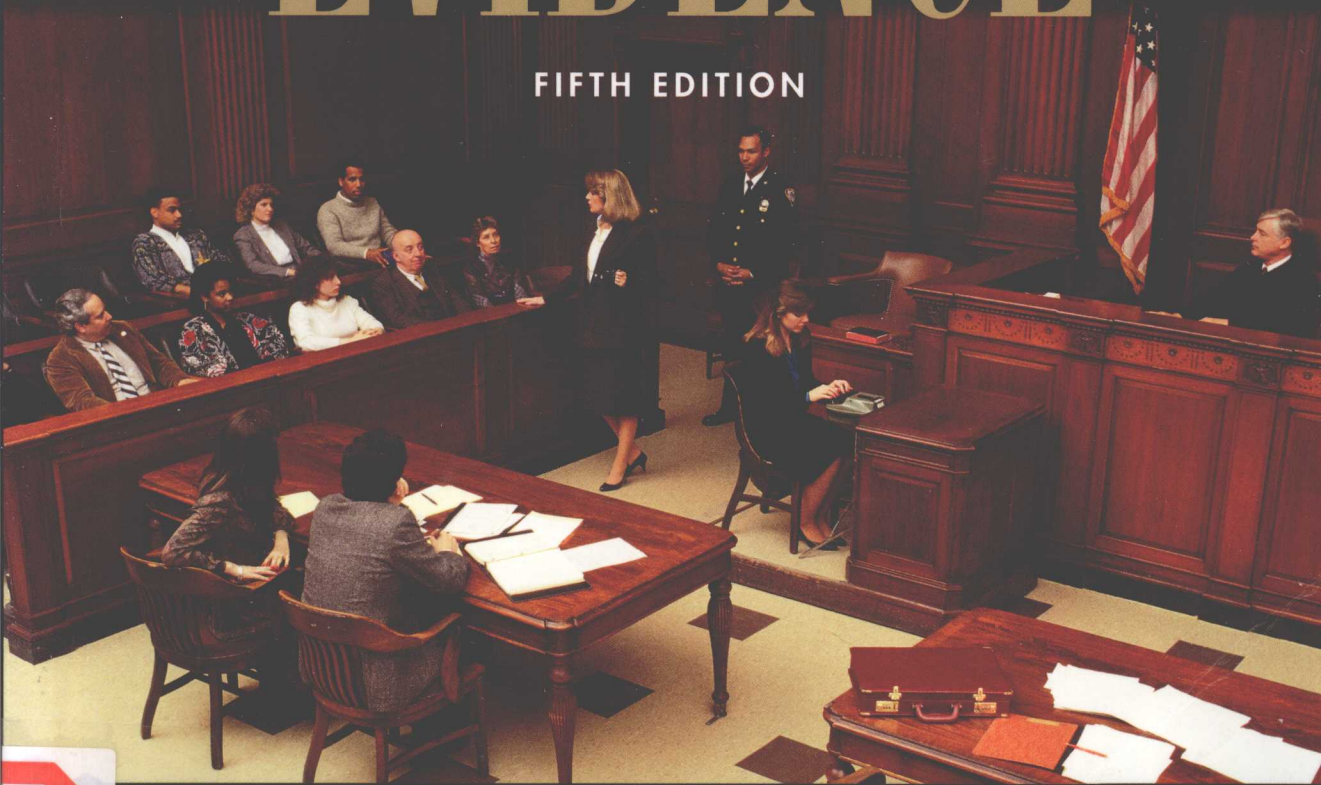


ASPEN COURSEBOOK SERIES

Thomas A. Mauet • Warren D. Wolfson

# TRIAL EVIDENCE

FIFTH EDITION



Wolters Kluwer  
Law & Business

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# TRIAL EVIDENCE

Fifth Edition



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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.

The changes to this fifth edition are principally three-fold. 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* through June 2011. Second, the Federal Rules of Evidence have been restyled, and the restyled rules go into effect on December 1, 2011. The restyled rules are not intended to make any substantive changes to the prior rules. The restyled rules have been incorporated throughout the text and also appear in the appendix. Third, the text incorporates all Supreme Court decisions through June 2011 that affect the rules.

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

Thomas A. Mauet  
Tucson, Arizona

Warren D. Wolfson  
Chicago, Illinois  
December 2011

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## CITATIONS

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

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**Mueller & Kirkpatrick**

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## TRIAL EVIDENCE



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# SUMMARY OF CONTENTS

---

---

<i>Contents</i>	<i>ix</i>
<i>Preface</i>	<i>xix</i>
<i>Citations</i>	<i>xxi</i>
I. AN ADVOCACY APPROACH TO TRIAL EVIDENCE	1
II. THE ROLE AND POWER OF THE TRIAL JUDGE: EVIDENTIARY OBJECTIONS BEFORE AND DURING TRIAL	9
III. OPENING STATEMENTS	27
IV. DIRECT EXAMINATION OF WITNESSES: BASIC CONSIDERATIONS	41
V. DIRECT EXAMINATION OF WITNESSES: RELEVANCE	75
VI. DIRECT EXAMINATION OF WITNESSES: HEARSAY AND NON-HEARSAY	125
VII. DIRECT EXAMINATION OF WITNESSES: HEARSAY EXCEPTIONS	163
VIII. DIRECT EXAMINATION OF WITNESSES: POLICY EXCLUSIONS AND PRIVILEGES	235
IX. DIRECT EXAMINATION OF EXPERTS	273
X. EXHIBITS	303
XI. JUDICIAL NOTICE AND PRESUMPTIONS	347
XII. CROSS-EXAMINATION AND IMPEACHMENT OF LAY AND EXPERT WITNESSES	355
XIII. REDIRECT, RECROSS, REBUTTAL, AND SURREBUTTAL	411
XIV. CLOSING ARGUMENTS	425
Appendix FEDERAL RULES OF EVIDENCE	447
Index	477

---

# CONTENTS

---

---

<i>Preface</i>	<i>xix</i>
<i>Citations</i>	<i>xxi</i>

---

I. AN ADVOCACY APPROACH TO TRIAL EVIDENCE	1
-------------------------------------------	---

---

§1.1.	Introduction	1
§1.2.	The three “Rs”	2
	1. Relevance	2
	2. Reliability	3
	3. Rightness	3
§1.3.	Using the three “Rs”	5
§1.4.	Conclusion	7

II. THE ROLE AND POWER OF THE TRIAL JUDGE: EVIDENTIARY OBJECTIONS BEFORE AND DURING TRIAL	9
-------------------------------------------------------------------------------------------------	---

---

§2.1.	Introduction	9
§2.2.	Sources of judicial power	10
	1. FRE 102	10
	2. FRE 611	10
	3. FRE 614	12
§2.3.	Sources of judicial procedure	13
	1. FRE 104	15
	2. FRE 103	19
	3. FRE 105	19
§2.4.	Raising and meeting objections	22

III. OPENING STATEMENTS	27
-------------------------	----

---

§3.1.	Introduction	27
§3.2.	Mentioning inadmissible evidence	29
	1. Law	29
	2. Practice	31
§3.3.	Mentioning unprovable evidence	32
	1. Law	32
	2. Practice	33

§3.4.	Arguing	34
	1. Law	34
	2. Practice	35
§3.5.	Stating personal opinions	36
	1. Law	36
	2. Practice	36
§3.6.	Discussing law	37
	1. Law	37
	2. Practice	38
§3.7.	Mentioning the opponent's case	38
	1. Law	38
	2. Practice	39

IV. DIRECT EXAMINATION OF WITNESSES: BASIC CONSIDERATIONS	41
--------------------------------------------------------------	----

---

§4.1.	Introduction	41
§4.2.	Witness competency (FRE 601)	41
	1. Law	41
	2. Practice	43
§4.3.	Oath or affirmation (FRE 603)	45
	1. Law	45
	2. Practice	45
§4.4.	Improper witnesses (FRE 605, 606)	46
	1. Law	46
	2. Practice	49
§4.5.	Who may call witnesses (FRE 614)	50
	1. Law	50
	2. Practice	51
§4.6.	Excluding witnesses (FRE 615)	52
	1. Law	52
	2. Practice	54
§4.7.	Personal knowledge and opinions (FRE 602, 701)	55
	1. Law	55
	2. Practice	59
§4.8.	Impeaching own witnesses (FRE 607)	61
	1. Law	61
	2. Practice	62
§4.9.	Leading questions (FRE 611(c))	64
	1. Law	64
	2. Practice	65
§4.10.	Other form objections	67
	1. Law	67
	2. Practice	69
§4.11.	Refreshing recollection and recorded recollection (FRE 612, 803(5))	69
	1. Law	69
	2. Practice	72

V.	DIRECT EXAMINATION OF WITNESSES: RELEVANCE	75
§5.1.	Introduction	75
§5.2.	General relevance	75
	1. Law	75
	a. FRE 401-402	76
	i. What are the matters in issue in the case?	76
	ii. Is the evidence probative of a matter in issue in the case?	77
	b. FRE 403	80
	2. Practice	81
§5.3.	Special relevancy rules	85
	1. Character traits	85
	a. Law	85
	i. "Essential element" rule	86
	ii. "Circumstantial evidence" rule	89
	b. Practice	93
	c. Summary of character evidence	97
	2. Other crimes, wrongs, and acts	98
	a. Law	98
	b. Practice	104
	c. Summary of other uncharged crimes, wrongs, or acts	109
	3. Similar incidents evidence	110
	a. Law	110
	b. Practice	111
	4. Other acts evidence in sexual assault cases (FRE 412-415)	113
	a. Law	113
	b. FRE 412	115
	c. FRE 413-415	117
	d. Practice	118
	5. Habit and routine practice (FRE 406)	119
	a. Law	119
	b. Practice	121
VI.	DIRECT EXAMINATION OF WITNESSES: HEARSAY AND NON-HEARSAY	125
§6.1.	Introduction	125
§6.2.	The hearsay rules	127
	1. A "statement"	127
	2. "Other than one made by the declarant while testifying at the trial or hearing"	129
	3. "Offered in evidence to prove the truth of the matter asserted"	129
§6.3.	Non-hearsay	131
	1. Law	131
	a. Independent legal significance	132

	b. Impeachment	133
	c. Effect on listener's state of mind	134
	2. Practice	135
§6.4.	Prior statement by witness (FRE 801(d)(1))	141
	1. Law	141
	a. Prior inconsistent statements made under oath used for impeachment	142
	b. Prior consistent statements used to rebut a charge of recent fabrication or of improper influence or motive	143
	c. A statement of identification of a person	145
	2. Practice	146
§6.5.	Admission by party-opponent (FRE 801(d)(2))	150
	1. Law	150
	a. A party's own admission	151
	b. Adoptive admissions	152
	c. Admissions by authorized persons, agents, and employees	153
	d. Co-conspirator statements	154
	2. Practice	156
§6.6.	Summary of hearsay analysis	162
<b>VII. DIRECT EXAMINATION OF WITNESSES: HEARSAY EXCEPTIONS</b>		<b>163</b>
§7.1.	Introduction	163
	1. Hearsay exceptions rationale	164
	2. The FRE 803 exceptions	165
	3. The FRE 804 exceptions	166
	4. The Sixth Amendment Confrontation Clause	168
	5. Organizing hearsay exceptions	173
§7.2.	Present sense impressions (FRE 803(1))	175
	1. Law	175
	2. Practice	176
§7.3.	Excited utterances (FRE 803(2))	177
	1. Law	177
	2. Practice	180
§7.4.	Then existing mental, emotional, or physical conditions (FRE 803(3))	181
	1. Law	181
	2. Practice	184
§7.5.	Statements for purpose of medical diagnosis or treatment (FRE 803(4))	186
	1. Law	186
	2. Practice	188
§7.6.	Statements under belief of impending death (FRE 804(b)(2))	190
	1. Law	190
	2. Practice	191

§7.7.	Former testimony (FRE 804(b)(1))	193
	1. Law	193
	2. Practice	196
§7.8.	Statements against interest (FRE 804(b)(3))	198
	1. Law	198
	2. Practice	202
§7.9.	Statements of personal or family history (FRE 804(b)(4))	204
	1. Law	204
	2. Practice	205
§7.10.	Business records (FRE 803(6), 803(7), 902(11), 902(12))	205
	1. Law	205
	2. Practice	212
§7.11.	Public records (FRE 803(8)-803(17))	213
	1. Law	213
	2. Practice	216
§7.12.	Recorded recollection (FRE 803(5))	217
	1. Law	217
	2. Practice	219
§7.13.	Reputation evidence (FRE 803(19)-803(21))	220
	1. Law	220
	2. Practice	221
§7.14.	Treatises (FRE 803(18))	222
	1. Law	222
	2. Practice	224
§7.15.	Residual or catchall exception (FRE 807)	225
	1. Law	225
	a. Trustworthiness	226
	b. Necessity	228
	c. Material fact	228
	d. Satisfy general purpose of Rules and interests of justice	228
	e. Notice	228
	2. Practice	229
§7.16.	Hearsay within hearsay (FRE 805)	230
	1. Law	230
	2. Practice	230
§7.17.	Attacking and supporting credibility of declarant (FRE 806)	231
	1. Law	231
	2. Practice	233
VIII. DIRECT EXAMINATION OF WITNESSES: POLICY EXCLUSIONS AND PRIVILEGES		235
§8.1.	Introduction to policy exclusions	235
§8.2.	Subsequent remedial measures (FRE 407)	236
	1. Law	236
	2. Practice	238

<b>xiv</b>	<b>Contents</b>	
§8.3.	Compromise and offers of compromise (FRE 408)	240
	1. Law	240
	2. Practice	242
§8.4.	Payment of medical expenses (FRE 409)	243
	1. Law	243
	2. Practice	243
§8.5.	Existence of liability insurance (FRE 411)	244
	1. Law	244
	2. Practice	245
§8.6.	Plea agreements and discussions (FRE 410)	247
	1. Law	247
	2. Practice	248
§8.7.	Victim's past sexual behavior or alleged sexual predisposition in sex offense cases (FRE 412)	249
	1. Law	249
	2. Practice	251
§8.8.	Introduction to privileges	252
§8.9.	Preliminary considerations	254
§8.10.	Marital privilege to bar spousal testimony	256
	1. Law	256
	2. Practice	257
§8.11.	Interspousal communications privilege	258
	1. Law	258
	2. Practice	259
§8.12.	Attorney-client privilege	261
	1. Law	261
	2. Practice	265
§8.13.	Doctor-patient privilege	269
	1. Law	269
	2. Practice	270
§8.14.	Other privileges	271
<b>IX. DIRECT EXAMINATION OF EXPERTS</b>		<b>273</b>
§9.1.	Introduction	273
§9.2.	<i>Frye, Daubert, Joiner, and Kumho Tire</i>	274
	1. Law	274
	2. Practice	278
§9.3.	Relevancy	280
	1. Law	280
	2. Practice	282
§9.4.	Reliability	284
	1. Law	284
	2. Practice	290
§9.5.	Sources of facts and data on which expert relies	293
	1. Law	293
	2. Practice	296

§9.6.	Disclosure of basis of expert's testimony	297
1.	Law	297
2.	Practice	298
§9.7.	Form of expert's testimony	299
1.	Law	299
2.	Practice	299
§9.8.	FRE 403	300
1.	Law	300
2.	Practice	300
§9.9.	Court-appointed experts	301
1.	Law	301
2.	Practice	302
X.	EXHIBITS	303
§10.1.	Introduction	303
§10.2.	Foundations	304
§10.3.	Real evidence	310
1.	Law	310
a.	Sensory identification	310
b.	Chain of custody	311
2.	Practice	312
§10.4.	Demonstrative evidence	315
1.	Law	315
2.	Practice	317
§10.5.	Documents and instruments	319
1.	Law	319
2.	Practice	320
§10.6.	Business records	321
1.	Law	321
2.	Practice	325
§10.7.	Public records	328
1.	Law	328
2.	Practice	330
§10.8.	Recorded recollection	332
1.	Law	332
2.	Practice	332
§10.9.	Summaries	334
1.	Law	334
2.	Practice	334
§10.10.	Original documents ("best evidence") rule	336
1.	Law	336
2.	Practice	339
§10.11.	Electronic evidence	341
1.	Computerized business records and data	342
2.	E-mails, text messages, and instant messages	343
3.	Web pages and postings	344



4. Digital photographs	345
5. Computer-generated animations and simulations	346
 XI. JUDICIAL NOTICE AND PRESUMPTIONS	 347
§11.1. Introduction	347
§11.2. Judicial notice	347
1. Law	347
2. Practice	349
§11.3. Presumptions	350
1. Burden of proof	351
2. Presumptions and inferences	352
 XII. CROSS-EXAMINATION AND IMPEACHMENT OF LAY AND EXPERT WITNESSES	 355
§12.1. Introduction	355
§12.2. Cross-examination	355
1. Law	355
2. Practice	357
§12.3. Impeachment procedures	360
1. Law	360
a. “Voucher” rule rejected	361
b. Impeachment methods	362
c. The good faith requirement	364
d. The “confrontation” or “warning question” requirement	364
e. The relevancy requirement and the “collateral”–“non-collateral” dichotomy	365
2. Practice	367
§12.4. Impeachment methods	370
1. Bias, interest, and motive	370
a. Law	370
b. Practice	372
2. Prior inconsistent statements	374
a. Law	374
b. Practice	378
3. Contradictory facts	383
a. Law	383
b. Practice	384
4. Prior convictions	386
a. Law	386
i. Overview of FRE 609	387
ii. The “general rule” of FRE 609(a)	388
iii. The 10-year rule of FRE 609(b)	390
iv. Pardons, juvenile convictions, and appeals	391
v. The FRE 104(a) hearing	391
b. Practice	393