# PREFACE

Why *Trial Evidence?* The present legal landscape has numerous evidence hornbooks and treatises, many of which are authoritative and long-standing. 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*, *Wigmore on Evidence*, and *Evidence* by Mueller and Kirkpatrick. 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



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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? Collectively we have more than 30 years of experience as trial lawyers, more than 60 years as professors teaching and writing about evidence and trial advocacy, and more than 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. As 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.

A book is always the result of more than the efforts of its authors. Our spouses, Gloria Torres Mauet and Hon. Lauretta Higgins Wolfson (retired), 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 hope you will find the additions to this edition valuable.

Thomas A. Mauet
Tucson, Arizona

Warren D. Wolfson
Chicago, Illinois

Jason Kreag
Tucson, Arizona

## ***Preface to the Eighth Edition***

I am thrilled to join Professor Mauet and Judge Wolfson for the eighth edition of *Trial Evidence*. For nearly a decade, I have enjoyed teaching from this book. Its approach is consistent with my approach as a professor — to teach the Rules of Evidence with an eye toward litigation. From its first edition, this has been a practical book, designed to easily transition from the classroom to a resource for attorneys in practice. I think it has accomplished this goal, and the changes made for the eighth edition are consistent with this approach.

Professor Mauet and Judge Wolfson continue to be extremely involved in the book, both in terms of substance and style. As such, the overall structure of the book and its themes remain the same. I have added a light edit throughout, in many cases responding to suggestions from my students who have worked through the book with me in prior years.

There are several substantive changes to highlight in the eighth edition. In 2022, the Advisory Committee on Evidence Rules approved changes to Rules 106, 615, and 702. These changes will take effect on December 1, 2023. The effective date for these revised rules is noted in the text and appendix. Because the effective date is mere

months after this edition's publishing date, I have included the revised Rules 106, 615, and 702 as if they have already been adopted. In addition, since the last edition, a restyled version of FRE 807 has been adopted.

Collectively, these revised and restyled rules are designed to promote fairness and reliability. The revisions to FRE 106—the rule of completeness—make clear that this rule applies to all statements, not only those that had been previously recorded. The revisions also clarify that a completing statement under FRE 106 survives a hearsay objection. The revised FRE 615 solidifies the judge's authority to ensure that witnesses do not have access to the testimony from prior witnesses before they testify. The revised FRE 702 strengthens the judge's gatekeeping role for the admission of expert testimony, with an aim at ensuring that expert testimony is based on a reliable application of the expert's methodology. Finally, restyled FRE 807 was not meant to change the scope of the residual hearsay exception. Rather, the restyle was designed to increase clarity, while maintaining the rule's focus on trustworthiness and necessity for the hearsay statement.

In addition, the eighth edition includes new problems. As has been the practice in prior editions, I have not removed the problems that accompanied the seventh edition. Rather, I have added the new problems, maintaining the existing numbering for the problems from prior editions. The problems are available in the online companion materials to the eighth edition.

Finally, I welcome comments and suggestions from students, practitioners, and evidence teachers who have used *Trial Evidence*. You can find my contact information at the University of Arizona College of Law faculty webpage.

Jason Kreag
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