

# **Foundation Evidence, Questions and Courtroom Protocols**

Fifth Edition

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# INTRODUCTION

Witnesses generally testify at a trial to introduce evidence in support of the litigator's position or to respond to or refute an adversary's position. The testimony may describe events (e.g., a lineup or a confrontation) or statements made by a defendant at the time of his or her arrest. The witness's testimony may also lay a foundation for the introduction of physical evidence (e.g., a report, picture or contraband) or the testimony of an expert witness, such as a medical examiner or ballistics technician.

Unless the parties have stipulated to the introduction of a specific piece of evidence or testimony, an attorney who wishes to present such evidence or testimony to the court or jury must be able to ask proper questions to ensure that the court will permit its introduction. Attorneys who do not ask the appropriate foundation questions may find themselves frustrated by a string of sustained objections. And, if precise evidentiary rules are addressed inarticulately or carelessly or not at all, the impact or importance of the evidence may well be affected.

This manual addresses these problems. It should aid all attorneys in preparing appropriate foundation testimony for the introduction of evidence and the examination of witnesses. Also included is a discussion of the business record rule,<sup>1</sup> which is the fundamental basis for the introduction of most business records, and other relevant provisions of the CPLR, such as sections 2306 and 2307 and rules 4520 and 4540, which simplify the procedures for the admission of certain documents by eliminating, through certificates, many foundation issues.

This book also contains a collection of forms and protocols, which set forth foundation questions for the introduction of some of the more traditional and common business records, and for the qualification of witnesses who will testify about them, including experts in a variety of disciplines, such as ballistics, narcotics and pathology.

The forms collection also includes the necessary predicate, or foundation, questions that must be asked before other forms of evidence, such as photos or contraband, may be introduced, as well as the proper methods for establishing a chain of custody for introducing physical evidence. In addition, it suggests proper methods for introducing evidence to impeach witnesses and evidence introduced by an adversary.

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<sup>1</sup> See N.Y. Civil Practice Law & Rules 4518 (CPLR).



For the most part, these forms and protocols concern issues and subjects that litigators encounter on a regular basis. They include basic questions that should be answered before the document or item can be received in evidence or the witness qualified as an expert. They always can be modified to fit the specific problems, issues or an individual judge's ruling.

Being prepared with proper questions and authority for a particular method of questioning will greatly assist attorneys in the smooth, seemingly effortless presentation of their evidence. Ultimately, litigators must be sufficiently prepared to permit flexibility and have the ability to adapt to the procedures required by the court. Flexibility is a quality of and requirement for all trial attorneys.

The fourth edition added two new chapters on form and substance objections and motions to strike. It significantly enlarged the chapters on direct and cross-examination; they now include much more information about the preparation of witnesses for trial, suggestions for the organization of direct and cross-examination, and more ideas for the cross-examination of expert witnesses. The chapter on cross-examination also includes a thorough review of Professor Irving Younger's "The Ten Commandments of Cross Examination," which most legal scholars and veteran attorneys believe contains the guiding principles for all cross-examination. It also includes illustrations and sample questions about issues and problems that may arise during direct and cross-examination, providing guidance and suggestions for the preparation process. This additional material and the question sets, protocols and foundation testimony illustrations from earlier editions that are reprinted in this edition provide law students and attorneys about to try their first case with a comprehensive outline of the elements of a trial and veteran litigators with handy reference material.

This fifth edition enlarges significantly on the preparation of witnesses for direct and cross-examination, and contains even more information about the issues and problems that could arise during the trial itself. It also includes additional illustrations of questions that could be asked during direct and cross-examination of witnesses. Once again it is intended to be a convenient resource for law students, attorneys who are about to try their first cases and even veteran litigators.

Like previous editions, this book intends to provide an outline of the trial process. For example: what evidence will I need to prove my case and what evidence will I use; which witnesses should I call to establish

these goals and in what order should they be called; what physical evidence will I need and how do I establish a proper foundation for its introduction into evidence. It also includes more illustrations and explanations for making objections; protocols for the behavior of attorneys in the court and lastly, how should I tie all of this information and material together to establish a coherent and convincing case.

We hope that we have succeeded.

**HONORABLE EDWARD M. DAVIDOWITZ**

Edward Davidowitz was a Justice of the Supreme Court for the criminal branch of the Bronx County Supreme Court. He is currently serving as a Judicial Hearing Officer in that court. Judge Davidowitz was admitted to the bar in 1959 after earning his J.D. from Cornell Law School. Prior to his court appointments, Judge Davidowitz was an assistant district attorney for six years, worked in private practice for eleven years and served in various capacities in the Office of the Special Prosecutor for the Investigation of the New York City Criminal Justice System. He is a member of the New York State Bar Association, The Association of the Bar of the City of New York and a former member of its Council on Judicial Administration, Council on Criminal Justice, Committee on Criminal Advocacy, Committee on Criminal Law, Committee on Criminal Justice Operations and Budget, and Committee on Criminal Courts. He is also the author of *The Practice of Criminal Law Under the CPLR and Related Civil Procedure Statutes*, Fifth Edition (NYSBA 2009; Supplement 2011).

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The authors wish to thank Dana Levin, court attorney for Judge James Kindler, who researched, prepared and wrote some of the additions and revisions for this edition.