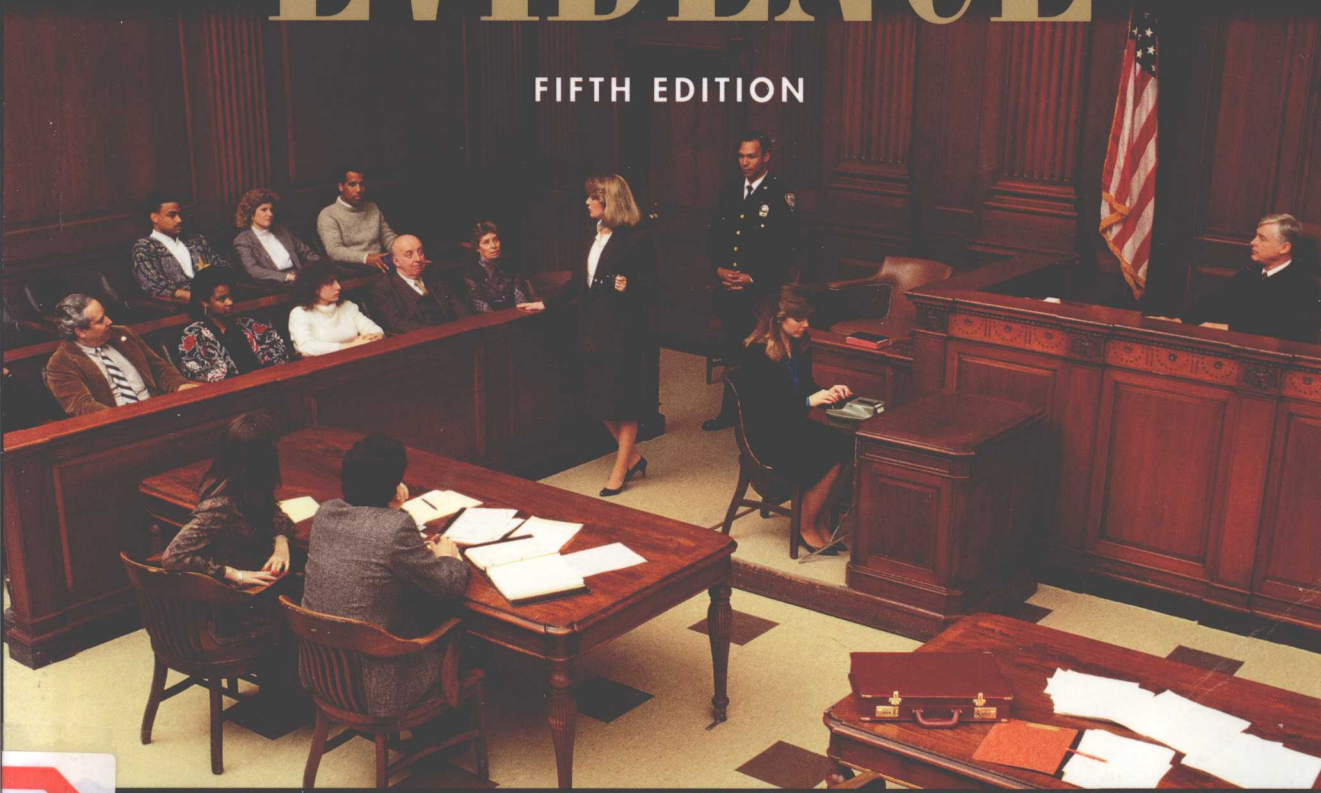
ASPEN COURSEBOOK SERIES

Thomas A. Mauet • Warren D. Wolfson

TRIAL EVIDENCE

FIFTH EDITION



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THOMAS A. MAUET
Milton O. Riepe Professor of Law and
Director of Trial Advocacy
University of Arizona College of Law

WARREN D. WOLFSON
Justice of the Appellate Court of the
State of Illinois (retired) and
Former Dean and
Distinguished Visiting Professor
DePaul University College of Law

Wolters Kluwer
Law & Business

Published by Wolters Kluwer Law & Business in New York.

Wolters Kluwer Law & Business serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.wolterskluwerlb.com)

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Wolters Kluwer Law & Business
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-4548-1018-6

Library of Congress Cataloging-in-Publication Data

Mauet, Thomas A.
Trial evidence / Thomas A. Mauet, Warren D. Wolfson. — 5th ed.
p. cm.
ISBN 978-1-4548-1018-6 (perfectbound)
1. Evidence (Law) — United States. I. Wolfson, Warren D. II. Title.

KF8935.M28 2012
347.73'6 — dc23

2011048125

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PREFACE

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. Lauretta 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

CITATIONS

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

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

Mueller & Kirkpatrick
Evidence, Christopher B. Mueller & Laird C. Kirkpatrick (4th ed. 2009)

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

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

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