

This is your new

Trial Handbook

Spring 2017

by Kent Sinclair

This *new Trial Handbook (Spring 2017)* replaces last year's *Trial Handbook*. Simply discard the two tangerine-colored volumes of *Trial Handbook (Fall 2016)*, 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 **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 2017)* 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 2017)* 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:

Scope/Applicability of the Rules. Since the Federal Rules of Evidence do not apply to sentencing proceedings, **the rules regarding expert witnesses (Rules 701–706) do not apply**. Nevertheless, expert witness evidence must still be considered reliable in order to be considered. (*See* page CA-3.)

Hearsay at Suppression Hearings. Although a quote in a newspaper article typically constitutes **double hearsay** under Rule 805, by operation of Rule 104(a), a **court may consider hearsay for purposes of a suppression hearing**. Nevertheless, the court must still determine whether such evidence is competent and credible. (*See* pages CA-7, -29, -1218.)

The “Mailbox Presumption.” Regardless of the quantum of evidence necessary to rebut the mailbox presumption as applied via Rule 301, the movant still bears the burden of proving non-receipt of the mailed item. Even after the “bubble” of presumption has “burst,” the factual question of receipt remains and may be decided in favor of receipt by a fact finder who may choose to draw inferences of receipt from the evidence of mailing, in spite of contrary evidence. (*See* page CA-112.)

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Excluding Relevant Evidence for Prejudice. A defendant who takes the stand to testify in his own defense may properly be impeached by proof of his prior felony convictions, which generally are not deemed unfairly prejudicial proof under Rule 403. (See page CA-164.)

Other Crimes and Wrongs. Evidence of other wrongful conduct under Rule 404(b) is considered intrinsic when it is offered to show the context in which the charged crime occurred, completing the story or providing a total picture of the charged crime. Based on the nature of elections, **vote buying** cannot occur every day, so evidence from prior years is not as remote as it might be in other types of cases, for purposes of a Rule 404(b) analysis. (See pages CA-221, -230.)

Rape Shield Rule. A defendant’s argument that Rule 412, the “rape shield rule,” should not apply because a minor does not contend that she was the victim of a sexual assault is without merit, because the Sixth Circuit has already determined that Rule 412 applies to criminal cases charging sex trafficking of minors. (See page CA-369.)

Psychotherapist-Patient Communications. A plaintiff may withdraw or formally abandon all **claims for emotional distress** in order to avoid **forfeiting his psychotherapist-patient privilege**. Thus, a plaintiff may continue to protect the privacy of his mental health records, but only at the expense of his mental health claims that go beyond garden-variety emotional distress. (See page CA-446.)

Executive Privilege. The “Presidential privilege” is the strongest branch of executive privilege and rests on the constitutional separation of powers, affording the **President of the United States** considerable autonomy and confidentiality, giving recognition to the paramount necessity of **protecting the executive branch from vexatious litigation** that might distract it from the energetic performance of its constitutional duties. But **it is not inviolate** and can be overcome by a showing of need and relevance. (See page CA-472.)

Juror’s Competency As a Witness. Federal courts differ as to whether evidence that a juror uttered racial comments or slurs in the jury room during deliberations may be considered under Rule 606(b). The U.S. Supreme Court is currently considering **whether an exception may be made** into the general prohibition of inquiry into jury deliberations expressed in Rule 606(b) **when issues of racial prejudice may be involved**. (See page CA-560.)

Opinion Testimony by Law Witnesses. Courts have recognized the reality that **eyewitnesses sometimes find it difficult to describe the appearance or relationship of persons**, the atmosphere of a place, or the value of an object by reference only to objective facts. Accordingly, Rule 701 permits witnesses to testify to their **personal perceptions** in the form of **inferences or conclusory opinions**. (See page CA-719.)

Hearsay Exception: Co-Conspirator’s Admissions. It is not necessary to know the **precise identity of a co-conspirator** before a witness’s statements can be admitted under the Rule 801(d)(2)(E) exception. (See page CA-1005.)

Authenticating Digital Files. The **authentication of social media evidence** in particular presents some special challenges because of the great ease with which a social media **account may be falsified** or a legitimate account may be **accessed by an imposter**. Depending on the circumstances of the case, a variety of factors could help support or diminish the proponent’s claims as to the authenticity of a document allegedly derived from a social media website, and Rules 901 and 902 provide an appropriate framework in which to conduct that analysis. (See page CA-1261.)