Richardson on Evidence:

Richardson is cited by edition:

(10th ed.) Jerome Prince, *Richardson on Evidence* (10th ed. 1973 & Cum. Supp. 1972-1985 by Jerome Prince & Richard T. Farrell)

(11th ed.) Richard T. Farrell, Prince, *Richardson on Evidence* (11th ed. 1995 & Supp. 1997)

Saltzburg, Martin & Capra, *Federal Rules of Evidence Manual*:

Stephen A. Saltzburg, Michael M. Martin & Daniel J. Capra, *Federal Rules of Evidence Manual* (8th ed. 2002 & Cum. Supp. June 2002)

Weinstein, Korn & Miller, *New York Civil Practice*:

Jack B. Weinstein, Harold L. Korn & Arthur R. Miller, *New York Civil Practice* (2002)

Weinstein’s Evidence:

Jack B. Weinstein & Margaret A. Berger, *Weinstein’s Evidence* (Joseph A. McLaughlin ed., 2d ed. 2002)

Wigmore:

John Henry Wigmore, *Evidence in Trials at Common Law*
Vols. 1 & 1A (Peter Tillers rev. ed. 1983)
Vol. 2 (James H. Chadbourn rev. ed. 1979)

- Vols. 3 & 3A (James H. Chadbourn rev. ed. 1970)
- Vol. 4 (James H. Chadbourn rev. ed. 1972)
- Vol. 5 (James H. Chadbourn rev. ed. 1974)
- Vol. 6 (James H. Chadbourn rev. ed. 1976)
- Vol. 7 (James H. Chadbourn rev. ed. 1978)
- Vol. 8 (John T. McNaughton rev. ed. 1961)
- Vol. 9 (James H. Chadbourn rev. ed. 1981)
- 2001-02 Cumulative Supplement (Arthur Best ed., 2002)

New York Evidence Handbook

Summary of Contents

<i>Contents</i>	<i>xi</i>
<i>Preface</i>	<i>xxiii</i>
<i>Note on Sources</i>	<i>xxv</i>
1 Introduction and General Principles	1
2 Judicial Notice	27
3 Presumptions	57
4 Relevance	105
5 Privileges	277
6 Witnesses	419
7 Opinion Testimony	559
8 Hearsay	639
9 Authentication and Identification	875
10 Contents of Writings, Recordings, and Photographs: The “Best Evidence” Rule	917
<i>Table of Cases</i>	<i>939</i>
<i>Table of Federal Statutes</i>	<i>1063</i>
<i>Table of State Statutes</i>	<i>1067</i>
<i>Index</i>	<i>1077</i>

Contents

<i>Preface</i>	<i>xxiii</i>	
<i>Note on Sources</i>	<i>xxv</i>	
Chapter 1	Introduction and General Principles	1
§1.1	Scope of This Book	1
§1.2	Sources of New York Evidence Law	2
	§1.2.1 Common Law, Statutes, Constitutions	2
	§1.2.2 Codification	3
§1.3	Objections and Motions to Strike	4
§1.4	Preserving Evidentiary Rulings for Appeal	7
	§1.4.1 Erroneous Ruling Admitting Evidence	8
	§1.4.2 Erroneous Ruling Excluding Evidence	10
	§1.4.3 Appellate Review of Errors in the Absence of Objections	13
	§1.4.4 Exceptions	14
§1.5	Preliminary Questions	14
	§1.5.1 Preliminary Questions of Relevance	15
	§1.5.2 Other Preliminary Questions	16
	§1.5.3 Preliminary Hearings Outside Presence of Jury	20
§1.6	Limited Admissibility	21
§1.7	Remainder of Completing and Explaining Acts, Conversations, Statements, and Writings	22
§1.8	Court's Power to Marshal or Comment on the Evidence	24

Chapter 2	Judicial Notice	27
§2.1	Overview	27
§2.2	Judicial Notice of Adjudicative Facts	30
§2.2.1	Not Subject to Reasonable Dispute; Personal Knowledge of Judge or Jurors	31
§2.2.2	Examples of Facts of Common Notoriety Judicially Noticed	33
§2.2.3	Examples of Facts Capable of Accurate and Ready Determination Judicially Noticed	38
§2.2.4	Facts of Government and Politics Judicially Noticed; Public Records	40
§2.2.5	Procedure	44
§2.2.6	Conclusiveness of Judicial Notice	45
§2.3	Judicial Notice of Law	46
§2.3.1	Determination of Law to Be Made Without Request	51
§2.3.2	Determination of Law to Be Made upon Request	53
§2.4	Judicial Notice of Legislative Facts	55
Chapter 3	Presumptions	57
§3.1	Overview	57
§3.2	Selected Presumptions in Civil Cases	65
§3.2.1	Official Action and Government Proceedings	66
§3.2.2	Employment	69
§3.2.3	Property Interests and Dispositive Instruments	70
§3.2.4	Contracts, Commercial Transactions, and Releases	74
§3.2.5	Insurance	75
§3.2.6	Suicide	76
§3.2.7	Tort Liability and Automobiles	77
§3.2.8	Domestic Relations	84
§3.2.9	Mailing and Receipt	88
§3.2.10	Agency	89
§3.2.11	Miscellaneous	89
§3.2.12	Knowledge of the Law	92
§3.3	Presumptions in Criminal Cases	92
§3.3.1	Selected Presumptions in Criminal Cases	95
§3.3.2	Presumptions Against the Prosecution	101
§3.3.3	Innocence	103
Chapter 4	Relevance	105
§4.1	Overview	105
§4.1.1	Definition of “Relevance”	106
§4.1.2	Direct and Circumstantial Evidence	111
§4.2	Real Evidence	113

Contents

§4.2.1	Bodily Exhibitions and Personal Demonstrations	123
§4.2.2	Views and Inspections	126
§4.2.3	Photographs, Motion Pictures, and Videotapes	129
§4.2.4	Sound Recordings	141
§4.2.5	X Rays	145
§4.3	Illustrative Evidence	147
§4.4	Experiments and Demonstrations	149
§4.5	Circumstantial Evidence	153
§4.5.1	Consciousness of a Weak Case; Consciousness of Guilt	153
§4.5.2	Spoliation and Suppression of Evidence	158
§4.5.2.1	Failure to Produce Witnesses	158
§4.5.2.2	Prosecutor's Duty to Preserve Evidence	171
§4.5.2.3	Failure of Alibi Witness to Come Forward	178
§4.5.2.4	Pretrial Silence of Defendant	180
§4.5.3	Similar Events or Conditions	183
§4.6	Discretionary Exclusion	189
§4.6.1	Prejudicial Evidence	192
§4.6.2	Confusing or Misleading Evidence	194
§4.6.3	Unreliable Evidence	197
§4.6.4	Time-Consuming Evidence	198
§4.6.5	Cumulative Evidence	200
§4.6.6	Surprise	200
§4.7	Categorical Exclusion	201
§4.8	Character Evidence	202
§4.8.1	Character Directly in Issue	203
§4.8.2	Character Generally Inadmissible to Prove Consistent Conduct	205
§4.8.3	Character Evidence—Exception for Habit and Routine Practice	206
§4.8.4	Character Evidence—Exception for Character of Accused in a Criminal Case	209
§4.8.5	Character Evidence—Exception for Victim's Character	211
§4.8.6	Character Evidence—Exception for Acts Relevant for Other Purposes (Other Crimes Evidence)	219
§4.8.7	Other Acts Probative of Actor's Identity	225
§4.8.8	Other Acts Probative of Actor's Mental State	230
§4.8.9	Other Acts—Context Evidence	240
§4.8.10	Other Acts—Spurious Non-Character Purposes	244
§4.8.11	Other Acts—Balancing Probative Value Against Potential for Prejudice	246
§4.8.12	Methods of Proving Character	250
§4.9	Remedial Measures, Settlements, Medical Payments, Guilty Pleas, and Plea Discussions	256