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## Evidentiary Foundations, Fundamentals of Trial Techniques

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## BOOK REVIEWS

EVIDENTIARY FOUNDATIONS. By Edward J. Imwinkelried. Charlottesville: The Michie Company, 1980. pp.xii, 246. \$15.00.

FUNDAMENTALS OF TRIAL TECHNIQUES. By Thomas A. Mauet. Boston: Little, Brown & Company, 1980. pp.xii, 439. \$10.00.

*Reviewed by Thomas F. Guernsey\**

Any lawyering skill should be taught so as to provide the student or lawyer with the opportunity to plan, implement, and reflect on the execution of the skill. In these two books, Professors Imwinkelried and Mauet have accomplished just that. In writing books that are aimed primarily at the law school market, the authors have provided a valuable resource for the student as well as for the beginning trial lawyer.

As a teacher in clinical education, this reviewer is constantly caught between the necessity of teaching theory and the students' desire for practicality. The two goals are not, of course, unrelated. (Who was it that said there is nothing more practical than good theory?) Too often, however, trial practice materials lean too heavily in one direction or the other and fail to present a balanced approach. Heavily theoretical material often bores the young attorney or student since it cannot be comprehended for lack of sufficient practical guideposts. Material that errs in the direction of practicality gives endless examples which are useful only if one is fortunate enough to try the same case in the same jurisdiction, on the same facts, before the same judge. That is to say, such material lacks transferability. In addition, the young lawyer must often wade through a substantial amount of material which is included for the students' learning but is unrelated to the lawyer's problem. Sometimes the lawyer just wants an example.

In *Evidentiary Foundations*,<sup>1</sup> Edward J. Imwinkelried has admirably constructed a book which provides the novice with examples of how to lay foundations in almost every conceivable trial context. Because of its completeness, one suspects this wealth of examples will benefit the experienced attorney as well. However, Imwinkelried is not content to give examples and he explains why the foundation is laid in a particular manner.

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1. E. IMWINKELRIED, *EVIDENTIARY FOUNDATIONS* (1980).

The result is a valuable book which is far more than just a collection of academic war stories. Since the examples are firmly tied to theory, the neophyte is not limited to using *Evidentiary Foundations* in the same fact situations; because of its wealth of examples, the young lawyer will not find it too academic.

Professor Imwinkelried's format is effective primarily because of its interplay of theory and practice. Each broad chapter, such as Authentication, Competency, or The Best Evidence Rule, begins with a brief introduction describing basic evidentiary and trial practice points relevant to the broad topic. The chapter is then broken down into subtopics. For example, the Authentication chapter is divided into subtopics which treat private writings, business records and so on. Each subtopic begins with a specific discussion of evidentiary principles, entitled "The Doctrine," which is in turn broken down into numbered foundation elements. The section then ends with a sample foundation which includes questions corresponding to the numbered foundation elements.

An additional value of *Evidentiary Foundations* is its comprehensiveness. Contained in its pages are the difficult foundations such as qualification of an expert, past recollection recorded, and business records. At the same time, the more mundane foundations—the ones many an aspiring trial attorney may feel too embarrassed to ask how to do, and be unable to find elsewhere—are also included. For example, in his chapter on credibility, the author provides an excellent example of laying the foundation for impeachment with a prior bad act which did not result in a conviction. This example not only illustrates the book's breadth but its simplicity of approach. After a two paragraph discussion of the law, Imwinkelried addressed the point as follows:

#### ELEMENTS OF THE FOUNDATION

The opponent must show:

1. When the witness committed the act.
2. Where the witness committed the act.
3. The nature of the act reflects adversely on the witness's credibility.

#### SAMPLE FOUNDATION

The fact situation is a contract action. The plaintiff alleges that the defendant corporation breached its contract to deliver a generator to the plaintiff. The plaintiff alleges that he entered into the contract with the defendant's president during a conversation in the president's office. The plaintiff calls Mr. Giles as a witness. Giles testifies that he is a friend of the plaintiff and accompanied the plaintiff to the defendant's president's office. Giles testifies that he overheard the conversation in which the parties formed the contract. Now the defendant has Giles on cross-examination. The defendant is the opponent.

O Mr. Giles, ISN'T IT A FACT THAT on June 1st of this year, you applied for work with Acme Corporation downtown? (1)

W Yes.

O ISN'T IT TRUE THAT on that date, you had a job interview with Ms. Grant, the corporation's president at her office? (2)

W Yes.

O ISN'T IT CORRECT THAT during the interview, you told her that you had a Master's degree from Harvard Business School? (3)

W Yes.

O ISN'T IT A FACT THAT you don't have a Master's degree from that school? (3)

W Yes. I have only an undergraduate degree from that school.<sup>2</sup>

For the student, the book is an excellent study aid both to evidence and trial practice. It clearly addresses the concern of evidence students that the subject makes no sense out of the trial context. For the trial practice student, the book provides both a rationale for the questions and a refresher on evidence. Despite Professor Imwinkelried's disclaimer in the introduction that "The Doctrine" discussion is not detailed, one suspects that a number of students will use the book as a basis for outlining evidence. The book is highly recommended.

Professor Thomas A. Mauet's *Fundamentals of Trial Techniques*<sup>3</sup> is also highly recommended. While covering a broader topic and necessarily giving less attention to evidentiary detail, Mauet's book, like Imwinkelried's, is effective because of the interplay of theory and practice. Each topic is introduced with a sound discussion of trial theory and is followed by concise examples with commentary.

Mauet, a Regional Program Director for the National Institute for Trial Advocacy, leaves nothing to chance. The beginner should have confidence that he or she will know what to say at almost every stage of the trial process. Professor Mauet wisely provides step by step examples which many authors might feel too basic to provide. Not satisfied with merely describing technical requirements on how to offer exhibits into evidence, Mauet provides the following example:

Step 7. Have the identification symbol struck.

*Example:*

*Counsel:* Your Honor, may we have the "for identification" symbol struck from the exhibit?

*Court:* You may.

(Hand the exhibit to the court reporter, who will cross out the "for id." part of the label, showing the exhibit is now in evidence.)<sup>4</sup>

Many might feel that the book is too basic and formal since many jurisdictions do not require actions such as Step 7, or that Mauet's repeated

2. *Id.* at 34.

3. T. MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* (1980).

4. *Id.* at 181.

instruction to ask the judge's permission (most notably, permission to approach the witness) is either unnecessary or tactically incorrect. It is, however, precisely this formality and detail which provides the valuable instruction to the new lawyer. For example, not much can be said against developing the habit of protecting the record. If it is merely superfluous in the given jurisdiction to request that the "for id." be struck, it is always easier to delete a good habit than to learn by experience that you forgot an essential procedure.

*Fundamentals'* middle chapters follow traditional classifications: Jury Selection, Opening Statements, Direct Examination, Exhibits, Cross Examination. On a substantive level, however, Mauet eschews a doctrinaire approach of the right way to try a case. Reflecting the lack of empirical data on the value of certain techniques, he often provides differing views. The chapter on Jury Selection, with its sections on the various theories, is a good example of Mauet's approach.

The first and last chapters, Trial Preparation and Objections respectively, are also very valuable. The chapter on Objections is particularly valuable to the new lawyer and, like the rest of the book, leaves little to chance. Each objection begins with a definition followed by a statement of the objection: "Objection, Your Honor, to the compound question."<sup>5</sup> Each objection is also followed by examples, such as: "Did you go to Smith's Tavern on the 13th and to Frank's Tavern two days later?"<sup>6</sup> More so than *Evidentiary Foundations*, *Fundamentals of Trial Techniques* will be primarily attractive to the novice because it is basically of an introductory nature. In fact, one suspects that *Fundamentals of Trial Techniques* will become a standard text for use in law school trial practice courses.

Both books provide the young attorney with ready desk references that are quick, reliable, comprehensive, and inexpensive. Combined with a sound knowledge of local evidence law, they will be the final source for many of the questions which the novice might encounter. Each provides a sound beginning for working out the solutions to the more difficult trial problems.

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5. *Id.* at 385.

6. *Id.*