

Foundation Evidence, Questions and Courtroom Protocols

Fifth Edition

Hon. Edward M. Davidowitz
Robert L. Dreher, Esq.

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This book is dedicated to the memory of Judge Edward M. Davidowitz.

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**IN MEMORIAM:
JUDGE EDWARD M. DAVIDOWITZ**

My dear friend Ed Davidowitz died on October 10, 2014. He was a truly decent man who represented all the highest ideals of the practice of law. I have never met anyone who had more genuine friends, both in and out of his profession, than the Judge. He loved the law and its practice. As a judge, he took no greater pleasure than presiding over a trial where the litigators were young attorneys. He believed that the most important lessons new practitioners could learn were that they should always litigate ethically and maintain their integrity—and that of the court. His mentoring of young attorneys had an immeasurable impact on them and our courts. In a profession where advocacy is a core element, he was uniquely adept at maintaining the utmost level of professional conduct and respect for the process during the trials and courtroom proceedings over which he presided. This book was a true labor of love for the Judge. He wanted lawyers to always be prepared when they commenced trial, both in the collection of the evidence, legal authority and strategies, as well as in the principled manner in which they were implemented. His passing diminishes our profession. I will miss him very much.

Robert Dreher, October 2014

INTRODUCTION

All litigation requires the introduction of evidence, whether it is the recounting of events by a witness or a witness laying the foundation for the introduction of some form of physical evidence. Unless the litigants stipulate to the introduction of this evidence, the attorney proffering the evidence must be prepared to use the proper foundational questions to permit this evidence to be admitted for the fact finder's consideration. Attorneys who do not ask the appropriate questions may find themselves frustrated by a string of sustained objections. If the evidentiary rules are addressed inarticulately, carelessly or incorrectly, important evidence may be precluded from introduction by the Court.

This manual is intended to assist attorneys in addressing and insuring the introduction of competent evidence. 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,¹ 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.

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

¹ See N.Y. Civil Practice Law & Rules 4518 (CPLR).

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 is completely reorganized and has significantly expanded the chapters addressing the direct and cross-examination of witnesses. It has enhanced the previous material that explores various philosophies of how to best present witnesses and to cross-examine your adversary's witnesses. This additional material and the question sets, protocols and illustrations from earlier editions that are included here provide new litigators and law students with a comprehensive outline of the elements of a trial while supplying veteran litigators with handy reference material.

Like previous editions, this book follows 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 last, how to 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. After his retirement, he served 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 11 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 was a member of the New York State Bar Association, The Association of the Bar of the City of New York and served on the New York City Bar's 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 was also the author of *The Practice of Criminal Law Under the CPLR and Related Civil Procedure Statutes*, Fifth Edition (NYSBA 2009; Supplement 2011).

ROBERT L. DREHER, ESQ.

Robert Dreher has been a member of the Bronx District Attorney's staff for more than 40 years. He graduated from Cornell Law School in 1973 and has served as a trial assistant, supervisor, deputy, bureau and division chief. Mr. Dreher presently serves as an Executive Assistant District Attorney and Chief Trial Counsel. He created, and continues to author, an in-house, online, criminal law research program for the Bronx District Attorney's Office titled "Trial Assistance." He has written for the *Empire State Prosecutor* and serves as a lecturer for both the Continuing Legal Education program and for the training of Assistant District Attorneys in the Bronx District Attorney's Office and other District Attorney offices in New York State.