

# PREFACE TO THE THIRD EDITION

This is not the usual new edition of a treatise. In fact, it is in many ways an entirely new work. The reason is that there has been a sea change in the authoritative organization of the law of evidence in Massachusetts.

On November 24, 2008, the Supreme Judicial Court released to the public a *Massachusetts Guide to Evidence*<sup>1</sup> which “assembles existing Massachusetts evidence law in an easy-to-use document organized similarly to the Federal rules of Evidence.” This is the most important development in Massachusetts evidence law in over a quarter century. Ever since the compilation of proposed Massachusetts Rules of Evidence was rejected by the Supreme Judicial Court in 1982, there has been a need for an authoritative, manageable organization of Massachusetts evidentiary law from its statutory and decisional sources in a fashion comparable to the Federal Rules of Evidence.

Since the 1989 publication of our Massachusetts Evidentiary Standards, we had yearly attempted to meet that need by compiling in a single slim volume the existing statutory and decisional evidentiary law of Massachusetts and organizing it along the lines of the Federal Rules of Evidence. Whatever the success of that endeavor (and we are gratified that the idea was taken up by the Massachusetts Bar Association and now brought to such a successful conclusion), it was in no sense authorized or official.

Now, in the *Massachusetts Guide to Evidence*, we have such a document. As former Chief Justice Marshall says, “This new Guide will make the law of evidence more accessible and understandable to the bench, bar and the public.” Justice Marc Kantrowitz of the Massachusetts Appeals Court and his Advisory Committee have done a truly superb job of organization and refinement. We are proud to have served as external editors for this most important project. We predict that the *Guide*, with its

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<sup>1</sup> Massachusetts Guide to Evidence © 2008, Supreme Judicial Court, all rights reserved, updated in 2014. The Guide and the Advisory Committee notes are incorporated in this work and used by permission. No copyright is here claimed in these public documents. Announcement Concerning the Proposed Massachusetts Rules of Evidence (SJC No. 2787, Dec. 30, 1982) reprinted at Appendix D.

straightforward, authoritative statement of the law, and its easy-to-use, comprehensible organization will soon be the most oft-cited evidentiary reference through the trial courts of the Commonwealth.

Therefore, building on our twenty-five years of experience in compiling the developments in Massachusetts evidentiary law, both statutory and decisional, we are extraordinarily proud to bring to the bar this new edition of our two-volume treatise on Massachusetts Evidence, incorporating by permission the *Guide* and its Advisory Committee notes and fully discussing the development of every aspect of the law of evidence in Massachusetts.

In 1961, Professor Kenneth B. Hughes of Boston University School of Law brought out a genuine treatise on the law of evidence in Massachusetts. Kenneth B. Hughes, *Massachusetts Evidence*, 19 Mass. Prac. Series (1961). That is, Professor Hughes went far beyond the collection and indexing of relevant case and statutory citations to treat the subject of Massachusetts evidence to a formal, methodical discussion and exposition of its principles. As the inheritors of this tradition, we have tried to do the same. While we bear sole responsibility for the present work, we acknowledge his extensive contribution to the analyses found herein.

Wherever his approach has stood the test of time, we have in this volume preserved and amplified it, setting it in today's organization.

In the fifty-four years that have followed the publication of Professor Hughes' treatise, the most salient features of the law of evidence have been the shift in our thinking about the organization of evidentiary principles and an increasing tension between our willingness to receive data in evidence and our growing concern for individual autonomy and privacy. Today, while the major conceptual issues of the law of evidence remain relevance and hearsay, the advent of the Federal Rules of Evidence has fundamentally and pervasively altered our thinking about evidentiary issues. True, the Federal Rules of Evidence have not been accepted nationwide in the manner of the 1938 promulgation of the Federal Rules of Civil Procedure. Even so, the teaching of the Federal Rules of Evidence is universal among law schools today and with it comes the knack of addressing evidentiary problems in the easy to understand organization of the federal rules. It is thus no surprise to find that this treatise is organized in a format that parallels the Federal Rules of Evidence and allows for ready reference between the two complimen-

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tary bodies of law.

While it was the decision of the Supreme Judicial Court in 1982 to continue the evolution of the law of evidence on a case by case determination rather than adopt a general codification along the lines of the Federal Rules of Evidence<sup>2</sup> in the same order the Supreme Judicial Court invited the bar to cite the proposed Massachusetts Rules of Evidence as a guide to common law development.

Declining to adopt a general codification, which would have required revision of a significant portion of the legislative framework of our evidentiary law, did not, however, indicate a reticence on the part of the Supreme Judicial Court carefully to evaluate considered modifications of significant evidentiary principles. Major decisions concerning business records, admissions against penal interest, privileges and the basis for expert opinions are but a few of the significant additions to our law of evidence. Likewise, the court has addressed the constitutional dimensions of the law of evidence in developments that parallel the increased attention being shown by the Supreme Court of the United States to the confrontation clause of the United States Constitution.

Legislative modification of the law of evidence has also assumed major proportions, with a virtual explosion in the type and variety of privileges which may now be claimed in vindication of particular social policies deemed especially significant by the legislature. These new legislative obstacles to the receipt of evidence may be thought balanced by an assortment of new legislative exceptions to the rule against hearsay.

At the core of this work is the Massachusetts Guide to Evidence. This Guide codifies the statutory and decisional law of evidence in the Commonwealth in the format of the Federal Rules of Evidence and the proposed Massachusetts Rules of Evidence. Each section state the Massachusetts law of evidence as it has evolved to the present-accurate and up-to-date. Equally important, each section is readily ascertainable as the organization tracks the now familiar Federal Rules of Evidence. In addition, each section sets out the statutory text of the controlling rule or is backed by citation to both the seminal decisions and the most recent case law expression of the rule.

A treatise ought be complete, and we have done our best to provide a clear and accurate reflection of the law of evidence of

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<sup>2</sup> Announcement Concerning the Proposed Massachusetts Rules of Evidence (SJC No. 2787, Dec. 30, 1982) reprinted at Appendix D.

this commonwealth. We have examined and evaluated over four thousand Massachusetts and federal cases, statutes, and court rules, citing all those that shed light on the current state of Massachusetts evidentiary law. The textual statement of the law is supported by extensive, carefully documented citation to Massachusetts and federal cases and statutes. A wide range of law review citation amplifies the text. Wherever sensibly indicated, we avoid the bare citation of cases in favor of some key factual details so that reference to this volume ought allow you to determine from the note itself whether the cited case is worth further consideration.

The careful sub-section organization within each general section is designed to lead you quickly to the text and case and statute citations that will prove most useful. Six appendices complement the textual development.

The evidentiary rules are digested in Appendix A, the Massachusetts Evidentiary Finder. There you can view a complete area of evidence law at a glance. The cross reference to the standards will lead you at once to the full rule and the authority that backs it up.

A handy list of most commonly raised objections is included as Appendix B for your ready reference. This list sets out all the frequently raised objections and succinctly explains the grounds for raising each one. A more extensive listing of common trial objections, which also includes responses and commentary to those objections, is found in Appendix C.

The Massachusetts Guide to Evidence (2015) is found in Appendix E for ready reference.

The full text of the proposed Massachusetts Rules of Evidence (Appendix D) and the Federal Rules of Evidence (Appendix F), a table of cases, and index round out the work and give it dimension and context. These resources permit a comparative analysis of evidentiary issues.

We do not delude ourselves. You will not find every current case in this volume (though that remains our constant goal). As Justice Benjamin Kaplan remarked in analyzing a major legislative enactment, “In so large a[n] . . . enterprise, there are likely to be casual overstatements and understatements, half-answers, and gaps in the . . . provisions.”<sup>3</sup> So here. And while we ask your pardon, we ask more as well. As practice under the standards

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<sup>3</sup> *Mailhot v. The Travelers Ins. Co.*, 375 Mass. 342, 345, 377 N.E.2d 681, 682 (1978).

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develops and the difficulties are revealed, we ask you to let us know about the cases overlooked, the inevitable inconsistencies and lacunae. We deeply appreciate any such communication and promise to address such concerns in annual supplements to keep this treatise up-to-date.

Finally, though this has been a labor of love over a number of years, we recognize that no treatise, however comprehensive, can replicate the intensity of actual trial practice before juries. While all the technicalities of our statutory and common law of evidence can be found in these pages, we caution that the concern for interpreting the rules fairly to ascertain the truth and secure substantial justice remains the polestar of our profession. As the great Professor Wigmore himself observed:

Most practitioners, to-day, are unskilled in the Rules of Evidence. This is a hard saying; but those who ought to know report it so unanimously. The trial judges know the rules better, but still imperfectly. Is it not startling to reflect on the meaning of this? .. It means that there are thousands of trials in which neither attorney knew enough either to observe the rules, niceties or even to point out his opponent's errors and yet a verdict was reached which satisfied the judge. In other words, owing to the ignorance of the rules, they were not enforced, and yet justice (presumably) was as well done as if they had been enforced. How far this is the fact, no one can know. but the widespread ignorance of the rules shows that it must be a large fact. And the moral is that we can probably get along just as well without enforcing many of the niceties of the rules ...<sup>4</sup>

Why then a comprehensive treatise on the law of evidence, especially when it is recognized that the rules of evidence are frequently ignored in the courtroom and only the most flagrant errors warrant judicial correction? The answer is simple-professionalism. If we truly believe in direct citizen democracy within the judiciary through the jury system, then the even-handed application of the law of evidence in the real time constraints of the courtroom is a fundamental professional objective to judge and lawyer alike. True, evidentiary rules are not justice, and the two ought never be confused. They are, however, a keystone of the process by which we reach out for justice and every great trial lawyer and trial justice necessarily demonstrates a "feel" for evidence and its fair presentation. Professor Hughes, in his preface to the original volume, noted that the goal of all judicial administration is to be found in the constitution of the

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<sup>4</sup> J.H. Wigmore, 1 A Treatise on the Anglo-American System of Evidence (2nd ed.) 124-127. Thus, no lawyer or judge striving to be fair, learn the truth and seeking justice can go far wrong in the courts of the Commonwealth.

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commonwealth. “Every subject of the Commonwealth ought to find a certain remedy by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely and without denial; promptly and without delay.”<sup>5</sup>

Professor Hughes is right. The law of evidence contributes immeasurably to the end that those who have recourse to the laws will find a certain remedy. If this work assists you in the pursuit of that grand ideal, we shall be pleased indeed.

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<sup>5</sup> Constitution of Massachusetts, Pt. 1, Art. II.