

TABLE OF CONTENTS

Page

CHAPTER 1

INTRODUCTION

First Reason to Read.....	1-1
Second Reason to Read.....	1-3
Third Reason to Read.....	1-4
History of the Book.....	1-5

CHAPTER 2

LITIGIOUS RETAINER AND ADVISING

A. Introduction.....	2-1
B. Conflicts of Interest.....	2-2
1. Introduction.....	2-2
2. Motions to Remove Counsel.....	2-3
3. Confidences Without Retainer.....	2-3
4. Checking for Conflicts.....	2-4
5. A Conflicted Retainer.....	2-5
C. Money Laundering.....	2-5
D. The First Interview.....	2-6
1. Cross-Reference.....	2-6
2. Importance of this Interview.....	2-6
3. The Place of the First Interview.....	2-6
4. Prepare for the First Interview.....	2-7
5. Barriers to Understanding.....	2-7
6. How to Overcome Barriers to Understanding.....	2-10
7. Active or Reflective Listening.....	2-11
8. The Client's Aims.....	2-14
9. Give the Prospective Client Chance to Assess You.....	2-17
10. End of the Interview.....	2-18
11. How to Make a Record of the Interview.....	2-21
E. Client's Aims.....	2-21
F. Group Clients.....	2-22
1. Generally.....	2-22
2. Getting Paid.....	2-23
G. Are You Retained or Not?.....	2-24
H. Time Problems.....	2-25
1. Advice Without Instructions to Carry It Out.....	2-25
2. Impending Time Limits.....	2-25

TABLE OF CONTENTS

	Page
3. Out-of-Province Litigation	2-26
4. Uncertainty Whether You Will Act.....	2-26
5. Examples of Time Limits	2-26
6. Indirect or Cumulative Time Limits	2-27
7. Getting Timely Instructions.....	2-29
8. Deadline Diaries.....	2-29
9. Creating the Next Deadline.....	2-29
I. Money.....	2-30
1. Discuss Payment Carefully.....	2-30
2. What to Cover in the Agreement.....	2-31
3. Estimates are Dangerous	2-33
4. Interim Bills	2-33
J. Authority to Act	2-33
K. Whether You Should Act	2-35
L. Documenting Your Task	2-39
M. Advising Your Client.....	2-40
1. Introduction.....	2-40
2. Preconditions to Advice.....	2-40
3. Clients Who Will Not Take Your Advice.....	2-41
4. Why Clients May Be Slow or Reluctant to Take Your Advice.....	2-41
(a) Introduction.....	2-41
(b) Insincerity or Games	2-41
(c) Sudden News	2-42
(d) Defensiveness.....	2-43
(e) Error in Evaluating.....	2-43
(f) Slow Reasoning.....	2-44
(g) Insecurity	2-45
(h) Role of Emotion.....	2-45
(i) Different Reasoning Styles	2-46
(j) Your Own Reaction.....	2-47
(k) Other Advisers	2-47
(l) Pessimism	2-48
(m) Irrational Thinking	2-48
(n) Other Facts.....	2-48
(o) Miscellaneous.....	2-49
5. How to Deal with Irrational Opposition.....	2-50
6. The Time Element.....	2-52
N. Documenting Your Retainer	2-52
O. Giving a Preliminary Opinion	2-52
1. When to Opine	2-52
2. Form of Your Opinion.....	2-53
3. Do Not Be Too Firm.....	2-54

	Page
4. Other Economics.....	2-55
5. Updating Your Opinion.....	2-55
6. Keep Your Client Informed.....	2-56
P. Instructions for Special Steps During the Suit.....	2-57
Q. Resigning Your Retainer.....	2-58
1. Times to Review the Relationship and the Task.....	2-58
2. Nature of the Problem and What to Do About It.....	2-58
3. Money Problems.....	2-59
4. Formal Resignation.....	2-60
R. Suggested Further Reading.....	2-61

CHAPTER 3

EXPERTS

A. Introduction.....	3-1
B. What Expertise Exists.....	3-2
C. When to Find and Retain an Expert.....	3-3
D. How to Find Experts.....	3-4
E. Selecting an Expert.....	3-6
1. Need for Care.....	3-6
2. Who Selects.....	3-6
3. Gather Information.....	3-7
4. Where No One is Perfect.....	3-7
5. Ability to Explain and Convince.....	3-8
6. Ability to Decide.....	3-9
7. Unsound Judgment.....	3-10
8. Over-Flexible Experts.....	3-12
9. Economy.....	3-12
F. An Expert’s Proper Function.....	3-13
G. Paying Your Expert.....	3-14
H. Communicating With Your Expert.....	3-15
1. At the Outset.....	3-15
2. Ongoing Cooperation.....	3-17
3. Get and Keep all Data and Information Needed.....	3-18
4. Craft Your Initial Instructions Carefully.....	3-20
5. Prevent Half-Baked Opinions.....	3-21
I. Medical Examinations.....	3-23
J. Preparing for Trial.....	3-25
1. Cross-Reference.....	3-25
2. Law.....	3-25
3. Plans, Photos, Models, and Diagrams.....	3-25
4. Expert’s Resume.....	3-28

TABLE OF CONTENTS

	Page
K. Briefing Your Expert for Trial	3-31
1. General Briefing	3-31
2. Distinguish Between Probable and Possible.....	3-31
3. Be Careful of Technical Terminology	3-32
4. When to Brief.....	3-33
5. Are Facts Up to Date?.....	3-33
L. Preparing Your Expert for Cross-Examination	3-33
1. General Briefing	3-33
2. When to Explain Cross-Examination.....	3-34
3. How to Prepare Your Expert.....	3-34
M. Arranging When Your Witness Will Testify	3-36
N. Adducing Your Expert Evidence at Trial	3-36
1. Cross-References.....	3-36
2. Expert’s Qualifications	3-37
3. Hypothetical Questions	3-37
4. Show Moderation	3-39
5. Who Talks More	3-39
O. Cross-Examining Opposing Expert	3-39
P. Further Reading	3-39
1. Generally	3-39
2. Medical Terminology and Abbreviations.....	3-40

CHAPTER 4

INVESTIGATING FACTS

A. Importance of Investigating Facts	4-1
B. Learn More About the People Involved	4-2
1. Legal Restrictions.....	4-2
2. Finding People.....	4-3
3. Background Information About Parties	4-6
C. Your Legal Restraints and Opportunities	4-9
1. Government Lawyers.....	4-9
2. Information about Corporations	4-9
3. Standing Information Collections	4-10
4. Collecting Information about Individuals for a Specific	4-10
Lawsuit	
5. Legislation Allowing the Public to Access Certain	4-12
Government Records	
D. Use of Computers and the Internet.....	4-13
E. Gather Facts in Issue in This Suit	4-15
1. Get Outside Advice	4-15
2. Think Hard and Imagine	4-16
3. Sources for Facts in this Suit.....	4-18

TABLE OF CONTENTS

	Page
F. Interviewing	4-20
1. Cross-References	4-20
2. Introduction	4-20
3. Who to Interview and When.....	4-21
4. Interview Preparation	4-22
5. Set Up the Interview	4-24
(a) procedures	4-24
(b) live or not?	4-24
(c) who	4-24
(d) how to ask.....	4-24
(e) when	4-26
(f) where	4-27
(g) how to dress and appear	4-28
6. The Actual Interview	4-28
(a) Beginning	4-28
(b) Next Stage	4-30
(c) Sensitive Issues.....	4-30
(d) Helpful Witnesses.....	4-31
(e) Be Positive and Receptive.....	4-32
(f) Last Stages	4-32
7. Evaluate the Witness and His or Her Story	4-33
G. Record of Interview	4-34
1. Need for Record	4-34
2. Possible Ways to Record	4-35
H. Inspecting Places and Things.....	4-38
I. Miscellaneous	4-40
1. Other Sources of Factual Information.....	4-40
2. Organizing and Analyzing Notes About Facts	4-41
3. Updating	4-42
J. Further Reading	4-43

CHAPTER 5

PLEADINGS

A. Introduction.....	5-1
B. What to Do Before You Plead.....	5-2
1. Demand Letter.....	5-2
2. Other Formal Steps.....	5-3
C. Aims of Pleadings.....	5-4
D. Plan Your Pleading	5-6
1. Who Sues First?.....	5-6

TABLE OF CONTENTS

	Page
2. Where to Sue.....	5-6
3. Legal Research and Advice	5-7
4. Be Creative	5-7
E. Parties	5-9
F. Wording Your Pleading	5-11
1. Sequence.....	5-11
2. Details	5-12
3. Be Concise	5-12
4. Style.....	5-13
5. Format	5-14
6. Be Careful of Precedents	5-14
7. Editing	5-14
G. Dangers in Pleading	5-15
H. Seeking Relief	5-15
I. Serving Pleadings	5-16
J. Further Reading	5-18
APPENDIX	
Pleadings Checklist.....	5-19

CHAPTER 6

ORGANIZING THE LAWSUIT

A. Introduction.....	6-1
1. Importance	6-1
2. Cross-References	6-2
B. Plan How to Organize.....	6-2
1. Paper vs. Computers	6-2
2. Aims	6-3
C. "Trial Book"	6-3
1. Physical Form	6-3
2. Planning the "Trial Book"	6-4
3. Contents of the "Trial Book"	6-5
D. Scheduling	6-6
1. Introduction.....	6-6
2. How to Speed Up a Lawsuit	6-6
E. Ongoing File	6-8
F. Taking Notes.....	6-9
G. Further Reading	6-11

CHAPTER 7

DISCOVERY OF RECORDS

- A. Introduction..... 7-1
- B. Importance of Discovery of Records..... 7-1
- C. Origins and Use 7-4
- D. Other Ways of Getting Discovery..... 7-4
 - 1. Equitable Pre-suit Discovery 7-4
 - 2. Documents Expressly Pleaded..... 7-5
 - 3. Pending Motions 7-5
 - 4. Trial Subpoenas..... 7-6
 - 5. Medical Examinations..... 7-6
 - 6. Evidence on Commission 7-6
 - 7. Examination for Discovery 7-6
 - 8. Miscellaneous 7-6
- E. Whether to Have Formal Discovery of Records..... 7-7
- F. Aims of Discovery of Records..... 7-8
 - 1. Get Evidence and Admissions 7-8
 - 2. Avoid Surprise at Trial..... 7-8
 - 3. Pin Down Your Opponent..... 7-8
 - 4. Avoid Sanctions..... 7-8
 - 5. Get Organized 7-8
 - 6. Get Your Own Client’s Records..... 7-9
 - 7. Aid Settlement..... 7-9
- G. When to Have Discovery of Records..... 7-9
- H. A Lawyer’s Duty on Discovery 7-9
- I. How to Ensure That Your Client Produces 7-10
 - Enough
 - 1. Explain..... 7-10
 - 2. Follow Up..... 7-11
 - 3. Electronic Complexities 7-12
 - 4. Search Methods..... 7-13
 - 5. Extent of Search..... 7-14
- J. Do Not Destroy Evidence..... 7-16
 - 1. Introduction 7-16
 - 2. Examples 7-17
 - 3. Narrower Relevance vs. Hidden Relevance..... 7-19
 - 4. Computer Alterations..... 7-20
 - 5. Keep a Trail..... 7-20
 - 6. Custody of Originals 7-21

TABLE OF CONTENTS

	Page
K. Listing the Records	7-23
1. How to List Records	7-23
2. How to Number Records.....	7-25
L. Inspecting Other Parties' Records	7-27
1. Need to Inspect Promptly.....	7-27
2. How to Inspect	7-27
3. Act on Failure to Disclose.....	7-29
M. Stay Organized.....	7-29
1. Introduction.....	7-29
2. Finding Tools for Individual Issues?	7-29
3. Master Private List.....	7-30
4. What Computers Can and Cannot Do.....	7-30
5. Subject Index?.....	7-30
6. Making Your Private List.....	7-31
N. Finding Gaps and Omissions in the Records	7-33
1. Introduction.....	7-33
2. Gross Comparisons	7-33
3. Separated Twins.....	7-34
4. Gaps in Key Times.....	7-34
5. Usual Records.....	7-34
6. Individuals Involved.....	7-35
7. Files or Containers	7-35
8. Alleged Destruction.....	7-36
9. Accounting Records	7-36
10. Get Your Hands Dirty	7-36
O. Discovery Law Which You Need to Look Up	7-37
P. Further Reading.....	7-38

CHAPTER 8

EXAMINATION FOR DISCOVERY

A. Introduction.....	8-1
1. Preliminary	8-1
2. Understand What is Going On	8-1
(a) Most People Misunderstand the Process	8-1
(b) What is Really Going On.....	8-2
(c) Whether to Reveal What is Really Going On	8-3
B. What to Do Before Discoveries.....	8-4
1. Client's Homework	8-4
(a) read any relevant interview notes or witness statements.....	8-5
(b) read any diary logs or similar documents	8-5
(c) read any old appointment books relevant	8-5

TABLE OF CONTENTS

	Page
(d) read relevant parts of both sides' correspondence and other records (from discovery of records).....	8-5
(e) examination for discovery transcripts from unrelated suits.....	8-5
2. Brief Your Client to be Examined.....	8-6
(a) When and Where.....	8-6
(b) common misunderstandings.....	8-7
(c) opponent's aims in discovery.....	8-9
(d) physical set-up and process.....	8-9
(e) how the transcript is made.....	8-9
(f) how the transcript is and is not later used.....	8-10
(g) common bad habits of witnesses.....	8-10
(h) consequences of lying.....	8-11
(i) rules for safety.....	8-11
(j) checklist.....	8-12
(k) conduct a practice session.....	8-12
(l) brief and explain local ethical rules about not talking during breaks.....	8-13
(m) brief on the facts.....	8-13
3. Prepare What Questions to Ask the Opposing Witness.....	8-13
(a) General Preparation.....	8-13
(b) Complete All Discovery of Records.....	8-14
(c) Index the Records of Both Sides.....	8-15
(d) Ensure that Everything is Brought to the Discovery.....	8-15
(e) Plan the Questions to Ask.....	8-15
(f) Prepare Blank Forms for Lists to Use at Discovery.....	8-16
(g) Other Person.....	8-16
(h) Review Your own Faults.....	8-16
C. Logistics of the Discovery.....	8-16
1. When to Have the Discoveries.....	8-16
(a) How Far Ahead.....	8-16
(b) How Long in Total.....	8-16
(c) Divide Discoveries into Several Sessions.....	8-17
(d) Any Session Before Limitation Period Expires?.....	8-17
(e) Agree on Start and Stop Times Each Day?.....	8-17
(f) Who Examines First.....	8-18
2. Who.....	8-18
(a) Select which Court Reporter, and Who Hires.....	8-18
(b) Select Witnesses to be Examined.....	8-18
(c) Select Who Will Attend the Discoveries.....	8-19
(d) Confidentiality Agreements.....	8-20
(e) Select a Corporate Spokesperson.....	8-20

TABLE OF CONTENTS

	Page
3. Where.....	8-21
(a) Neutral Premises?.....	8-21
(b) Which Room?	8-21
(c) Break-out Room?	8-22
4. What.....	8-22
5. How	8-22
6. Special Instructions to Court Reporter?.....	8-24
D. Possible Aims of Examination for Discovery	8-24
1. To Avoid Surprise at Trial	8-25
2. To Pin Down the Witness	8-25
3. To Learn Other Sources of Information.....	8-26
4. To Get Admissions.....	8-27
5. To Ruin the Witness for Trial	8-27
6. To Evaluate the Person.....	8-28
7. To Preserve Evidence	8-29
8. To Aid Settlement	8-30
E. Break the Ice	8-30
1. Before the Discovery Begins.....	8-30
2. Arrange an Informal Relaxing Setting	8-31
3. Use an Informal Relaxing Sympathetic Manner	8-31
4. Adapt Your Manner to Your Witness and His or Her Background	8-32
5. Ask for Help or Explanations.....	8-32
6. Don't Reveal Dangers.....	8-32
7. Start Slowly with Easy and Pleasant Topics	8-33
8. Don't Try to Twist Answers; Be Helpful	8-33
9. Conceal Your Aims, Even Conceal the Topic.....	8-33
10. Use Contemporary or Neutral Documents to Make Your Suggestions Plausible	8-34
11. Seem to Know It All Already	8-34
F. Conceal the Objective of Your Questions	8-35
G. Create a Usable Record.....	8-37
1. Audibility and Recording	8-37
(a) incompetent reporter.....	8-37
(b) inaudible speech	8-37
(c) two people talk at once	8-38
(d) gestures are part of the answer.....	8-38
(e) poor enunciation.....	8-38
2. Obscure Language	8-39
(a) Jargon.....	8-39
(b) Unclear Questions	8-39
(c) Pronouns	8-40

TABLE OF CONTENTS

	Page
H. Avoid Gaps or Surprises.....	8-41
1. Prepare at Intervals.....	8-41
2. Ask About Other Sources of Information	8-41
3. Ask Criss-crossing Questions	8-42
4. Ask the Obvious.....	8-42
5. Listen for Unresponsive Answers	8-42
6. Ask for Hearsay	8-43
7. Give the Witness Time	8-43
8. Do Not Skip Breaks	8-44
9. Ask A Bit About Unpled Issues	8-44
10. Vary Your Manner	8-44
11. Privilege	8-44
I. General Principles of Examining.....	8-44
1. Be Thorough	8-44
2. Set the Scene	8-45
3. Examine about the Core Facts.....	8-46
4. Use Contemporary Records	8-47
5. Avoid Deliberately Harmful Answers.....	8-48
6. Cross Examining.....	8-49
J. Control the Witness.....	8-50
1. Your Manner.....	8-50
2. Make it Easy to Agree with You, Hard to Disagree.....	8-52
(a) Soften the Blow	8-52
(b) Conceal Your Objective.....	8-52
(c) Show No Conclusions.....	8-52
(d) Give No Easy Way out: Pose Unpalatable Alternatives.....	8-53
(e) Morton’s Fork.....	8-55
(f) Produce a Habit of Agreeing.....	8-56
K. How to Make Admissions Usable.....	8-56
1. Ask the Residual Question	8-57
2. Let the Witness Go Off the Record.....	8-57
3. Do Not Rely on Questions with Vague Antecedents.....	8-57
4. Create Uncontaminated Answers.....	8-57
5. Beware of Pronouns.....	8-58
6. Monitor Audibility.....	8-58
7. Question about Corroboration.....	8-58
8. Corporate Spokespersons	8-59
L. Follow Up Leads.....	8-59
M. Examining Non-Parties.....	8-60
1. Who is Counsel?.....	8-60
2. Whether to Examine Non-Parties for Discovery	8-62
3. Setting Up Examination of a Non-Party	8-62

TABLE OF CONTENTS

	Page
N. Undertakings.....	8-63
O. Objections	8-64
P. Re-Examination.....	8-67
Q. Close of Discovery	8-68
R. Your Follow-up After Discovery	8-69
1. Transcripts	8-70
2. Your Notes from the Discovery	8-70
3. Status Report	8-71
4. Discuss with Your Client	8-71
S. Reading In Answers at Trial.....	8-71
T. Further Reading	8-73
APPENDIX	
Sample Client Pamphlet on Discoveries	8-75

CHAPTER 9

MOTIONS (APPLICATIONS)

A. Introduction.....	9-1
B. Is the Point Worth Fighting?	9-1
C. Especially Dangerous Motions	9-4
1. Motions to Strike Opponent's Pleadings.....	9-4
2. Particulars	9-4
3. Trial of Preliminary Issues.....	9-5
4. Summary Judgment or Summary Trial.....	9-5
5. Sympathy or Superficial Motions.....	9-6
6. Suits Where You are in a Hurry	9-6
7. Bad Days	9-6
D. Selecting Your Argument	9-6
1. Do Not Wing It.....	9-6
2. How to Select Topics	9-7
3. Topics to Avoid	9-10
4. Topics to Remember	9-10
5. Stay Flexible	9-11
E. General Planning	9-11
F. Manner During Argument	9-12
G. Dangers of Affidavits	9-14
H. Cross-Examination on Affidavit.....	9-15
I. Adjournments and Stalling	9-16
1. When You Want More Time.....	9-16
2. When You are in a Hurry.....	9-17
(a) Build a Record	9-17
(b) Plan Ahead.....	9-17
(c) Don't Give Free Indulgences.....	9-18
(d) Don't Get Bounced From One Judge to Another	9-18

	Page
J. Be Fair and Reasonable.....	9-20
K. Ethics	9-20
L. Costs	9-21
M. Ex Parte Motions.....	9-23
N. Further Reading.....	9-25

CHAPTER 10

SUMMARY TRIAL AND SUMMARY JUDGMENT

A. Introduction.....	10-1
B. Advocacy for Negotiation.....	10-2
C. Advocacy at a Summary Judgment Hearing.....	10-4

CHAPTER 11

MEDIATION ADVOCACY

A. Introduction.....	11-1
1. What Mediation Advocacy Includes.....	11-1
2. A Modern Topic.....	11-1
B. Is Mediation Desirable in Your Case?.....	11-2
1. Introduction.....	11-2
2. Cost of Mediation in Time and Money.....	11-3
3. Benefits of Mediation	11-3
4. Possible Drawbacks of Mediation	11-4
5. When to Mediate?.....	11-5
C. Other Situations	11-6
1. Difficult Client.....	11-6
2. Difficult Lawyer	11-6
D. Role of Counsel Before the Mediation Starts.....	11-7
1. Who Should Act as Mediation Counsel for Your Client?	11-7
2. Pick or Negotiate the Mediation.....	11-8
(a) type of mediation.....	11-8
(b) who will be the mediator?	11-8
(c) procedure at the mediation.....	11-9
(d) scheduling.....	11-10
(e) location.....	11-10
3. Counsel’s Preparation.....	11-10
(a) Importance of Preparing Beforehand	11-10
(b) Clients’ Feelings, Goals, Needs, and Interests.....	11-11
(c) Opponents’ Feelings, Goals, Needs, Interests, and Legal Advice.	11-13
(d) Who is Decision Maker?	11-14
(e) Who Attends?	11-14

TABLE OF CONTENTS

	Page
(f) Review Negotiation History	11-14
(g) Find Creative Solutions.....	11-15
(h) Prepare for a Settlement Agreement.....	11-17
4. Written Presentation.....	11-18
5. Brief Your Client.....	11-20
E. Counsel’s Role at the Mediation Session.....	11-24
1. Privilege	11-24
2. Opening Statement	11-25
3. Watch and Listen.....	11-26
4. Keep an Open Mind and Be Flexible	11-28
5. Ask Open Questions.....	11-29
6. Show Attentive Listening.....	11-29
7. Do Not Assume Your Opponent’s Motives	11-30
8. Keep Updating Your Advice	11-31
9. Speak Diplomatically	11-32
10. Bargain Realistically	11-34
11. Consider the Mediator	11-36
12. Advance the Idea of Settling Out of Court.....	11-38
13. Alter Your Opponent’s Attitude	11-40
14. End of the Mediation.....	11-42
F. Your Client’s Role	11-42
1. Client’s Preparation.....	11-42
2. Client Speaking at Mediation.....	11-42
3. Client Doing Private Work at Mediation	11-43
G. What to Do If There is No Settlement.....	11-43
1. Don’t Quit Too Soon.....	11-43
2. Don’t Give Up on Negotiation.....	11-44
3. Analyze the Hurdle	11-44
4. Alternative Procedures	11-45
H. Settlement Agreement.....	11-46
I. Further Reading.....	11-47

CHAPTER 12

PREPARING FOR TRIAL

A. Introduction.....	12-1
1. Importance of Preparation.....	12-1
2. Procrastination	12-2
B. Purpose of Planning	12-3
C. What You Need to Know.....	12-4
D. Mode of Trial.....	12-5
E. Trial as Drama or Story.....	12-7

TABLE OF CONTENTS

	Page
F. Advocacy as Teaching.....	12-9
G. Assess the Other Key People.....	12-12
H. Timing and Deadlines.....	12-14
I. Theory of Your Case.....	12-15
J. What You Must Prove and How	12-17
1. What Must You Prove?	12-17
2. Prove Each Fact Needed	12-18
3. Assess the Reliability of Evidence	12-21
4. Dangers of Some Ways and Numbers of Proving a Fact	12-22
5. Assessing Different Modes of Proof.....	12-25
(a) Visual Evidence.....	12-25
(b) Live Lay Witnesses	12-26
(c) Evidence Taken Abroad on Commission.....	12-26
(d) Subpoenaing the Opposite Party or Some Adverse Person	12-26
(e) Read-Ins from Discoveries or Other Transcripts	12-27
(f) Documents or Records.....	12-27
(g) Cross-Examination	12-28
(h) Expert Witnesses.....	12-28
(i) Physical Objects or Demonstrations	12-28
(j) Admissions	12-29
K. What Your Opponents Must Prove.....	12-29
L. Other Miscellaneous Preparation.....	12-31
M. Sequence of Proof	12-31
1. Introduction.....	12-31
2. Primacy.....	12-32
3. Recency.....	12-33
4. Safety is in the Middle.....	12-33
5. Intelligibility	12-34
6. Order of Cross-Examination	12-35
7. Breaks in the Trial.....	12-36
8. Maintain Attention.....	12-36
9. Balancing These Factors.....	12-37
N. Organize Yourself	12-38
1. Introduction.....	12-38
2. Organizing and Holding Records	12-39
3. Witness Checklist.....	12-39
4. Things for the Judge	12-40
5. Notes for Your Opening Statement.....	12-41
6. Notes for Your Cross-Examination	12-41
7. Draft of Your Closing Argument	12-41
8. Notes for Settlement	12-41
O. Brief Witnesses	12-41

TABLE OF CONTENTS

	Page
P. Prepare to Cross-Examine	12-41
1. Introduction	12-41
2. Who Will be Available to Cross-Examine?	12-42
3. Gather Information	12-42
4. Arrange the Information About that Witness	12-44
5. List Possible Cross-Examination Topics	12-44
6. Order of Questions	12-45
Q. Further Reading	12-46
APPENDIX A	
Miscellaneous Steps Before Trial	12-48
APPENDIX B	
Evidence Chart	12-50

CHAPTER 13

BRIEFING YOUR WITNESSES

A. Introduction	13-1
B. Purpose of Briefing	13-2
C. Reassure Your Witness	13-3
1. Check Previous Court Experience	13-3
2. Checklist and Notes	13-3
3. Put Your Witness at Ease	13-3
4. Have Your Witness Review the Facts	13-4
5. Ethics	13-5
D. Educate Your Witness Generally	13-6
1. Introduction	13-6
2. Visit Court	13-6
3. Explain Basics	13-7
4. General Approach	13-8
5. When to be in the Courtroom	13-8
E. Go Over Your Questions With Your Witness	13-9
1. Introduction	13-9
2. Who Attends Briefing	13-9
3. Aim of Evidence in Chief	13-9
4. Poor Communication	13-9
5. The Witness' Story	13-10
6. Answering Your Questions	13-10
7. Answer the Question	13-10
8. Hearing and Volume	13-11
9. Identifying or Using Things	13-11
F. General Manner While Testifying	13-12
1. General Manner	13-12
2. Powerless Speech	13-12
3. Other Quirks to Avoid	13-13

	Page
G. Manner When Off the Witness Stand	13-14
1. In the Audience	13-14
2. Outside Court	13-15
3. How to Dress.....	13-16
H. Preparing Your Witness for Cross-Examination	13-17
1. Explain the Nature of Cross-Examination	13-17
2. General Approach to Answering Cross-Examination	13-17
Questions	
3. Practise Cross-Examination.....	13-19
4. Previous Utterances.....	13-19
5. Leaving Your Own Traps.....	13-19
6. Likely Cross-Examination	13-19
7. Traps Which Your Witness Should Avoid.....	13-20
I. Preparing Your Witness for Re-Examination	13-21
J. Further Reading	13-21

CHAPTER 14

STARTING THE TRIAL

A. Before You Speak	14-1
B. Whether to Give a Plaintiff’s Opening Statement.....	14-2
1. Importance	14-2
2. Purpose.....	14-2
C. Guidelines for an Opening Statement	14-5
1. Be Brief.....	14-5
2. Avoid Detail.....	14-6
3. Legal Issues.....	14-6
4. Emphasize Your Strongest Points.....	14-6
5. Opening Before a Jury	14-7
6. Remove Damaging Issues.....	14-7
D. Planning Your Opening Statement.....	14-7
1. First Ideas.....	14-7
2. Prepare the First Draft.....	14-8
3. Revise After You Brief Your Witnesses	14-8
4. Revise after You Learn Who the Trial Judge will Be	14-9
5. Revise After Learning What is Consented to or Admitted	14-9
6. Rehearse	14-10
E. Delivering Your Opening Statement.....	14-10
1. Stage Fright.....	14-10
2. Where and How to Stand	14-10
3. Your Manner.....	14-11
4. Speak Clearly and Audibly.....	14-12

TABLE OF CONTENTS

	Page
5. Separate its Parts	14-13
6. Display a Few Words	14-13
F. Other Early Tasks at Trial	14-14
1. Objections.....	14-14
2. Exclude Witnesses?.....	14-15
3. Show Dominance	14-15
4. Arrange Logistics.....	14-16
5. Liaise with Court Staff	14-17
G. Defendant's Opening Statement	14-17
1. General Situation	14-17
2. When to Give the Opening Statement	14-18
3. How to Give the Defence Opening Statement.....	14-20
H. Further Reading	14-21

CHAPTER 15

EVIDENCE IN CHIEF

A. Introduction.....	15-1
B. General Impression	15-2
1. Introduction.....	15-2
2. Put Your Witness at Ease	15-2
3. Your Posture and Manner.....	15-3
(a) standing.....	15-3
(b) focus on the witness	15-4
(c) encourage.....	15-4
(d) control.....	15-5
(e) emphasize	15-5
(f) pace.....	15-5
(g) informality	15-5
(h) warn.....	15-6
4. Reacting to Answers.....	15-6
5. Energy Level.....	15-7
6. Movement	15-7
7. Maintaining Attention.....	15-8
C. Questioning Methods.....	15-9
1. How Much to Ask.....	15-9
2. Wording Your Questions.....	15-10
3. Content of the Witness' Testimony	15-12
(a) one issue at a time.....	15-12
(b) reinforce important points.....	15-12
(c) use a theme	15-14
(d) base the question on a past answer.....	15-15

TABLE OF CONTENTS

	Page
(e) avoid irrelevance and explanations	15-15
(f) circumstantial evidence	15-15
(g) fixing bad answers	15-16
D. Feedback	15-16
E. Stay Flexible.....	15-17
F. Leading Questions.....	15-19
1. What is a Leading Question	15-19
2. When You Can Lead	15-20
3. How to Avoid Asking Leading Questions	15-20
4. When Your Witness Gets Stuck	15-21
5. Effect of a Leading Question	15-23
G. Objects and Exhibits.....	15-23
H. Help in the Courtroom	15-26
I. Objections	15-27
J. Discovery Read-Ins.....	15-29
1. Introduction.....	15-29
2. Chance to Explain.....	15-29
3. Procedure at Trial	15-30
4. Connected Answers.....	15-31
K. Further Reading	15-31

APPENDIX

Language Difficult for Many Witnesses.....	15-33
--	-------

CHAPTER 16

CROSS-EXAMINATION

A. Introduction.....	16-1
B. Aims.....	16-2
1. Get Evidence.....	16-2
2. Alert the Court to a Topic.....	16-2
3. Build Up Your Own Witness or Party.....	16-3
4. Attack the Witness' Credibility	16-3
5. Attack the Accuracy of the Witness' Testimony	16-3
6. Help Attack Other Opposing Witnesses.....	16-3
7. Carry Out Duty to Cross-Examine.....	16-3
8. Give the Appearance of Cross-Examining.....	16-4
9. Distract	16-5
10. Suggest Possibilities	16-5
11. Remind the Court of Your Presence.....	16-5
C. Preparing to Cross-Examine	16-6
1. Interview Likely Opposing Witnesses.....	16-6

TABLE OF CONTENTS

	Page
2. Exclude Witnesses	16-6
3. Handling Opposing Evidence in Chief	16-7
D. Whether to Cross-Examine.....	16-7
E. Your Attitude to Cross-Examination.....	16-9
1. Change Your Task	16-9
2. Pick Your Manner	16-11
(a) generally.....	16-11
(b) assess the witness	16-11
(c) confidence and purpose.....	16-14
(d) show witness' weakness	16-14
F. Control the Witness	16-15
1. Introduction.....	16-15
2. Narrow Questions	16-15
3. Prevent Explanations.....	16-16
4. Curiosity Killed the Cat	16-16
5. Edge Out Slowly	16-18
6. Control the Agenda	16-19
7. Control the Pace	16-19
8. Use Nonverbal Communication	16-20
9. Focus Your Attention.....	16-20
G. Reinforce Success.....	16-20
H. Conceal Your Aims and Knowledge.....	16-21
1. Introduction.....	16-21
2. How to Conceal Your Aims.....	16-22
3. Box the Witness In	16-23
4. Objections to Relevance	16-25
I. Be Decent and Ethical	16-25
1. General Manner	16-25
2. Improper Questions.....	16-27
J. Wording Questions	16-28
1. Background.....	16-28
2. Simplicity	16-28
3. Making Suggestions	16-30
4. Types of Questions	16-30
5. Regain Attention	16-30
K. Memory and Perception	16-31
1. Introduction.....	16-31
2. General Tests of Memory.....	16-31
3. Perceiving.....	16-32
4. Impaired Perception.....	16-33
5. Any Reason to Remember?	16-34
6. Cues to Retrieve Memory	16-35

TABLE OF CONTENTS

	Page
7. Later Interference with Memory	16-36
8. Words Mean Different Things to Different People	16-37
9. Levelling vs. Sharpening	16-37
L. Specific Strategies	16-37
1. Mixed-Up Order	16-38
2. Conceal the Object of Your Questions	16-38
3. Conceal Your Proof.....	16-38
4. Causes, Effects, and Corollaries.....	16-38
5. Motives and Biasses.....	16-40
6. Previous Statements	16-41
7. Suggestibility	16-43
8. Pin Down the Witness.....	16-44
9. Follow One Item Through.....	16-47
10. Apparent Errors and Omissions.....	16-48
M. Repetition.....	16-48
N. Problem Witnesses.....	16-49
1. Introduction.....	16-49
2. Lying Witnesses	16-50
(a) Signs of Lying	16-50
(b) What to do With a Lying Witness	16-52
3. Partisan Witnesses	16-54
(a) Introduction.....	16-54
(b) How to Cross-Examine Partisans.....	16-54
4. Witnesses with Poor or Impaired Thinking or Memory.....	16-55
5. Hesitant Witnesses.....	16-55
6. Evasive Witnesses.....	16-55
7. Talkative Witness	16-56
8. Investigator	16-56
O. Other Counsel Interfering	16-57
P. End of Cross-Examination.....	16-57
Q. Experts.....	16-58
R. Further Reading	16-59

CHAPTER 17

CROSS-EXAMINING EXPERT WITNESSES

A. Introduction.....	17-1
1. Engrossing and Valuable	17-1
2. Cross-References.....	17-1
B. Preparation for Cross-Examining.....	17-2
1. Consult Your Own Expert	17-2
2. Do Your Homework	17-3

TABLE OF CONTENTS

	Page
3. Consider Possible Topics.....	17-5
4. Adjournments.....	17-5
C. Qualifications	17-5
1. Introduction.....	17-5
2. Ways to Attack Qualifications.....	17-6
(a) incompleteness.....	17-6
(b) inapplicable credentials.....	17-8
(c) lack of theoretical credentials.....	17-10
(d) too little practical experience	17-10
(e) credentials rejected.....	17-13
(f) rusty on basics.....	17-13
(g) unusual conclusion.....	17-14
(h) total picture.....	17-15
D. Bias or Interest.....	17-15
1. Introduction.....	17-15
2. Who Pays.....	17-16
3. Usual Clients.....	17-16
4. Looking for Business or Favors in the Future.....	17-18
5. Does the Expert Act for Both Sides?.....	17-19
6. Partisanship	17-19
7. Forming a Premature Conclusion	17-20
8. Always Finds Same Unusual Condition	17-22
9. Expose a Personal Connection	17-23
10. Expose a Professional Testifier.....	17-23
11. Has the Witness an Axe to Grind?.....	17-23
12. Uncover Opposing Counsel’s Helper	17-25
13. Show that the Expert is Too Keen	17-26
E. Suitability of Expert’s Task.....	17-27
1. Cross-Reference.....	17-27
2. Faulty Instructions Generally.....	17-27
3. How to Cross-Examine About Instructions.....	17-28
4. Other Flaws in Instructions	17-28
5. When the Flaw Makes the Testimony Irrelevant	17-29
6. Too Broad a Task.....	17-29
7. Patent Errors in Defining Task	17-29
8. Legal Errors or Omissions in Instructions.....	17-30
9. Clarify Witness’ Thesis.....	17-30
F. Data Not Proved, or Actually Disproved.....	17-31
1. Introduction.....	17-31
2. Where Witness Investigates the Basic Facts.....	17-32
3. Test Completeness of Assumptions	17-33
4. Test Accuracy of Assumptions.....	17-34

TABLE OF CONTENTS

	Page
5. Test the Effect of Combining Assumptions.....	17-35
6. Try to Show Inaccurate Data.....	17-36
7. Show Inadequate Fact Investigation.....	17-36
8. Check the Witness' Actual Data.....	17-37
9. Probe Adjustments.....	17-38
10. Check Chain of Custody.....	17-39
11. Test Memory of Assumptions.....	17-40
12. Do Not Ask for a New Conclusion.....	17-40
G. Suitability of Theory or Methods.....	17-40
1. Dangers.....	17-40
2. Possible Attacks.....	17-41
3. Method of Attack.....	17-42
4. Attack by Textbook.....	17-43
H. Mechanical or Clerical Errors.....	17-43
I. Conclusions Not Supported by Results.....	17-45
1. Introduction.....	17-45
2. Ambiguous Results.....	17-45
3. Statistics.....	17-46
4. Real Life Differs.....	17-46
5. Discarded Results or Tests.....	17-46
6. Inconsistent Assumptions.....	17-47
7. Double Counting.....	17-47
J. Process Used is Arbitrary.....	17-47
K. Inconsistent Previous Statements.....	17-49
1. Witness' Previous Publications.....	17-49
2. Other Contrary Previous Statements.....	17-50
L. Conclusion Contrary to Authority, Science,.....	17-50
or Common Sense	
1. Introduction.....	17-50
2. Published Authorities Contrary to this Witness.....	17-51
3. Works Connected to the Witness.....	17-52
4. General Practice.....	17-52
5. Views of Others.....	17-53
6. Conclusion Contrary to Logic or Common Sense.....	17-53
M. Work Too Quick or Superficial.....	17-54
1. Introduction.....	17-54
2. Time.....	17-55
3. Steps Skipped.....	17-55
N. Less Rational Cross-Examination.....	17-56
1. Introduction.....	17-56
2. Ridicule.....	17-56
3. Expose Jargon and Incomprehensibility.....	17-57

TABLE OF CONTENTS

	Page
4. Expose Partisanship or Hostility	17-58
5. Expose Strange or Foreign Ideas	17-58
6. Avoid Innuendo	17-58
O. Facts Helpful to You	17-59
P. Your Manner and Appearance.....	17-62
Q. Further Reading.....	17-63
1. Discussions of the Topic	17-63
2. Examples of Good Cross-Examination.....	17-63

CHAPTER 18

RE-EXAMINATION AND REBUTTAL

A. Order of Evidence.....	18-1
B. Re-Examining.....	18-2
1. What is Permitted	18-2
2. What is Forbidden	18-2
3. When to Re-Examine.....	18-2
C. Specific Dangers of Re-Examining	18-4
1. Shows Something is Broken	18-4
2. No Briefing.....	18-5
3. Re-Cross-Examination.....	18-5
4. Do Not End Weak	18-5
5. Leave Good Answers Untouched.....	18-5
6. Asking Without Preparation	18-6
D. Alternatives to Re-Examining.....	18-6
E. Preparing to Re-Examine.....	18-6
F. Manner of Re-Examining.....	18-6
G. Rebuttal	18-7
H. Further Reading.....	18-8

CHAPTER 19

ARGUMENT

A. Introduction.....	19-1
1. Scope.....	19-1
2. Importance	19-1
B. Aims of Argument.....	19-1
1. Why Aims Matter.....	19-1
2. What are the Aims of Argument?.....	19-2
(a) get and hold attention	19-2
(b) be understood.....	19-2
(c) set the issues and the agenda.....	19-2

TABLE OF CONTENTS

	Page
(d) rearrange.....	19-2
(e) relate.....	19-3
(f) remind.....	19-3
(g) educate.....	19-3
(h) motivate.....	19-3
(i) help with judge’s reasons.....	19-4
(j) preserve points for appeal.....	19-4
3. Wrong Aim.....	19-4
C. Written or Oral Argument?.....	19-4
1. Need to Pick a Type.....	19-4
2. Advantages of Written Argument.....	19-5
3. Advantages of Oral Argument.....	19-5
4. Hybrid Forms of Argument.....	19-5
D. Planning an Argument.....	19-6
1. Introduction.....	19-6
2. What to Plan First.....	19-7
(a) Plan From Your Destination.....	19-7
(b) Allow for Obstacles.....	19-9
(c) Keep Revising Your Plan.....	19-9
3. Revise Your Argument Later.....	19-10
4. How to Present Facts.....	19-11
5. Headings.....	19-12
6. Rehearse.....	19-13
7. Number of Issues.....	19-13
8. Simplicity vs. Accuracy.....	19-15
(a) Summarize.....	19-15
(b) Use Footnotes.....	19-15
(c) Use Appendices.....	19-16
(d) Use Charts.....	19-16
(e) Give Only the Substance.....	19-16
(f) Use Headings.....	19-17
(g) Use Brief Transitional Words.....	19-17
E. Specific Persuasion Methods.....	19-17
1. A Strong Argument Hits Three Targets.....	19-17
2. Enhance Your Credibility.....	19-20
(a) Appearance.....	19-20
(b) The Medium is the Message.....	19-21
(c) Do Not Sail Close to the Wind.....	19-21
(d) Be Pleasant.....	19-21
(e) Weak Arguments.....	19-22
(f) Disorganization.....	19-22
(g) Do Not be a Stranger.....	19-22
(h) Check and Recheck.....	19-22

TABLE OF CONTENTS

	Page
3. Order of Argument.....	19-22
4. Examples and Analogies.....	19-23
5. Citing Legal Authority	19-24
6. Logic.....	19-26
7. Reconcile Conflicts and Solve Mysteries.....	19-27
8. Frame the Issues.....	19-28
9. Look for Alternatives.....	19-29
10. Reduce Opposing Argument to Absurdity	19-30
11. The Goldilocks Formula	19-31
12. Put Your Opponent on the Defensive.....	19-31
13. Take Care with Connotations.....	19-32
14. Draw the Court Step by Step.....	19-33
15. Be Moderate.....	19-34
F. Oral Argument.....	19-34
1. Vital to Gain and Hold Attention	19-34
2. How to Hold Attention	19-35
(a) Do not read out loud	19-35
(b) Give a road map.....	19-35
(c) Vary things.....	19-36
(d) Use the word “you”.....	19-36
(e) Surprise the audience.....	19-37
(f) Involve the audience	19-37
(g) Be brief.....	19-38
(h) Use Simple Language.....	19-40
3. Notes for Oral Argument.....	19-40
4. Citations	19-41
5. Style and Tone.....	19-41
6. Speak Simply and Clearly	19-42
7. Use Aids	19-43
8. Welcome Feedback	19-44
G. Preparing Written Argument.....	19-45
1. Huge Importance.....	19-45
2. Who Should Prepare the Written Argument	19-46
3. Clarity	19-46
4. Be Concise.....	19-48
(a) Why be Concise?.....	19-48
(b) How to be Concise.....	19-49
(c) Rewrite for Brevity	19-50
(d) How to Draft.....	19-50
(e) Start Strong	19-51
(f) Syllogisms	19-51
(g) Bad Example.....	19-51

TABLE OF CONTENTS

	Page
5. Follow Proper Form	19-52
6. Offer Variety	19-53
H. Arguing Facts	19-53
1. Importance	19-53
2. Arranging Evidence.....	19-54
3. Conflicting Evidence	19-56
(a) Relation of Pieces of Evidence	19-57
(b) Forgetting or Not Noticing vs. Lying	19-57
(c) Probable Conduct	19-58
(d) Internal inconsistencies.....	19-60
(e) Chronology.....	19-60
(f) Parsimony	19-61
(g) Absence of evidence.....	19-61
(h) Quality of evidence.....	19-61
(i) Presumptions.....	19-62
(j) Adverse inferences	19-62
(k) Corroboration.....	19-62
(l) Standard of proof.....	19-62
(m) Circumstantial evidence	19-63
(n) Logic	19-63
(o) Estoppel.....	19-63
(p) Causation	19-64
(q) Capacity	19-64
(r) Disbelief of a witness.....	19-64
(s) Leading questions.....	19-64
(t) Failure to cross-examine	19-65
(u) Proven falsity.....	19-65
I. Arguing Before a Jury	19-65
1. Cross-Reference.....	19-65
2. Place and Manner of Jury Address.....	19-65
3. Contents of Your Jury Address	19-66
4. Argument to the Trial Judge	19-68
J. Arguing Before Tribunals.....	19-69
1. Introduction.....	19-69
2. Lay Members.....	19-69
3. Sensitivity to Status	19-70
4. Other Goals.....	19-71
(a) Certainty.....	19-71
(b) Ease of administration	19-71
(c) No responsibility	19-72
(d) Danger of noncompliance	19-72
5. Unpublished Procedure.....	19-72

TABLE OF CONTENTS

	Page
K. Rebuttal Argument.....	19-73
L. Order of Argument of Counsel.....	19-73
1. The Law.....	19-73
2. What to Do When You Argue Last.....	19-74
(a) Select issues.....	19-74
(b) Access recency.....	19-74
(c) Give antidotes to primacy.....	19-75
(d) Benefit from vacillation.....	19-75
(e) Be simple.....	19-75
(f) Be pleasant.....	19-75
3. What to do When You Argue First.....	19-76
(a) Emphasize first impression.....	19-76
(b) Select the issues.....	19-76
(c) Anticipate your Opponent’s Argument.....	19-76
4. Acting for the Sole Defendant.....	19-77
5. Acting for One of Several Defendants.....	19-77
M. Factums for an Appeal Court.....	19-78
1. Introduction.....	19-78
2. Importance.....	19-78
3. Basic Principles of Appellate Argument.....	19-80
4. Effect of Your Opponent’s Factum.....	19-81
(a) when you act for the respondent.....	19-81
(b) when you act for the appellant.....	19-82
(c) generally.....	19-82
5. Special Problems of Factums.....	19-83
(a) Audience Knows Little.....	19-83
(b) Brevity.....	19-83
(c) Clarity.....	19-84
(d) Accuracy.....	19-84
6. The Heart of Argument.....	19-86
7. Example of How to Improve Factum Writing.....	19-87
(a) Do not file this:.....	19-87
(b) Instead substitute this:.....	19-87
N. Oral Argument on Appeal.....	19-88
1. Introduction.....	19-88
2. Opening Your Argument.....	19-88
3. Questions from the Bench.....	19-90
4. Substance of Oral Argument.....	19-92
O. Further Reading.....	19-95
APPENDIX	
Checklist of Some Possible Grounds to Resist Appeal.....	19-98
INDEX	Index-1
REFERENCES	Ref-1