

This is your new

Trial Handbook

Spring 2016

by Kent Sinclair

This new *Trial Handbook (Spring 2016)* replaces last year's *Trial Handbook*. Simply discard the two blood-orange volumes of *Trial Handbook (Fall 2015)*, as well as the USB flash drive, and replace them with this completely updated set.

As always, *Trial Handbook* continues to provide the extensive practical information you need regarding the complex principles of evidence law. **Volume 1** separates the materials of the first seven chapters into one volume that is **small and light-weight enough to drop into a briefcase** or carry under your arm into the courtroom. **Volume 2** contains the extensive and up-to-date **Case Authority**, a compendium of cases summarizing hundreds of the **leading decisions construing each evidence rule**, organized and presented in a clear and thorough volume of well over 1,000 pages. In addition, you will find the entire contents of both volumes of *Trial Handbook (Spring 2016)* on the companion **USB flash drive**—a searchable electronic version of the book that provides instant access to all of Professor Sinclair's materials, in a convenient, portable format.

The product of Professor Kent Sinclair's knowledge and experience as a litigator, judge, law professor, and legal skills trainer, *Trial Handbook (Spring 2016)* helps you master every trial phase—from **pretrial planning** and **opening statements**, to the **presentation of proof**, to **closing arguments** and **post-trial motions**.

Here's just a tiny sample of what you'll find in the Case Authority:

In a criminal case, once the trial judge renders a clear-cut determination that a defendant's confession was in fact voluntary, consistent with Rule 104(e), **the defendant retains freedom to familiarize a jury with circumstances that attend the taking of his confession** since the jury is empowered to assess the credibility of confessions as part of its decision on the ultimate factual issue of guilt or innocence. (See page 30.)

When a **witness testifies by deposition**, and the offering party chooses to submit only excerpts of that witness's testimony at trial, several rules come into play. (See pages 52 to 53.)

Public records, including judgments and other court documents, are proper **subjects of judicial notice**. (See *new* discussion of public records, pages 77 to 78.)

Although in sexual assault cases a propensity inference arising from a defendant's prior sexual assaults is permissible under Rule 413, **evidence of a defendant's prior sexual assaults still remains subject to Rules 401 and 402** and is admissible only

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if relevant, having a tendency to make a fact of consequence more or less probable than it would be without the evidence. (*See* pages 143, 390.)

Evidence of death threats against witnesses is generally admissible against a criminal defendant to show consciousness of guilt of the crime charged. Such evidence is considered direct evidence of the crime charged and is not subject to a Rule 404(b) analysis. (*See* pages 190, 204, 285, 286.)

Habit evidence is never to be lightly established under Rule 406, and evidence of examples, for purposes of establishing such habit, must be carefully scrutinized before admission. (*See* page 313.)

Rule 407 (subsequent remedial efforts) **does not apply to third parties; it applies only to the litigants.** (*See* page 330.)

Waiver of the attorney-client privilege is an exceedingly harsh sanction considered on a case-by-case basis in light of all of the circumstances. Courts generally find waiver only in cases involving unjustified delay, inexcusable conduct, or bad faith. (*See* page 416.)

There is a **circuit split** with respect to the **standard of proof required to establish the crime-fraud exception** to the attorney-client privilege. The **First, Second, Third, Sixth, and Ninth Circuits** all rely upon the **“reasonable basis” approach**. In the **Fifth, Ninth, Tenth, and D.C. Circuits**, the party asserting the exception must present evidence that the allegation of attorney participation in the fraudulent conduct has some foundation in fact. (*See* page 436.)

Private communications between spouses are generally presumed confidential, but that presumption may be rebutted by various factors, including the nature of the message and the circumstances under which it was delivered. (*See* page 449.)

There appears to be **no “work-product privilege” explicitly recognized within the scope of Rule 501**. Rather, federal courts recognize the work-product doctrine as a tool of judicial administration that furthers the goals of fairness and convenience. (*See new* discussion of the work-product doctrine beginning on page 480.)

Courts, in applying the various provisions of Rule 609, have allowed evidence of some—but not all—**foreign convictions** to be admitted. (*See* page 587.)

Under Rule 614, a **judge is free to interject during a direct or cross-examination** to clarify an issue, to require an attorney to lay a foundation, or to encourage an examining attorney to get to the point. (*See* page 676.)

Pursuant to Rule 703, an expert may rely on data that she did not personally collect in order to form an opinion, and need not have conducted her own tests on such data. (*See* page 829.)

A photograph is not hearsay because it makes no “assertion” within the intent of Rule 801(a), but merely depicts a scene as it existed at a particular time. The same is true of a Google Earth image produced by high-resolution imaging satellites. (*See* pages 906, 914, 1228.)

Excited utterances must rest on personal knowledge to be admissible, however, they need not be made contemporaneous with the startling event. (*See* page 1012.)

Where statements contained in emails and chats involving a defendant and obtained from Google pursuant to an SCA warrant were offered as self-authenticating business records of Google under Rule 902(11), but were not created by someone with knowledge, as required by Rule 803(6), the court’s Rule 902(11) authenticity inquiry must end. (*See* page 1249.)