This is your new

Trial Handbook
Fall 2014
by Kent Sinclair

Your new ***Trial Handbook (Fall 2014)*** replaces the Spring 2014 edition of *Trial Handbook*. Simply discard the two grass-green volumes of *Trial Handbook (Spring 2014)*, as well as the CD-ROM and 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 lightweight 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 (Fall 2014)* on the companion **CD-ROM** and **USB flash drive**. These searchable, electronic media provide 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 (Fall 2014)* 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 prosecution for murder-for-hire and conspiracy to commit that crime, the district court's invitation to re-raise the issue of whether it should allow introduction of a co-defendant's conflicting account of her whereabouts following the murder prevented its ruling from being "definitive" under Rule 103(b), and the co-defendant failed to preserve this issue for normal appellate review. *See* page CA-27.

The business records status of a receipt for $10,000 found in a search of the defendant's residence, accompanied at trial by an affidavit from an attorney attesting that the receipt was a business record reflecting payment for legal services, should have been decided by the judge under Rule 803(6). The court should not have allowed the jury to see the attorney's affidavit, which in addition to being hearsay was not relevant to any issue in the prosecution of the defendant for conspiracy to distribute more than 5 kg of cocaine. Its only function was to get the receipt into evidence. *See* page CA-32.

A defendant's contention that admission of a redacted version of his confession misled the jury because it left out parts concerning his prior prison sentence, his drug history, and his church, misunderstands the purpose of Rule 106, which is not so broad as to require the admission of all redacted portions of a statement, without regard to content. While the defendant argued that the redacted portions should be admitted to show the jury the "flavor of the interview," to "humanize" him, and to convey the voluntariness of his statement, and while this evidence might be relevant to sympathy and sentencing, the redacted version was not misleading; therefore the Rule of Completeness did not require admission of the full statement into evidence. *See* page CA-68.

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An employee may introduce evidence of instances of racial harassment of which he is not personally aware, sometimes referred to as "me-too evidence," to prove that his employer is responsible for the harassment or to rebut an affirmative defense, consistent with Rules 401 and 402. But even when "me too" evidence is relevant under Rule 401, the district court retains the discretion to exclude that evidence under Rule 403, if it is unduly prejudicial, confusing, misleading, or cumulative. *See* page CA-127.

Rule 412 contains three exceptions in criminal cases to the general ban on evidence of prior sexual conduct. Of course, even if the proffered evidence fits into one of the exceptions delineated in the rule, it, like all evidence, must still pass the Rule 403 balancing test before it can be admitted at trial. *See* page CA-163.

Rule 414(a) provides that in a criminal case alleging that a defendant committed child molestation, a court may admit evidence that the defendant committed a prior act or acts of child molestation, which includes possession of child pornography under Rule 414(d)(2). *See* page CA-402.

The marital communications privilege, as recognized under Rule 501, exists to promote marital harmony and stability by ensuring that spouses feel free to communicate their deepest feelings to each other without fear of eventual exposure in a court of law. However, this privilege is not limitless. Courts have long recognized an exception to the privilege when one spouse commits an offense against the other. The Fifth, Eighth, Ninth, and Tenth Circuits have expanded the "offense against spouse" exception to the marital communications privilege recognized under Rule 501 to include an offense committed against a child of either spouse. *See* page CA-453.

Only a very small handful of federal district courts have recognized a parent-child privilege that would permit a child to refuse to testify against his or her parent. As of June 2014, the Districts of Nevada and Connecticut, as well as the Eastern District of Washington, have all recognized the privilege. In contrast, every federal appellate court that has considered adoption of the parent-child privilege—including the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits—has rejected it. *See* page CA-475.

Judging the speed of a vehicle or a distance between two vehicles based on an individual's perception is the quintessential kind of lay opinion evidence contemplated by Rule 701. Accordingly, the district court, in applying Rule 701, committed no error in crediting the testimony of an experienced police officer that the officer credibly believed, after observing two cars traveling in tandem for a period of time, that the trailing car was approximately seventy-five feet behind the lead car at a speed of approximately sixty miles per hour. If an officer knowing these facts could reasonably conclude that this combination of speed and distance violated Indiana law, that is all that is necessary to support probable cause for a traffic stop. *See* pages CA-704 to CA-705.

In a slip-and-fall case, a plaintiff's statements to his doctor made for the purpose of treatment are not hearsay, by virtue of Rule 803(4)'s medical diagnosis exception to hearsay. This includes statements concerning the manner of the plaintiff's fall—for example, "I slipped on wet concrete and fell flat onto my right side" or "I couldn't move my right leg for thirty seconds." However, any statements of fault or fact that were not necessary for medical treatment—for example, "there were no warning signs" or "an employee had just mopped the floor"—are hearsay and are not admissible under Rule 803(4). *See* page CA-1013.

Police reports can be adversarial in nature, arising from a confrontation between a suspect and a police officer, but they can also be advocacy pieces, written for prosecutors to use in deciding whether or how to charge a suspect. A police officer thus may have many reasons to present events in a non-neutral light and cannot be assumed to have recorded the relevant events in an entirely neutral way. Even the most candid witness will naturally remember and recount events in a light that supports the story he is trying to tell. These concerns led Congress to exclude police reports from the hearsay exception for public records and reports found in Rule 803(8), when offered in criminal cases. *See* page CA-1053.