

This is your new

Trial Handbook

Fall 2017

by Kent Sinclair

This new *Trial Handbook (Fall 2017)* replaces the Spring 2017 *Trial Handbook*. Simply discard the two aquamarine-colored volumes of *Trial Handbook (Spring 2017)*, as well as the USB flash drive, and replace them with this completely updated set. The product of Professor Kent Sinclair's knowledge and experience as a litigator, judge, law professor, and legal skills trainer, *Trial Handbook* helps you master every trial phase—from **pretrial planning** and **opening statements**, to the **presentation of proof**, to **closing arguments** and **post-trial motions**.

This edition of *Trial Handbook* updates **Volume 2's** extensive **Case Authority** with scores of the most recent leading decisions construing the evidence rules. Here's just a small sample:

Judicial Notice of Adjudicative Facts. A new section lists several recent **cases construing Rule 201** with respect to judicial notice taken of information contained on websites of various state and federal government bodies, including USCIS, the EPA, and the Financial Accounting Standards Board. *See* page CA-66.

Relevance and Its Limits. As Rule 401 applies in discrimination and harassment cases, **evidence of harassing comments** directed at persons of other nationalities will support an inference of a national-origin-based **hostile work environment** if the plaintiff in an employment discrimination case was present when the comments were made or otherwise became aware of them during the time that he or she was allegedly subject to a hostile work environment. *See* page CA-123.

Spousal and Marital Communications Privileges. The testimonial privilege under **Rule 501** does not apply if a marriage is in permanent disrepair, because where the marriage is nothing but a legal formality, there is no marital relationship to protect. But if a marriage is intact, courts should seek to protect it from the adverse consequences of **forcing one spouse to testify against the other** regardless of whether the subject matter of the testimony concerns pre- or post-marriage events. *See* page CA-457.

Competency to Testify. Simply having **Asperger syndrome** does not disqualify a witness from testifying. Cross-examination provides the opposing party the opportunity to **probe the witness's cognitive abilities and recollection** of the relevant events. Susceptibility to cross-examination is not a basis on which to conclude that such a witness must be incredible so as to exclude his testimony under **Rule 601**. *See* page CA-518.

Juror's Competency as a Witness. Where a juror makes a clear statement indicating reliance on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule, as embodied in **Rule 606(b)**, give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial

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of the jury trial guarantee. Not every offhand comment indicating racial bias or hostility will justify further judicial inquiry. There must be a showing that one or more jurors made statements exhibiting overt racial bias that cast **serious doubt on the fairness and impartiality of the jury’s deliberations** and resulting verdict. *See* page CA-566.

Overlap of Lay and Expert Opinion Testimony. When a physician testifies that the plaintiff was coughing and running a fever, this is **lay witness testimony governed by Rule 701**. However, if the physician also testifies that to diagnosing the patient as having Reactive Airways Dysfunction Syndrome caused by exposure to a toxic chemical, this is testimony based on scientific, technical, or other specialized knowledge and the witness must be **qualified as an expert under Rule 702** for such testimony to be admissible. *See* page CA-739.

Hearsay Exclusions: Party Admissions. Statements in the lyrics of rap music created by defendant prior to trial and describing behavior of the singer and indicating that he had possessed, brandished, and used a firearm qualified as **statements against interest under Rule 801(d)(2)(A)** in a prosecution for being a felon in possession of a firearm. *See* page CA-979.

Hearsay Exclusions: Co-Conspirator’s Admissions. Individuals need not even know each other to be part of the same conspiracy, for purposes of applying the hearsay exclusion for co-conspirator statements embodied in Rule 802(d)(2)(E). *See* page CA-1013.

Authenticating or Identifying Evidence. Despite the prevalence of email communication in this day and age, case law regarding **how Rule 901 relates to the authentication of emails** is sparse. Under Rule 901(b)(4), records may be authenticated by the introduction of testimony regarding their unique characteristics: the appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances. *See* page CA-1269.

Contents of Writings. A party offering email messages purportedly originating from a user’s account using the America Online software suite needs to lay a foundation to establish whether the printed messages were printed directly from AOL in a view-only mode, prohibiting alterations, or whether the messages were copied from AOL and pasted into another program, like MS Word, enabling a user to edit the message text. This bears on the assessment of whether the content of the text is **authentic under Rule 901(a)**, and also **raises a query under the best-evidence rule** and its exceptions, as embodied in Rules 1001–1008. *See* page CA-1322. Similarly, with an email message containing “cut-and-paste” copies of Internet messaging conversations involving one of the litigants, it is possible the text was edited so the email does not accurately reflect the original instant messages. If such edits were made, to the extent the email message no longer accurately represents the original message, it may not be admissible as a duplicate under Rule 1003. *See* page CA-1341.

In addition, you will find the entire contents of both volumes of *Trial Handbook (Fall 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.

Thank you for subscribing to *Trial Handbook*. If you have questions about this product, or would like information on our other products, please contact customer service at (800) 260-4PLI.