

# Table of Contents

## Volume 1

### PART I. PREPARATION FOR TRIAL

#### CHAPTER 1. THE FACTS

- § 1:1 Prelitigation investigation—Mastery of the facts
- § 1:2 The art of interviewing
- § 1:3 Interviewing the client
  - § 1:4 —Interview setting
  - § 1:5 —Record of the interview
  - § 1:6 —Restricting attendance at the interview
  - § 1:7 —Appreciating the psychodynamics of interviewing and counseling
  - § 1:8 —Scope of the initial interview
  - § 1:9 —Putting the client at ease
  - § 1:10 —Using open-ended questions
  - § 1:11 —Listening to the client
  - § 1:12 —Emotional reactions to the client's story
  - § 1:13 —Evaluating the client as a witness
  - § 1:14 —Corroborating evidence
  - § 1:15 —Anticipating adverse party's claims
  - § 1:16 —Advising the client of legal alternatives
  - § 1:17 —Avoiding the role of psychotherapist
  - § 1:18 —Familiarity with nonlegal assistance
  - § 1:19 —Cautioning the client
  - § 1:20 —Explaining the realities of the case
  - § 1:21 —Client interview forms
    - § 1:22 — —Sample client interview sheet No. 1
    - § 1:23 — —Sample client interview sheet No. 2
  - § 1:24 —Attorneys' fees
    - § 1:25 — —Sample attorney's fee agreement (dissolution of marriage)
    - § 1:26 — —Contingent fees
    - § 1:27 — —Sample retainer agreement
    - § 1:28 — —Hourly fees
    - § 1:29 — —Fixed fees
    - § 1:30 — —Attorney's lien
    - § 1:31 — — —Sample notice of attorney's lien
    - § 1:32 —Follow-up letter of lawyer retained

- § 1:33 — —Sample follow-up letter of lawyer retained No. 1
- § 1:34 — —Sample follow-up letter of lawyer retained No. 2
- § 1:35 — —Sample follow-up letter of lawyer retained No. 3
- § 1:36 — —Sample follow-up letter of lawyer not retained No.  
1
- § 1:37 — —Sample follow-up letter of lawyer not retained No.  
2
- § 1:38 — —Sample follow-up letter of lawyer not retained No.  
3
- § 1:39 Interviewing witnesses
- § 1:40 —Favorable witnesses
- § 1:41 —Unfavorable witnesses
- § 1:42 —Witness evaluation report
- § 1:43 —Court reporter statements—Recordings
- § 1:44 —The written statement or Affidavit
- § 1:45 —The written statement—Witness' subscription to the  
statement
- § 1:46 — —Including personal information
- § 1:47 — —Correcting errors in the statement
- § 1:48 — —Copies of the written statement
- § 1:49 — —Witness not fluent in English
- § 1:50 The parties—Correct name and entity
- § 1:51 Selection of experts
- § 1:52 Scientific aids
- § 1:53 —Laboratories
- § 1:54 Discovery
- § 1:55 Suspicious documents
- § 1:56 Diagram or synopsis of case
- § 1:57 Rushing into suit
- § 1:58 Notices to municipalities
- § 1:59 Organization of file for trial
- § 1:60 —Suggested organization
- § 1:61 Trial notebook
- § 1:62 —Suggested structure
- § 1:63 Trial manual—Case law and statutes
- § 1:64 Court reporters

## CHAPTER 1A. THE COMMUNICATIVE PROCESS

- § 1A:1 Importance
- § 1A:2 Preparing self and case
- § 1A:3 Becoming trial technicians
- § 1A:4 —Thoroughly preparing the case
- § 1A:5 Components of the communicative process
- § 1A:6 Effective communication as receiver centered
- § 1A:7 Relaxation

## TABLE OF CONTENTS

§ 1A:8	—Relaxation techniques
§ 1A:9	—Abdominal breathing
§ 1A:10	Listening
§ 1A:11	—Distractions to effective listening
§ 1A:12	— —Environmental
§ 1A:13	— —Distractions created by the speaker
§ 1A:14	— —Listener source distractions
§ 1A:15	—Listening with empathy
§ 1A:16	—Suspending judgment
§ 1A:17	—Active listening
§ 1A:18	—Organizing information
§ 1A:19	—Evaluating information
§ 1A:20	—Nonverbal cues
§ 1A:21	—Review
§ 1A:22	Feedback
§ 1A:23	Verbal communication
§ 1A:24	—Analyzing your “audience”
§ 1A:25	—Keeping it simple
§ 1A:26	—Telling the story
§ 1A:27	—Using vivid language
§ 1A:28	Avoiding offense or embarrassment
§ 1A:29	Nonverbal communication
§ 1A:30	—Appearance
§ 1A:31	—Kinesics
§ 1A:32	— —Emblems
§ 1A:33	— —Illustrators
§ 1A:34	— —Affect displays
§ 1A:35	— —Regulators
§ 1A:36	— —Adaptors
§ 1A:37	— —Applying oral interpretation skills
§ 1A:38	—Proxemics
§ 1A:39	—Vocalics
§ 1A:40	—Objectics
§ 1A:41	—Environmental factors
§ 1A:42	—Chronemics
§ 1A:43	—Touching
§ 1A:44	—Deception leakage
§ 1A:45	The voice
§ 1A:46	—The vocal mechanism
§ 1A:47	—Articulation
§ 1A:48	—Pitch and inflection
§ 1A:49	—Volume
§ 1A:50	—Resonance
§ 1A:51	Varying delivery
§ 1A:52	—Voice production
§ 1A:53	—Nonverbal

- § 1A:54 Persuasion
- § 1A:55 —Identification and human motivation
- § 1A:56 —Speaker credibility
- § 1A:57 —Competence
- § 1A:58 — —Good moral character
- § 1A:59 — —Dynamism and enthusiasm
- § 1A:60 —Structuring the presentation
- § 1A:61 — —Principles of primacy, recency, and repetition
- § 1A:62 — —Anticipating bad features
- § 1A:63 —Bibliographic references

## **CHAPTER 2. THE PERSONAL INJURY CASE**

- § 2:1 Preparing the personal injury case
- § 2:2 Employment of attorney
- § 2:3 —Sample personal injury retainer agreement
- § 2:4 Sample medical malpractice retainer agreement
- § 2:5 Interviewing the personal injury client
- § 2:6 Full disclosure of all information
- § 2:7 Sample medical update letter
- § 2:8 Sample questions to personal injury client
- § 2:9 —Sample general questionnaire
- § 2:10 —Sample questionnaire for automobile accident cases
- § 2:11 Instructions to client—"My day" statement
- § 2:12 — —Form
- § 2:13 Protecting the case
- § 2:14 —Form
- § 2:15 Sample first letter to plaintiff-client
- § 2:16 Contact the defendant
- § 2:17 —Sample lien letter to the defendant
- § 2:18 —Sample letter to the secretary state
- § 2:19 Statutory notice—Suits against municipalities
- § 2:20 — —Sample notice No. 1
- § 2:21 — —Sample notice No. 2
- § 2:22 — —Sample notice No. 3
- § 2:23 Statute of limitations—Suits against municipalities
- § 2:24 Additional pre-suit requirements
- § 2:25 Investigation—In general
- § 2:26 How did the accident happen?
- § 2:27 Who should investigate the case—Lawyer or investigator?
- § 2:28 — —Investigators
- § 2:29 —Police report—Other governmental agencies
- § 2:30 — —Sample authorization letter to obtain police records
- § 2:31 —Written standards, codes, rules and regulations

## TABLE OF CONTENTS

§ 2:32	— —Sources
§ 2:33	— —Use discovery
§ 2:34	— —Prepare “safety” trial brief
§ 2:35	— —Uses during trial
§ 2:36	— —Admissibility
§ 2:37	— —Introducing into evidence—Illustration
§ 2:38	—Photographs of the plaintiff, objects involved and the scene
§ 2:39	—Visiting the scene of the accident—Photographs and diagrams
§ 2:40	—Locating witnesses
§ 2:41	— —Investigative reports
§ 2:42	— — —Sample letter to client’s insurance investigator
§ 2:43	— —Canvassing the neighborhood
§ 2:44	— —Discovery
§ 2:45	—Interviewing witnesses
§ 2:46	— —Automobile accident cases
§ 2:47	—Proof of witnesses’ handwriting
§ 2:48	Nature, extent and duration of the injury
§ 2:49	—Understanding the medical phases of the case
§ 2:50	—Medical dictionary and access to the internet
§ 2:51	—Medical literature
§ 2:52	—Client’s prior medical history
§ 2:53	—Medical release
§ 2:54	— —Sample release
§ 2:55	—Sample release No. 2
§ 2:56	—Medical reports
§ 2:57	—Request for physician’s report
§ 2:58	— —Sample request for physician’s report No. 1
§ 2:59	— —Sample request for physician’s report No. 2
§ 2:60	— —Sample request for physician’s report No. 3
§ 2:61	—Medical expert
§ 2:62	—Hospital records
§ 2:63	— —Sample request for hospital records
§ 2:64	Sample Request for electronic medical records
§ 2:65	Nature, extent and duration of the injury—Hospital records—Conferences with medical witnesses
§ 2:66	—Preparing hypothetical questions
§ 2:67	—Electronic research
§ 2:68	Defendant’s investigation of plaintiff’s prior medical history
§ 2:69	Medical bibliography for lawyers
§ 2:70	Checklist—Investigation
§ 2:71	—Sample personal injury investigation checklist No. 1
§ 2:72	Sample personal injury investigation checklist No. 2

- § 2:73 —Sample automobile accident investigation checklist  
No. 3
- § 2:74 Demonstrative evidence—Visual aids
- § 2:75 — —Blackboards
- § 2:76 — —Sketch pads
- § 2:77 — —Printed charts
- § 2:78 — —Medical illustrations, skeletons, models and  
manikins
- § 2:79 — —Motion pictures, videotape and animation
- § 2:80 — —Color photographs
- § 2:81 Weather reports
- § 2:82 —Sample letter requesting weather report
- § 2:83 Lab reports and imaging studies
- § 2:84 —Radiologist or x-ray technician
- § 2:85 —Presentation of x-rays—Illumination box or positive  
prints
- § 2:86 Damages
- § 2:87 —Preexisting ailments, aggravation
- § 2:88 —Obtain paid bills
- § 2:89 — —Request for bills
- § 2:90 —Obtain bills—Request for bills—Sample letter  
requesting copies of medical bills
- § 2:91 —Effect of permanent disability—Impairment of  
earning capacity
- § 2:92 —Disability
- § 2:93 —Pain and suffering
- § 2:94 —Hedonic Damages
- § 2:95 —Lost past earnings
- § 2:96 — —Sample authorization to review employment  
records
- § 2:97 — —Sample wage loss letter No. 1
- § 2:98 — —Sample wage loss letter No. 2
- § 2:99 — — —Wage loss verification form
- § 2:100 — —Sample income tax authorization
- § 2:101 —Punitive damages
- § 2:102 —Impairment of earning capacity of infants
- § 2:103 —Lost future earnings and earning capacity
- § 2:104 —Loss of profits
- § 2:105 —Mortality tables
- § 2:106 —Present cash value
- § 2:107 —Inflation
- § 2:108 —Impact of taxes
- § 2:109 —Derivative suits
- § 2:110 —Wrongful death—Survival action
- § 2:111 —Collateral source rule
- § 2:112 — —Earnings
- § 2:113 Checklist—Case file

## TABLE OF CONTENTS

- § 2:114 — —Sample file checklist No. 1
- § 2:115 — —Sample file checklist No. 2
- § 2:116 Diagram of a personal injury case
- § 2:117 —Sample diagram

## CHAPTER 3. THE CONTRACT CASE

- § 3:1 Familiarity with contract law
- § 3:2 A “simple” contract case
- § 3:3 The contract-client interview
- § 3:4 Investigating the dispute
- § 3:5 Utilizing an expert
- § 3:6 Account stated—Actual or implied
- § 3:7 Accuracy of account stated
- § 3:8 Letter to debtor
- § 3:9 —Sample Demand Letter No. 1
- § 3:10 —Sample Demand Letter No. 2
- § 3:11 Preparing the defense of a contract case
- § 3:12 Sufficiency of allegations in Complaint
- § 3:13 Diagram of a contract case

## CHAPTER 4. THE CRIMINAL CASE

- § 4:1 In general
- § 4:2 Employment as defense counsel—The first interview
- § 4:3 The office interview
- § 4:4 —Client interview—Criminal case—Checklist
- § 4:5 —Compensation
- § 4:6 —Sample retainer agreement and contract
- § 4:7 —Interpreter
- § 4:8 —Fact witnesses
- § 4:9 —Content—Details of arrest, confession, and scientific tests
- § 4:10 Bail—Bond
- § 4:11 —Sample motion for bond reduction
- § 4:12 Charge, information, complaint, indictment
- § 4:13 —Arraignment—Pleas
- § 4:14 Speedy trial
- § 4:15 Plea bargaining and waiver of felony
- § 4:16 Scene of occurrence—Photographs—Diagrams
- § 4:17 Interviewing prosecution witnesses
- § 4:18 —Sample motion for production of confidential informant and disclosure of relevant criminal background and financial information
- § 4:19 Identification procedures
- § 4:20 Discovery
- § 4:21 —Sample motion for pre-trial discovery
- § 4:22 —Sample answer to people’s motion for pre-trial discovery

- § 4:23 Experts
- § 4:24 Scientific aids
- § 4:25 Preparation of the law
- § 4:26 Motions to suppress
- § 4:27 —Sample motion to suppress statements
- § 4:28 Motions to Suppress—Sample Motion to Suppress Cell  
Phone Records
- § 4:29 Motions to suppress—The arrest—Search and seizure
- § 4:30 —Illegal search and seizure
- § 4:31 —Sample motion to quash arrest and suppress  
evidence
- § 4:32 —Improperly obtained confessions
- § 4:33 —Wiretapping, recording devices
- § 4:34 Statute of limitations
- § 4:35 —Sample defendant's demand for trial
- § 4:36 Adverse publicity—Change of venue
- § 4:37 Multiple defendants or charges—Separate trials
- § 4:38 —Sample motion for severance
- § 4:39 Jury or nonjury
- § 4:40 Impeachment
- § 4:41 —Complaining witness' description of perpetrator
- § 4:42 —Flight
- § 4:43 —Confessions
- § 4:44 —Prior conviction
- § 4:45 Reputation and character—Witnesses
- § 4:46 Intoxication
- § 4:47 Alibi
- § 4:48 Hearsay rules governing criminal cases
- § 4:49 —Coconspirator statements
- § 4:50 —Outcry in sex cases
- § 4:51 Admissibility of prior identifications as substantive  
evidence
- § 4:52 Diagram of criminal case—Burglary
- § 4:53 Rape shield statutes

## CHAPTER 5. PLEADINGS

- § 5:1 In general
- § 5:2 Courtroom resources—Trial briefs, trial manual,  
treatises
- § 5:3 —The trial brief—Contents
- § 5:4 Pleadings—Careful preparation and monitoring
- § 5:5 Form of pleadings
- § 5:6 —Caption
- § 5:7 — —Sample party designations
- § 5:8 —Introduction
- § 5:9 —Characterizing the parties



## TABLE OF CONTENTS

§ 5:10	—Jurisdiction and venue
§ 5:11	—Specificity of pleadings
§ 5:12	Demand
§ 5:13	Indorsement by attorney
§ 5:14	—Verification
§ 5:15	—Annexed exhibits
§ 5:16	—Outline form of complaint
§ 5:17	Sample pleadings
§ 5:18	—Slip and fall on ice—Negligence
§ 5:19	—Gas explosion damaging building
§ 5:20	—Dramshop—Wrongful death
§ 5:21	—Thrown object—Negligence
§ 5:22	—Injuries to invitee—Negligence
§ 5:23	—Subrogation by insurer; boiler explosion
§ 5:24	—Petition for divorce
§ 5:25	—Petition to contest will—General form
§ 5:26	Breach of warranty—Defective product
§ 5:27	—Breach of employment contract
§ 5:28	Complaint based on libel—Federal diversity jurisdiction—Exemplary damages
§ 5:29	—Injuries to invitee—Answer and affirmative defense
§ 5:30	Medical negligence—Wrongful death and survival actions
§ 5:31	Automobile—Injury and loss of consortium

## **PART II. PRETRIAL**

### **CHAPTER 6. DISCOVERY**

#### **I. INTRODUCTION**

##### **A. OVERVIEW OF DISCOVERY**

§ 6:1	Generally
§ 6:2	Purposes of discovery
§ 6:3	Federal rules of discovery
§ 6:4	State rules of discovery
§ 6:5	Work product doctrine
§ 6:6	Refusal to comply with and abuse of discovery procedures; sanctions

##### **B. HOW TO PREPARE YOUR CLIENT**

§ 6:7	Providing printed instructions to client
§ 6:8	—Answering written interrogatories handout
§ 6:9	—Discovery deposition handout
§ 6:10	—Letter to client regarding interrogatories and production request

## II. DISCOVERY DEVICES

### A. WRITTEN INTERROGATORIES

#### 1. In General

- § 6:11 Generally
- § 6:12 —Legal requirements—Interrogatories
- § 6:13 —Objections to interrogatories
- § 6:14 —Answers to interrogatories
- § 6:15 Admissibility of interrogatories as evidence
- § 6:16 —Answer as impeachment or admission

#### 2. Sample Interrogatories

- § 6:17 Automobile negligence case—interrogatories to plaintiff—personal injuries
- § 6:18 — — —another form
- § 6:19 — — —property damage
- § 6:20 —interrogatories to defendant
- § 6:21 — — —another form
- § 6:22 Physician's malpractice case—interrogatories to defendant
- § 6:23 — — —another form
- § 6:24 —interrogatories to plaintiff
- § 6:25 Premises liability case—interrogatories to defendant

### B. DEPOSITIONS

- § 6:26 Generally
- § 6:27 Advantages of depositions
- § 6:28 —Parties' right to be present
- § 6:29 Preparing your client or witness
- § 6:30 Sample questions—Automobile injury case
- § 6:31 Open-ended final questions
- § 6:32 Videotaped depositions
- § 6:33 —When permissible
- § 6:34 —Forms to use in connection with videotaped depositions

### C. REQUESTS TO PRODUCE DOCUMENTS AND TO INSPECT LAND

- § 6:35 Generally
- § 6:36 Sample request to produce under Federal Rules of Civil Procedure
- § 6:37 Sample request to produce under state supreme court rule—Automobile collision case
- § 6:38 —Premises liability case
- § 6:39 —Medical malpractice case

TABLE OF CONTENTS

**D. REQUESTS FOR ADMISSION OF FACTS;  
GENUINENESS OF DOCUMENTS**

- § 6:40 Generally
- § 6:41 Request for admission of fact in medical malpractice case
- § 6:42 Request for admission of facts in premises liability case, with interrogatories
- § 6:43 Genuineness of signatures

**III. DISCOVERY IN CRIMINAL CASES**

- § 6:44 Generally
- § 6:45 Federal criminal discovery
- § 6:46 State criminal discovery
- § 6:47 —Florida
- § 6:48 —Illinois
- § 6:49 —New York
- § 6:50 —Wisconsin

**IV. DISCOVERY OF PARTICULAR MATTERS**

**A. PHYSICAL AND MENTAL EXAMINATIONS**

- § 6:51 Generally
- § 6:52 California
- § 6:53 Illinois
- § 6:54 New York

**B. EXPERT OPINIONS**

- § 6:55 Generally
- § 6:56 Illinois

**C. OTHER MATTERS**

- § 6:57 Discovery of accident reports
- § 6:58 Discovery against corporations
- § 6:59 Discovery of income tax returns
- § 6:60 Discovery in eminent domain proceedings
- § 6:61 Discovery of impeaching surveillance films
- § 6:62 Discovery of insurance agreements
- § 6:63 Discovery of financial status of parties

**CHAPTER 7. PRELIMINARY MOTIONS**

**I. INTRODUCTION**

- § 7:1 In general

## II. CIVIL CASES

- § 7:2 Motions to strike, demurrers, for dismissal due to failure to state a cause of action and for judgment on the pleadings
- § 7:3 Motions to strike and demurrers—Sample defendant’s motion to strike
- § 7:4 —Sample plaintiff’s response
- § 7:5 Bills of particulars
- § 7:6 —Plaintiff limited by bill of particulars
- § 7:7 —Sample notice of motion requesting bill of particulars
- § 7:8 Motion for default judgment
- § 7:9 Motions in limine
- § 7:10 —Sample plaintiff’s motion
- § 7:11 —Sample plaintiff’s motion in limine accompanying a motion to strike
- § 7:12 — —Sample motion to strike and motion in limine
- § 7:13 — —Sample plaintiff’s memorandum in support of motion in limine
- § 7:14 — —Sample supplemental statement of plaintiff in support of motion in limine
- § 7:15 Motion for order of protection
- § 7:16 Change of venue
- § 7:17 —Sample petition—Prejudice of judge
- § 7:18 —Sample motion for substitution of judge—Without cause
- § 7:19 —Undue influence—Inhabitants prejudiced
- § 7:20 Motion to withdraw as attorney of record
- § 7:21 Motion to substitute attorneys
- § 7:22 Continuances
- § 7:23 —Motions for continuance—Sample rule
- § 7:24 — —Absent witness—Sample affidavit
- § 7:25 Amendments to pleadings
- § 7:26 —Typical state rule
- § 7:27 —Federal rule
- § 7:28 —Timely amendments to pleadings
- § 7:29 —Motions accompanied by proposed amendment
- § 7:30 —Sample Motion
- § 7:31 Summary judgments
- § 7:32 —Outline
- § 7:33 —To determine opponent’s evidence
- § 7:34 —Federal rules
- § 7:35 —State rules
- § 7:36 —Affidavits
- § 7:37 —Multiple issues
- § 7:38 —Counterclaims

## TABLE OF CONTENTS

§ 7:39	—Sample notice of motion for summary judgment
§ 7:40	—Sample motion for summary judgment
§ 7:41	Another sample motion for summary judgment—Filed by plaintiff
§ 7:42	—Sample affidavits—Summary judgment—Recovery of money
§ 7:43	— — —Recovery of land
§ 7:44	— — —Defense to all of claim
§ 7:45	— — —Defense to part of claim
§ 7:46	Motions relating to discovery
§ 7:47	—Sample motion to compel compliance—Notice to produce
§ 7:48	— —Deposition
§ 7:49	—Sample motion for sanctions—Failure to answer interrogatories
§ 7:50	— —For sanctions for failure to produce defendant for deposition
§ 7:51	—Motion for in camera inspection
§ 7:52	Substitutions of parties—Federal rule
§ 7:53	—Sample motion—Suggestion of death of plaintiff
§ 7:54	— —Order
§ 7:55	Setting case for trial
§ 7:56	—Sample motion to set for trial
§ 7:57	—Sample petition to advance case for trial
§ 7:58	—Motion to advance for trial—Age of plaintiff
§ 7:59	— —Parties ready
§ 7:60	Motion for voluntary pretrial conference

## III. CRIMINAL CASES

§ 7:61	Search and seizure
§ 7:62	—Motion to suppress—Timely and standing
§ 7:63	—Sample motion to suppress
§ 7:64	—Another sample motion to suppress
§ 7:65	—Motion to suppress identification
§ 7:66	— —Sample hearing on motion to suppress
§ 7:67	Sample form—Motion to suppress confession—federal
§ 7:68	— —State
§ 7:69	—Petition for writ of habeas corpus—Failure to charge
§ 7:70	— —Fugitive warrant
§ 7:71	—Order for writ of habeas corpus
§ 7:72	—Motion for bill of particulars
§ 7:73	—Petition for change of venue
§ 7:74	—Notice of severance
§ 7:75	Petition and motion for a severance
§ 7:76	Notice and petition for mental examination of defendant

- § 7:77 Defendant's motion for discovery
- § 7:78 State's motion for discovery
- § 7:79 Motion to produce documents and persons
- § 7:80 Motion for disclosure of transactional confidential informant
- § 7:81 Motion for list of witnesses
- § 7:82 Motion to produce confession and list of witnesses
- § 7:83 Motion to produce exhibits
- § 7:84 Motion to produce evidence favorable to defendant
- § 7:85 Motion for Franks hearing and production of informant
- § 7:86 Motion to preserve grand jury testimony and investigation
- § 7:87 Juvenile case—Motion for discovery
- § 7:88 —Motion to produce records
- § 7:89 — —Order for production of records
- § 7:90 Rule to show cause
- § 7:91 Right to speedy trial discharge petition
- § 7:92 —Sample petition for discharge—Speedy trial
- § 7:93 Sample federal motion for omnibus hearing

## CHAPTER 7A. SETTLEMENT TECHNIQUES

- § 7A:1 Importance
- § 7A:2 The art of negotiating
- § 7A:3 Spirit of compromise
- § 7A:4 Applicability of techniques in all types of cases
- § 7A:5 The “need” theory
- § 7A:6 —Needs of client
- § 7A:7 —Needs of opposing side
- § 7A:8 —Needs of judge
- § 7A:9 Initial interview with client
- § 7A:10 —Being realistic about liability
- § 7A:11 —Client's unrealistic value of case
- § 7A:12 —Avoiding opinion on value
- § 7A:13 —Settlement discussions
- § 7A:14 —Explaining how case will progress
- § 7A:15 —Gaining confidence of client
- § 7A:16 Communication with client
- § 7A:17 A “reasonable” investigation—Controlling expenses
- § 7A:18 —Investigation checklist
- § 7A:19 Preparing for trial
- § 7A:20 Commencement of negotiations
- § 7A:21 Face to face negotiations
- § 7A:22 Where to negotiate—The “home turf advantage”
- § 7A:23 Negotiating personal injury cases
- § 7A:24 —Avoiding “piecemeal” submission of documents

## TABLE OF CONTENTS

§ 7A:25	—Evaluating the case for settlement
§ 7A:26	— —Importance of injury
§ 7A:27	— —Other factors to be considered
§ 7A:28	— —Outside sources
§ 7A:29	Initial demands and offers—Flexible
§ 7A:30	Maintaining credibility
§ 7A:31	Waiting for counteroffers
§ 7A:32	Looking for common interests
§ 7A:33	Projecting power
§ 7A:34	Apprising client of settlement negotiations
§ 7A:35	Evaluating the case
§ 7A:36	Special settlement devices
§ 7A:37	—Releases versus covenants not-to-sue
§ 7A:38	—Loan receipts
§ 7A:39	—“Mary Carter” agreements
§ 7A:40	—“Pierringer” release
§ 7A:41	—High-low agreements
§ 7A:42	—Structured settlements
§ 7A:43	— —Both sides benefitting
§ 7A:44	— —Professional assistance
§ 7A:45	— —Contents of agreement
§ 7A:46	— —Sample agreement
§ 7A:47	Recommending settlements be accepted or declined
§ 7A:48	Resolving client’s objections to settlement
§ 7A:49	Client’s ultimate decision
§ 7A:50	Mediations and Settlement Conferences

## Volume 2

### CHAPTER 8. PRETRIAL CONFERENCE

§ 8:1	In general
§ 8:2	Rule and statutory basis
§ 8:3	—Federal rule
§ 8:4	—State court rule
§ 8:5	Pretrial procedure
§ 8:6	Pretrial notice
§ 8:7	Sample notice
§ 8:8	Penalties for failure to comply with rules as to pretrials
§ 8:9	—Where the plaintiff’s attorney fails to comply
§ 8:10	—Where the defendant’s attorney fails to comply
§ 8:11	Completion of discovery
§ 8:12	—Additional time for discovery
§ 8:13	Admissions and stipulations
§ 8:14	—Binding effect of admissions and stipulations

- § 8:15 Legal research
- § 8:16 Medical reports
- § 8:17 Medical authorities
- § 8:18 Exhibits
- § 8:19 Instructions
- § 8:20 Court reporter at pretrial conference
- § 8:21 Pretrial memorandum
- § 8:22 Sample pretrial memorandum
- § 8:23 —Sample pretrial memorandum No. 2
- § 8:24 —Sample pretrial memorandum No. 3 (short form)

## **PART III. JURY SELECTION**

### **CHAPTER 9. SELECTION OF THE JURY**

#### **I. IN GENERAL**

- § 9:1 Importance
- § 9:2 Jury or non-jury
- § 9:3 Primary goals of jury voir dire
- § 9:4 Preparation
- § 9:5 Investigating jury
- § 9:6 —Juror questionnaire—Illustration
- § 9:7 —Professional consultants
- § 9:8 —Discussing case with others
- § 9:9 Six- or twelve-person jury; Unanimity
- § 9:10 New jury
- § 9:11 Preparing questions in advance
- § 9:12 —Narrow or open-ended questions
- § 9:13 Recording jurors' answers
- § 9:14 —Diagram method
- § 9:15 —Other method
- § 9:16 Presence of parties
- § 9:17 —Possible exceptions
- § 9:18 Using court reporter during selection of jury
- § 9:19 Instruction to the jury at recess periods

#### **II. STATUTES AND RULES**

- § 9:20 Federal rule—Civil cases
- § 9:21 —Criminal cases
- § 9:22 State courts
- § 9:23 Types of challenges
- § 9:24 —Challenges for cause—Generally
- § 9:25 — —Examples
- § 9:26 — —Illustration of challenge



## TABLE OF CONTENTS

- § 9:27 —Peremptory challenges
- § 9:28 — —Batson v. Kentucky and its progeny
- § 9:29 — —Exercising challenges tactfully
- § 9:30 — —Keeping record of peremptory challenges
- § 9:31 —Challenge to array (entire venire)
- § 9:32 Asking jurors to hypothesize
- § 9:33 Questions concerning law
- § 9:34 —Preventing statements on the law—Illustration
- § 9:35 Introductory remarks

## III. METHODS OF EXAMINATION OF JURORS

- § 9:36 Examination by judge
- § 9:37 —Preparing list of questions
- § 9:38 Judge initiating and attorneys supplementing the examination
- § 9:39 Examination by attorneys
- § 9:40 Watching jurors as they take seat and respond to questions

## IV. GENERAL SUGGESTIONS

- § 9:41 Accepting, tendering and breaking the panel
- § 9:42 Challenges after tender or acceptance
- § 9:43 Examining jurors in panels of four or twelve
- § 9:44 Discussing insurance
- § 9:45 Discussing tort reform
- § 9:46 Types of jurors—Theories
- § 9:47 —For plaintiff in personal injury cases
- § 9:48 —For defendant in personal injury cases
- § 9:49 —For prosecution in criminal cases
- § 9:50 —For defendant in criminal cases

## V. WHAT NOT TO DO

- § 9:51 Avoiding display of brilliancy
- § 9:52 Unfairness
- § 9:53 Affectations
- § 9:54 Embarrassing prospective juror
- § 9:55 Avoiding the word “accident”—Plaintiff’s attorney
- § 9:56 One-man jury—The “expert” juror
- § 9:57 —Law, medicine or other professions
- § 9:58 —Unfair tactic to challenge opponent
- § 9:59 Prejudice, bias—Feeling
- § 9:60 Not an inquisition
- § 9:61 Questioning all jurors in detail
- § 9:62 —Sacrificing goals
- § 9:63 Accepting juror without questioning

§ 9:64 Neglecting last few jurors or alternate jurors

## **VI. WHAT TO DO**

- § 9:65 Questioning of jurors—Seated or standing
- § 9:66 Collective questioning
- § 9:67 Examination of first two or three jurors
- § 9:68 New jury—Explaining procedure
- § 9:69 Friendly, inoffensive manner
- § 9:70 “As you know”—“You understand, of course”—“You realize”
- § 9:71 Use of words “please,” “thank you”
- § 9:72 Requesting names of jurors
- § 9:73 Using juror’s name
- § 9:74 Assuming blame
- § 9:75 Use of parties’ names
- § 9:76 Representing corporations—“We,” “us,” “our”
- § 9:77 Technical terms
- § 9:78 Admitting weakness of case
- § 9:79 Handicaps of client or favorable witnesses
- § 9:80 Recognizing prejudices and natural sympathies
- § 9:81 Occupational and professional experience of juror
- § 9:82 Accident history—Juror, family, friends
- § 9:83 Participation of and consultation with client
- § 9:84 —Exception—Personal injury plaintiff
- § 9:85 Excusing jurors—Illustrations
- § 9:86 Handling opposing counsel’s damaging questions—  
Rebuttal
- § 9:87 —Anticipating counsel’s damaging questions
- § 9:88 Counterclaims
- § 9:89 Laws of the road
- § 9:90 Plaintiff’s attorney—Emphasize damages
- § 9:91 Stressing law
- § 9:92 Final statement

## **VII. QUESTIONS TO JURORS**

§ 9:93 Variations of each question

### **1. CIVIL CASES**

- § 9:94 Personal injury case—Plaintiff’s questions
- § 9:95 —Defendant’s questions

### **2. CRIMINAL CASES**

- § 9:96 Conspiracy case—Prosecution’s questions
- § 9:97 —Defendant’s questions
- § 9:98 Use of words “prosecutor” or “assistant prosecutor”

TABLE OF CONTENTS

§ 9:99 If defendant permits you to remain

## **PART IV. OPENING STATEMENTS**

### **CHAPTER 10. OPENING STATEMENTS TO THE JURY**

§ 10:1 Importance—Goals

#### **I. LAW—GENERAL**

- § 10:2 Right to make opening statement
- § 10:3 Directed verdict following opening statement
- § 10:4 Admissions of counsel
- § 10:5 Purpose and scope of opening statement
- § 10:6 Visual aids
- § 10:7 Discussing law in opening statement
- § 10:8 Right to make first opening statement
- § 10:9 —Waiver
- § 10:10 —Reserving opening statement
- § 10:11 Propriety of arguing the case
- § 10:12 Outline—All types of cases—General discussion
- § 10:13 —Making theory more acceptable—Better flow
- § 10:14 —Checklist
- § 10:15 —Opening statement by defendant—General
- § 10:16 Emphasizing “pictures” and not witnesses

#### **II. OUTLINE ANALYSIS**

- § 10:17 Introduction—Plaintiff
- § 10:18 Salutation—Reintroducing self and client
- § 10:19 —Purpose of opening statement
- § 10:20 — —Analogizing to jigsaw puzzle or roadmap
- § 10:21 — —“Not to be considered evidence”
- § 10:22 —Describing stages of trial
- § 10:23 Introduction—Necessity?
- § 10:24 —Title or theme
- § 10:25 —Defendant
- § 10:26 History of parties and key witnesses
- § 10:27 —Administrators, executors, trustees, and next friends
- § 10:28 Scene of the occurrence
- § 10:29 Instrumentality
- § 10:30 Practices, procedures or customs
- § 10:31 Weather, date and time
- § 10:32 Creation of the issue—Denials (defendant)
- § 10:33 How it happened—Through eyes of client or key witness

- § 10:34 —Flashback technique
- § 10:35 —Critical part
- § 10:36 Basis of liability/nonliability or guilt/innocence
- § 10:37 —Cause of action based on statute
- § 10:38 Anticipating and refuting defenses
- § 10:39 Damages
- § 10:40 —Plaintiff (contract case)
- § 10:41 —Plaintiff (personal injury case)
- § 10:42 —Defendant
- § 10:43 — —Avoiding “we are sorry”
- § 10:44 Conclusion

### III. GENERAL SUGGESTIONS

- § 10:45 Use of rhetorical question
- § 10:46 Humanizing and personalizing your client
- § 10:47 “We expect to prove”
- § 10:48 —Opponent objecting to “argument”
- § 10:49 Anticipating bad features and weaknesses of case
- § 10:50 —Client not to testify
- § 10:51 —Missing witnesses and parties
- § 10:52 —Language problem—Interpreters
- § 10:53 Preparation and use of notes and outline
- § 10:54 Visual aids—Effective use
- § 10:55 Gestures
- § 10:56 General denial
- § 10:57 Short or long opening statement—How much detail?
- § 10:58 —Inarticulate or technical witnesses
- § 10:59 — —Reassuring versus “talking down” to jurors
- § 10:60 Importance of voice
- § 10:61 Attitude—Manner—Delivery
- § 10:62 —Defendant’s manner
- § 10:63 Overstatement and exaggeration
- § 10:64 Testing opening statement
- § 10:65 Motions to exclude witnesses
- § 10:66 Nonjury cases
- § 10:67 Collision, accident, occurrence
- § 10:68 Admission of liability
- § 10:69 Motions in limine—Objections
- § 10:70 Representing a corporation—“We,” “us,” and “our”
- § 10:71 Opening statements in criminal cases
- § 10:72 Attitude and demeanor of the prosecutor
- § 10:73 The people of the state of \_\_\_\_: The government

### IV. SAMPLE OPENING STATEMENTS—CIVIL

- § 10:74 Personal injury case—Scaffold—Plaintiff

TABLE OF CONTENTS

§ 10:75 —Automobile collision—Defendant

**V. SAMPLE OPENING STATEMENTS—CRIMINAL**

§ 10:76 Murder case—Prosecution

§ 10:77 Rape case—Defendant

**PART V. EXAMINATION OF  
WITNESSES**

**CHAPTER 11. DIRECT EXAMINATION:  
EXAMINATION-IN-CHIEF**

- § 11:1 In general
- § 11:2 Preparing witnesses—Conference
- § 11:3 —Varying one’s approach
- § 11:4 —Attorney’s preparations for conference
- § 11:5 —Explaining need for subpoena
- § 11:6 —Dress and appearance
- § 11:7 —Manner on stand
- § 11:8 —Explaining technical terms
- § 11:9 —Keeping jurors’ view unobstructed
- § 11:10 —Reviewing all questions and answers—Direct examination
- § 11:11 —Preparing for cross-examination
- § 11:12 —Preparing for redirect examination
- § 11:13 —Being truthful
- § 11:14 —Volunteering answers
- § 11:15 —Looking at jury
- § 11:16 —Speak clearly and speak up
- § 11:17 —“That’s all I remember”
- § 11:18 —Explaining burden—“More probably true”
- § 11:19 —Describing judge and opposing counsel
- § 11:20 —Discussing logistics of coming to court
- § 11:21 —Visiting courtroom
- § 11:22 Preparing “narrative” statements
- § 11:23 Proving one’s own case
- § 11:24 Theme and theory of case
- § 11:25 Easily understood questions
- § 11:26 Witnesses—Order of presentation
- § 11:27 —Excessive number
- § 11:28 Pacing testimony
- § 11:29 Exclusion (separation-sequestration) of witnesses
- § 11:30 —Federal rule
- § 11:31 —When made and form of motion
- § 11:32 —Violation of rule—Objection—Hearing request

- § 11:33 —Hearing on violation of rule—Illustration
- § 11:34 — —If motion to disqualify overruled
- § 11:35 Position during direct examination
- § 11:36 “Tell the court and jury, please”
- § 11:37 Connectives
- § 11:38 Nonverbal responses by witness
- § 11:39 Leading questions
- § 11:40 —Federal rule
- § 11:41 Competency of witness
- § 11:42 Propriety of Use of Service or Facility Dogs During  
Testimony
- § 11:43 Competency of witness—General characteristics of  
competent witness
- § 11:44 General rule—Federal
- § 11:45 —Lack of personal knowledge
- § 11:46 —Oath or affirmation
- § 11:47 —Competency of judges and jurors
- § 11:48 —Child witness
- § 11:49 — —Voir dire of child witness
- § 11:50 Dead Man’s Act
- § 11:51 —Waiver of objection
- § 11:52 —Exceptions
- § 11:53 —Offering favorable incompetent witness
- § 11:54 Using adverse incompetent witness—Limited Waiver
- § 11:55 Invading province of jury
- § 11:56 —Federal rule
- § 11:57 Contract case—Pattern of proof
- § 11:58 Personal injury case—Sample questions to plaintiff
- § 11:59 Opinion as to speed—Illustration
- § 11:60 Opinion as to under the influence of alcohol—  
Illustration
- § 11:61 Probate of wills
- § 11:62 —Proof of heirship—Husband as witness—  
Illustration
- § 11:63 —Proof of will—Illustration
- § 11:64 —Secondary proof to will—Illustration
- § 11:65 —Presumption of death—Illustration
- § 11:66 —Nuncupative will—Illustration
- § 11:67 — —Witnesses to original signatures—Illustration
- § 11:68 —Lay opinion in will contest
- § 11:69 —Testamentary capacity—Proper concluding  
questions—Illustrations
- § 11:70 — —Improper concluding questions—Illustration
- § 11:71 — —Proving unsound mind—Illustration
- § 11:72 — —Proving sound mind—Illustration
- § 11:73 — —Testimony concerning mental capacity—Other  
illustrations

## TABLE OF CONTENTS

§ 11:74	Voir dire examination—Subjects—Illustration
§ 11:75	Withdrawing witness
§ 11:76	Witness resuming stand
§ 11:77	Correcting testimony
§ 11:78	Careful habits of deceased
§ 11:79	Dying declarations
§ 11:80	Harmful evidence—Anticipating cross-examination
§ 11:81	Prior or subsequent injuries
§ 11:82	Hostile, unwilling, or surprise witness or adverse party—“Cross-examination”
§ 11:83	—Withdrawing testimony of hostile witness
§ 11:84	—Awakening conscience or refreshing memory
§ 11:85	—Adverse party examination
§ 11:86	—Calling adverse party as witness—Strategy
§ 11:87	Court’s witnesses
§ 11:88	—Federal rule
§ 11:89	—Court appointed experts
§ 11:90	Identifying persons
§ 11:91	Conversations—Face to face
§ 11:92	—Fixing time of conversations and events
§ 11:93	Telephone conversations
§ 11:94	—Federal rule
§ 11:95	—Proving foundation
§ 11:96	— —Call made by witness—Illustration
§ 11:97	— —Call received by witness—Illustration
§ 11:98	— —Call made through secretary—Illustration
§ 11:99	— —Business call using classified directory— Illustration
§ 11:100	— —Business call using alphabetical directory— Illustration
§ 11:101	— —Voice recognition based on subsequent face-to- face conversation—Illustration
§ 11:102	— —Subsequent admission during face-to-face conversation—Illustration
§ 11:103	— —Subsequent acts tending to prove identity of person by circumstantial evidence—Illustration
§ 11:104	Authentication or identification
§ 11:105	—Federal rule
§ 11:106	— —In practice
§ 11:107	—Self-authentication—Federal rule
§ 11:108	— —In practice
§ 11:109	Res gestae—Excited utterance
§ 11:110	—Personal injury cases—Examples admissible
§ 11:111	—Criminal cases—Examples admissible
§ 11:112	Refreshing recollection
§ 11:113	—Using memoranda
§ 11:114	— —Right to inspect—Opposing counsel

- § 11:115 — —Federal rule
- § 11:116 —Use of hypnosis to refresh recollection
- § 11:117 Past recollection recorded
- § 11:118 —Getting memorandum into evidence—Illustration
- § 11:119 Redacted version of admitted document
- § 11:120 Interpreter in trial of cases
- § 11:121 —Voir dire of witness
- § 11:122 —Federal rule
- § 11:123 —Voir dire of interpreter
- § 11:124 — —Direct attack
- § 11:125 — —Collateral attack
- § 11:126 — —Completing examination without agreeing to  
interpreter
- § 11:127 —Swearing interpreter
- § 11:128 —Getting one’s own interpreter
- § 11:129 —Positioning interpreter
- § 11:130 —Administering oath to witness through interpreter
- § 11:131 —Ignoring presence of interpreter
- § 11:132 —Verbatim translations
- § 11:133 —Objections to interpretations
- § 11:134 —Using two interpreters
- § 11:135 —Making record for appeal
- § 11:136 Negative evidence
- § 11:137 —Illustrations
- § 11:138 Presumptions
- § 11:139 —Federal rules
- § 11:140 —Failure to produce evidence or witness
- § 11:141 — —Instruction—Illustration
- § 11:142 — —Accounting for the absence of an eyewitness—  
Illustration
- § 11:143 Subpoenaed witness failing to appear
- § 11:144 —Offer to stipulate—Illustration
- § 11:145 Use of prior testimony
- § 11:146 —Illustration
- § 11:147 Judicial notice
- § 11:148 —How information is “transmitted” to jury
- § 11:149 —Federal rule
- § 11:150 —“Adjudicative” and “legislative” facts—Distinction
- § 11:151 “Custom and usage” or “trade practice”—Contract  
cases
- § 11:152 —Proving existence—Illustration
- § 11:153 —Disproving existence—Illustration
- § 11:154 Usual method, practice or procedure—Tort cases
- § 11:155 —Federal rule
- § 11:156 —Applicability to other types of cases
- § 11:157 —Proving usual method, practice or procedure—  
Illustration



## TABLE OF CONTENTS

§ 11:158	Stipulations
§ 11:159	Real and demonstrative evidence—In general
§ 11:160	—Real evidence
§ 11:161	—Demonstrative evidence
§ 11:162	— —Making record of use
§ 11:163	— —Use during closing arguments
§ 11:164	— —“Real” evidence used for demonstrative purpose
§ 11:165	— —Using x-ray projector—Illustration
§ 11:166	— —Model skeleton—Illustration
§ 11:167	— —Blackboards, traffic boards, visual sheets— Illustration
§ 11:168	—Experiments and demonstrations
§ 11:169	— —Foundation for “demonstration”—Oil burner— Illustration
§ 11:170	— —Demonstration to show effect of injury— Illustration
§ 11:171	— —Experimental evidence involving automobiles
§ 11:172	— —Experimental evidence to determine chemical or physical qualities of substance
§ 11:173	Chemical tests for intoxication
§ 11:174	—Testimony of police technician—Illustration
§ 11:175	—Testimony of pathologist—Illustration
§ 11:176	Confessions in criminal cases
§ 11:177	—Motion to suppress—Guidelines
§ 11:178	— —Hearing—Prosecution’s evidence—Illustration
§ 11:179	— —Defendant’s evidence—Illustration
§ 11:180	Admissibility of guilty plea in civil action
§ 11:181	—Defendant’s guilty plea in traffic case— Illustration
§ 11:182	—Explanation of plea—Illustration
§ 11:183	—Federal rule
§ 11:184	Use of testimony given in criminal case in subsequent civil suit
§ 11:185	Proving damages in personal injury cases
§ 11:186	—Loss of earnings—Illustration
§ 11:187	— —Proving loss if salary paid
§ 11:188	—Loss of profits—Illustration
§ 11:189	—Testimony of actuary—Illustration
§ 11:190	— —Another illustration
§ 11:191	— —Mortality tables—Samples
§ 11:192	—Proving pain and suffering—Testimony of plaintiff
§ 11:193	—Testimony of lay witnesses
§ 11:194	— —Testimony of physician
§ 11:195	Mention of insurance during trial
§ 11:196	Federal rule
§ 11:197	Depositions
§ 11:198	—Procedure for taking deposition

- § 11:199 —Use of deposition de bene esse
- § 11:200 —Depositions for perpetuating testimony
- § 11:201 —Evidence deposition in criminal trials
- § 11:202 —Physician’s evidence deposition
- § 11:203 —Disadvantage of evidence deposition
- § 11:204 — —Preparing jury for evidence deposition—  
Illustration
- § 11:205 — —Use of reader—Illustration
- § 11:206 — —Selecting reader
- § 11:207 — —Requesting instruction and argument
- § 11:208 Class actions
- § 11:209 —Certifying class—School application rejected
- § 11:210 —Plaintiff direct examination
- § 11:211 —Adverse examination of officer of defendant—  
Illustration

## CHAPTER 12. EXHIBITS

### I. GENERAL EXHIBIT PROCEDURE—STEPS

- § 12:1 In general
- § 12:2 Types of exhibits
- § 12:3 Selecting exhibits
- § 12:4 Selecting exhibit witnesses
- § 12:5 Exhibits handled differently
- § 12:6 Introducing and using exhibits—Steps
- § 12:7 —Step 1. Mark for identification
- § 12:8 —Methods of marking exhibits
- § 12:9 —Premarking exhibits
- § 12:10 — —Describing or characterizing exhibits
- § 12:11 —Step 2. Show exhibit to opposing counsel
- § 12:12 —Step 3. Request permission to approach witness  
and show exhibit
- § 12:13 —Step 4. Lay the foundation—General requirements
- § 12:14 — —Material and relevant
- § 12:15 — —Proof of “authentication” and “identification”
- § 12:16 — — —Unique exhibits (chattels)
- § 12:17 Illustration—Chain of custody not necessary  
(weapons of crime)
- § 12:18 — —Chain of custody (chattels)
- § 12:19 — —Authenticating handwritten or signed  
documents—Basic methods
- § 12:20 — — —First method—Witness signed instrument  
first
- § 12:21 — — —Second method—Witness signed instrument  
after party being charged
- § 12:22 — — —Third method—Conversations and activities  
prior to execution proved

## TABLE OF CONTENTS

§ 12:23	— — —Fourth method—Adverse party examination
§ 12:24	— — —Fifth method—Execution admitted in pleadings, discovery or by stipulation
§ 12:25	— — —Sixth method—Witness familiar with handwriting of “signator”
§ 12:26	— — —Seventh method—Distinctive characteristics of document
§ 12:27	— — —Eighth method—Handwriting expert
§ 12:28	— — —Self-authentication
§ 12:29	Demonstrative or illustrative exhibits
§ 12:30	—May require several witnesses
§ 12:31	Excluding exhibit although proper foundation laid
§ 12:32	—Step 5. Offer exhibit into evidence
§ 12:33	—Offer portion of exhibit
§ 12:34	—Where authenticity admitted in pleadings or stipulations
§ 12:35	—Step 6. To opposing counsel for examination and possible objection
§ 12:36	—Careful examination by opposing counsel
§ 12:37	—Making timely and specific objections
§ 12:38	—Consider voir dire examination—Request court to reserve ruling
§ 12:39	—Step 7. Obtain court’s ruling
§ 12:40	—Step 8. Strike identifying marks from exhibit
§ 12:41	—Step 9. “Publication” and “use” of exhibits
§ 12:42	—When to publish and use exhibit
§ 12:43	— — —When exhibit will make most sense
§ 12:44	— — —During course of direct examination
§ 12:45	— — —At close of direct examination
§ 12:46	— — —Methods of “publishing” and “using” exhibits
§ 12:47	— — —Show exhibit to the jury
§ 12:48	— — —By the witness
§ 12:49	— — —By the attorney
§ 12:50	— — —Make record of use
§ 12:51	— — —Communicate well; Be considerate
§ 12:52	Multiple similar exhibits
§ 12:53	Stipulations to the admissibility of exhibits
§ 12:54	Offering exhibits identified by opponents
§ 12:55	Disclosing or displaying contents of exhibit prematurely
§ 12:56	—Preliminary hearing before jury views exhibit
§ 12:57	Substitute copies for original exhibits
§ 12:58	Review status of exhibits; reoffer

## II. EXAMPLES OF DIFFERENT TYPES OF EXHIBITS—FOUNDATIONAL PROOF

§ 12:59	Business records
---------	------------------

- § 12:60 —Federal rules of evidence
- § 12:61 —Illustration
- § 12:62 Proof of copies and duplicates
- § 12:63 —Carbon copy—Proof of preparation and mailing of original
- § 12:64 Notice to produce
- § 12:65 —Form
- § 12:66 —Admissibility by inspection
- § 12:67 —Original document (letter) produced
- § 12:68 Handwritten or signed documents and instruments
- § 12:69 —Illustration (promissory note)
- § 12:70 —Illustration (checks)
- § 12:71 —Illustration (delivery receipt)
- § 12:72 Lost or destroyed instruments
- § 12:73 Weather reports
- § 12:74 Photographs
- § 12:75 Mug shots
- § 12:76 Photographs—Real evidence
- § 12:77 —Proof of photographs
- § 12:78 —Enlargements
- § 12:79 —Aerial photographs
- § 12:80 —Of injuries
- § 12:81 —Copies of documents
- § 12:82 —X-rays
- § 12:83 Motion pictures and video tapes
- § 12:84 —Illustration direct examination (photographer, investigator and projectionist)
- § 12:85 —Illustration direct and cross-examination (photographer)
- § 12:86 Microfilms
- § 12:87 —Illustration direct examination under the uniform act
- § 12:88 —Illustration direct and cross-examination where uniform act has not been adopted
- § 12:89 —Illustration—Not under uniform act hospital records
- § 12:90 Sound recordings
- § 12:91 —Master tapes and transcripts
- § 12:92 —Qualification and identification of recording machine
- § 12:93 —Identification of contents of recording
- § 12:94 —Location and care of recorded materials
- § 12:95 —Broadcast of recording outside of jury's presence
- § 12:96 —Offer of proof
- § 12:97 —Outline of testimony for introduction of recording
- § 12:98 Diagrams, maps, plats, charts, drawings and models
- § 12:99 —Model (not to scale) qualified by layperson

## TABLE OF CONTENTS

§ 12:100	—Model (to scale) qualified by expert
§ 12:101	—Scale drawings and models
§ 12:102	Hospital records
§ 12:103	Illustration (Uniform Business Records as Evidence Act)
§ 12:104	—Remedying objections based on hearsay or relevancy
§ 12:105	Paid bills for repairs or services
§ 12:106	—For repairs
§ 12:107	— —Illustration direct examination (automobile repairs)
§ 12:108	—For services
§ 12:109	Unpaid bills and estimates
§ 12:110	—Illustration direct examination (automobile repairs)
§ 12:111	Admission of medical bills
§ 12:112	—Illustration direct examination (admission of medical bills)
§ 12:113	Foreign judgments
§ 12:114	—Illustration direct examination judgment debtor denies he is person against whom the judgment was rendered
§ 12:115	Stipulations of facts
§ 12:116	—Form of stipulation
§ 12:117	Notary
§ 12:118	Certified copies
§ 12:119	—Exemplified copy
§ 12:120	—Authenticated copy
§ 12:121	Pleadings and discovery documents
§ 12:122	—Illustration—Answer to interrogatories
§ 12:123	— —Laying the foundation for admissions in pleadings
§ 12:124	“Rule of completeness”
§ 12:125	Computer technology
§ 12:126	—How computers receive information
§ 12:127	—How computers transmit and display information
§ 12:128	—Software programs guide computers
§ 12:129	—Error control in computer systems
§ 12:130	—Computer output is vulnerable
§ 12:131	—Introduction of computer records
§ 12:132	— —Illustration (record of mailing of policy expiration notice)
§ 12:133	— —Illustration (bookkeeping records to show amount due)
§ 12:134	— —Illustration (adverse party’s sales data broken down by area)
§ 12:135	— —Illustration (introduction of computer printouts)

- § 12:136 Mortality tables
- § 12:137 Corporate minutes
- § 12:138 Learned treatises
- § 12:139 Notice to city before suit
- § 12:140 Laws, statutes and ordinances—Judicial notice
- § 12:141 —Proof of ordinances
- § 12:142 Public records
- § 12:143 —Marriage certificates
- § 12:144 — —Introducing marriage certificate into evidence
- § 12:145 —Birth and death certificates
- § 12:146 Police reports
- § 12:147 —Illustration direct examination (police report as past recollection recorded)
- § 12:148 Refreshing present recollection
- § 12:149 —Illustration direct examination (refreshing present recollection)
- § 12:150 Past recollection recorded

## Volume 3

### CHAPTER 13. OBJECTIONS

#### I. GENERAL LAW AND TACTICS

- § 13:1 In general
- § 13:2 Federal rules—In general
- § 13:3 —Rulings on evidence
- § 13:4 —Preliminary questions
- § 13:5 Issues in case—Importance to court’s rulings
- § 13:6 Address objections to court
- § 13:7 —Outside jury’s presence
- § 13:8 When to object
- § 13:9 —Objection sustained—Danger
- § 13:10 —Legally proper basis
- § 13:11 —Can prevent harm to case
- § 13:12 —Objections to interrupt flow
- § 13:13 Motions to strike, disregard and for mistrial
- § 13:14 Waiver of error
- § 13:15 General and specific objections
- § 13:16 —General objections
- § 13:17 — —Incompetent, irrelevant and immaterial
- § 13:18 — —No proper foundation
- § 13:19 — — —Testimony
- § 13:20 — — —Exhibits
- § 13:21 —Specific objections
- § 13:22 Consider making general objection first

## TABLE OF CONTENTS

§ 13:23	Include all possible bases
§ 13:24	Make your objection!
§ 13:25	Improper evidence admitted
§ 13:26	Do not lead court into error
§ 13:27	Request basis for objection
§ 13:28	Continuing objections to entire subject matter
§ 13:29	Offers of proof
§ 13:30	—Narrative method
§ 13:31	—Question and answer method
§ 13:32	—Series of offers
§ 13:33	—Outside hearing of jury
§ 13:34	—Outside hearing of witness
§ 13:35	Plain error
§ 13:36	Make your record
§ 13:37	Questioning witnesses and objections by court
§ 13:38	Necessity of rulings and exceptions

## II. COMMON BASES FOR OBJECTIONS

§ 13:39	Nonresponsive answers
§ 13:40	Hypothetical questions
§ 13:41	Assuming facts not in evidence or in issue
§ 13:42	Client ordered not to discuss case with his attorney
§ 13:43	Form of question
§ 13:44	—Confusing, vague or unintelligible
§ 13:45	—Leading questions
§ 13:46	—Argumentative questions
§ 13:47	—Compound questions
§ 13:48	—Requesting speculative or conjectural answer
§ 13:49	—Requesting improper narrative answer
§ 13:50	Hearsay
§ 13:51	—Federal hearsay rules
§ 13:52	— —Definitions
§ 13:53	— —Statements not hearsay
§ 13:54	— —Hearsay rule
§ 13:55	— —Hearsay exceptions—Availability of declarant immaterial
§ 13:56	— — —Declarant unavailable
§ 13:57	— —Hearsay within hearsay
§ 13:58	— —Attacking and supporting credibility of declarant
§ 13:59	—Self-serving statements
§ 13:60	Correcting your answer
§ 13:61	Conclusion and opinion—Lay witnesses
§ 13:62	—Expert witnesses
§ 13:63	Ultimate issue—Invading province of jury
§ 13:64	Improper characterization

- § 13:65 Misstatement and distortion
- § 13:66 Improper remarks or conduct of court or counsel
- § 13:67 —Improper conduct
- § 13:68 Authentication and identification
- § 13:69 —Self-authentication
- § 13:70 “Best evidence” or “original document” rule
- § 13:71 —Federal rules
- § 13:72 — —Definitions
- § 13:73 — —Requirement of original
- § 13:74 — —Admissibility of duplicates
- § 13:75 — —Admissibility of other evidence of contents
- § 13:76 — —Public records
- § 13:77 — —Summaries
- § 13:78 — —Testimony or written admission of party
- § 13:79 — —Functions of court and jury
- § 13:80 Beyond scope of examination
- § 13:81 Immaterial and irrelevant
- § 13:82 —Federal rules
- § 13:83 — —Relevant evidence—Definition
- § 13:84 — —Admissibility
- § 13:85 — —Exclusion on grounds of prejudice, confusion, or waste of time
- § 13:86 — — —Prejudicial exhibit
- § 13:87 — — —Prejudicial testimony
- § 13:88 — — —Cumulative evidence
- § 13:89 Improper impeachment
- § 13:90 —Impeaching own witness
- § 13:91 — —Federal Rule 607, who may impeach
- § 13:92 Parol evidence rule
- § 13:93 Privileged or confidential communications
- § 13:94 —Preliminary questions—Federal rule
- § 13:95 —Conflicts of law
- § 13:96 — —Federal rule
- § 13:97 —Attorney-client privilege
- § 13:98 — —Attorneys’ agents
- § 13:99 —Husband-wife privilege
- § 13:100 —Physician-patient privilege
- § 13:101 —Psychotherapist-patient privilege
- § 13:102 —Priest-penitent privilege
- § 13:103 —Journalist’s privilege
- § 13:104 —Accountant-client privilege
- § 13:105 —Insurer-insured privilege
- § 13:106 —Informer’s privilege
- § 13:107 —Social worker’s privilege
- § 13:108 —State secrets
- § 13:109 —Compulsory reports



## TABLE OF CONTENTS

§ 13:110	—Trade secrets
§ 13:111	Question asked and answered
§ 13:112	Document speaks for itself
§ 13:113	Violation of exclusion of witnesses order
§ 13:114	Subsequent remedial measures
§ 13:115	Compromise and offers to compromise
§ 13:116	Payment of medical and similar expenses
§ 13:117	Incompetence of witness
§ 13:118	Objections during jury selection, opening statements and closing arguments
§ 13:119	—Jury selection
§ 13:120	—Opening statements
§ 13:121	—Closing argument
§ 13:122	Instructions
§ 13:123	Exhibits to jury room
§ 13:124	Unfair tactics—Generally

## CHAPTER 14. OPINION EVIDENCE AND EXPERT WITNESSES

### I. THE LAW

#### A. IN GENERAL

§ 14:1	History
--------	---------

#### B. PRELIMINARY QUESTIONS

§ 14:2	Court's discretion
§ 14:3	Should opinion evidence be allowed?
§ 14:4	Subjects of expert opinions
§ 14:5	Is witness sufficiently qualified?
§ 14:6	—Experience as source of expertise
§ 14:7	—Study as source of expertise
§ 14:8	—Overall knowledge
§ 14:9	Federal Rules 104(a) and (b); Preliminary questions
§ 14:10	Federal Rule 702; Testimony by experts

#### C. CREDIBILITY OF EXPERT FOR JURY

§ 14:11	Generally
§ 14:12	Federal Rule 104(e); Weight and credibility

#### D. BASES OF OPINION

§ 14:13	Generally
§ 14:14	Federal Rule 703; Bases of opinion testimony by experts

- § 14:15 Federal Rule 705; Disclosure of facts or data  
underlying expert opinion
- § 14:16 Hypothetical questions

#### E. ULTIMATE ISSUE

- § 14:17 Invading province of jury
- § 14:18 Federal Rule 704; Opinion on ultimate issue

#### F. LEARNED TREATISES

- § 14:19 Generally
- § 14:20 Use on direct examination
- § 14:21 Use on cross-examination
- § 14:22 Federal Rule 803(18); Learned treatises

#### G. CROSS-EXAMINATION OF EXPERT

- § 14:23 Generally
- § 14:24 Eliciting opinions

#### H. COURT-APPOINTED EXPERTS

- § 14:25 Generally
- § 14:26 Federal Rule 706; Court appointed experts

#### I. LAY OPINIONS

- § 14:27 Generally
- § 14:28 Subjects of lay opinions
- § 14:29 Federal Rule 701; Opinion testimony by lay witnesses

### II. GENERAL CONSIDERATIONS

#### A. SELECTION AND PREPARATION OF EXPERT

- § 14:30 Selection of expert; Generally
- § 14:31 Source of experts
- § 14:32 —Paid experts
- § 14:33 —Using opposing expert's superior as witness
- § 14:34 Preparation of expert; Generally
- § 14:35 Areas of special preparation
- § 14:36 Attorney must prepare self

#### B. EDUCATING THE JURY

- § 14:37 Generally
- § 14:38 Develop qualifications effectively
- § 14:39 —Qualifications essential to summation
- § 14:40 —“Dig” for credentials

## TABLE OF CONTENTS

- § 14:41 —Credentials checklist
- § 14:42 —Narrow questions/narrow answers
- § 14:43 —Narrow questions/broad answers
- § 14:44 —Develop the “big number”
- § 14:45 —Know credentials; Avoid negative answers
- § 14:46 —Stipulations to expert’s qualifications
- § 14:47 —Consider accepting offer to stipulate
- § 14:48 —Consider not accepting offer to stipulate
- § 14:49 —Voir dire examination as to competency
- § 14:50 Use demonstrative aids
- § 14:51 Explain technical terms and use familiar illustrations
- § 14:52 Examinations or tests made; What they disclosed

### C. “TIMING” OF EXPERT’S TESTIMONY

- § 14:53 Generally
- § 14:54 Limit expert to scope of question
- § 14:55 Redirect examination and rebuttal proof

## CHAPTER 15. THE MEDICAL WITNESS— DIRECT EXAMINATION

### I. GENERAL

- § 15:1 Threshold requirements for opinion testimony
- § 15:2 The general practitioner
- § 15:3 The attending and treating physician
- § 15:4 —Hypothetical questions
- § 15:5 Direct examination
- § 15:6 —Qualifying medical witnesses
- § 15:7 — —Qualifying expert by cross-examination of  
opponent’s expert
- § 15:8 —History
- § 15:9 — —Federal Rule 803(4); statements for medical  
diagnosis or treatment
- § 15:10 —Examinations and other diagnostic procedures
- § 15:11 —Objective findings and subjective symptoms
- § 15:12 — —Using witness to establish “objectivity”
- § 15:13 —Demonstrative evidence
- § 15:14 —Demonstrative evidence; x-rays
- § 15:15 —Diagnosis
- § 15:16 Treatment
- § 15:17 —Proximate cause
- § 15:18 Medical expenses
- § 15:19 —Developing other medical opinions and bases
- § 15:20 Developing other medical opinions and bases—Is the  
plaintiff malingering?

- § 15:21 —Condition as pain producing
- § 15:22 —Prognosis and future medical treatment and expenses
- § 15:23 — —Condition temporary or permanent
- § 15:24 — —How condition will affect activities
- § 15:25 — —Future medical services
- § 15:26 The medical expert—“Examining” physician
- § 15:27 —History
- § 15:28 —Testimony usually limited to objective findings
- § 15:29 —Used to educate jury
- § 15:30 —Hypothetical question
- § 15:31 Standard of care—Proximate cause
- § 15:32 —Proof of violation of standard and proximate cause
- § 15:33 Checklist for direct examination of treating physician

## II. ILLUSTRATIONS OF MEDICAL WITNESSES

- § 15:34 Qualifying the Roentgenologist—Radiologist; foundation for x-rays
- § 15:35 —Taken or developed under witness’s supervision
- § 15:36 —Roentgenologist; traumatic (Jacksonian) epilepsy case supported by x-ray findings
- § 15:37 The attending and treating physician
- § 15:38 —Soft tissue injury
- § 15:39 Qualifying the clinical psychologist
- § 15:40 Qualifying the chiropractor
- § 15:41 Neurosurgeon—Skull fracture, brain injury
- § 15:42 —Hypothetical question
- § 15:43 Orthopedic surgeon—Herniated intervertebral disk
- § 15:44 —Hypothetical question
- § 15:45 Otolaryngologist (ear, nose and throat specialist)
- § 15:46 —Hypothetical question
- § 15:47 Otoneurology—Qualifications and additional tests
- § 15:48 —Hypothetical question; another example
- § 15:49 Neurologist—Traumatic neurosis, conversion hysteria, anxiety state
- § 15:50 The Electroencephalographer
- § 15:51 Psychologist—Tests for brain damage
- § 15:52 —Hypothetical question
- § 15:53 —Psychiatrist; sanity issue
- § 15:54 —Hypothetical question

## CHAPTER 16. EXPERT WITNESSES—ILLUSTRATIONS

- § 16:1 In general
- § 16:2 Handwriting expert—Questioned document examiner
- § 16:3 Federal courts

## TABLE OF CONTENTS

§ 16:4	—State statutes
§ 16:5	Proof of handwriting
§ 16:6	—Notice of intent to use standards of comparison
§ 16:7	— —Notice of intent and to admit genuineness— Illustration
§ 16:8	— —Standards of comparison (exemplars)—Offer into evidence
§ 16:9	—“Facts” on which document examiners base opinions
§ 16:10	—Associations
§ 16:11	—Direct examination—Illustration
§ 16:12	—Cross-examination
§ 16:13	Automobile accident reconstruction expert
§ 16:14	—Traffic engineer—Direct examination—Illustration
§ 16:15	Opinions in eminent domain (condemnation) cases
§ 16:16	—“Just compensation”
§ 16:17	—Proof of value—Owner’s opinion
§ 16:18	Expert’s opinion
§ 16:19	—Basis of opinion
§ 16:20	—Petitioner’s expert illustration of direct and cross-examination
§ 16:21	—Defendant’s expert—Illustration of direct and cross-examination
§ 16:22	Surveyors
§ 16:23	—Illustration of direct and cross-examination
§ 16:24	—Chemist—Illustration of direct and cross- examination (qualifications)
§ 16:25	—Accountant—Illustration of direct examination
§ 16:26	Firearms and ballistics expert
§ 16:27	—Illustration of direct examination of prosecution witness—Ballistics comparison test
§ 16:28	—Engineer ventilation—Illustration of direct examination
§ 16:29	—Civil (scaffold safety)—Illustration of direct examination
§ 16:30	Wooden ladder failure illustration
§ 16:31	—Professor of forestry for plaintiff—Direct and cross-examination
§ 16:32	—Mechanical engineer for defendant—Direct and cross-examination
§ 16:33	—Mechanical engineer for plaintiff (rebuttal witness)—Direct and cross-examination
§ 16:34	Economists
§ 16:35	Photographic experts
§ 16:36	Attorneys
§ 16:37	—Malicious prosecution—Illustration of direct and cross-examination of defendant attorney’s expert

- § 16:38 Musicologists
- § 16:39 Vocational Rehabilitation Expert—Medical  
Malpractice direct examination of plaintiffs' expert
- § 16:40 Musicologists—Illustration—Copyright infringement  
direct and cross-examination of plaintiff's expert
- § 16:41 — —Illustration of cross and redirect examination of  
plaintiff's expert
- § 16:42 Design defect of conveyor belt—Products liability case  
illustration
- § 16:43 —Mechanical engineer—Direct examination

## **CHAPTER 17. CROSS-EXAMINATION OF MEDICAL WITNESSES**

### **I. IN GENERAL**

- § 17:1 Preparation
- § 17:2 Purposes of cross-examination
- § 17:3 The primary purpose of cross-examination
- § 17:4 The secondary purpose of cross-examination
- § 17:5 Avoid “too broad” cross-examination
- § 17:6 Lectures by the witness should be prevented
- § 17:7 Use leading questions
- § 17:8 The evasive expert on cross-examination
- § 17:9 The “how” of cross-examining opponent's medical  
witnesses
- § 17:10 No cross-examination may be best
- § 17:11 Educating the jury
- § 17:12 Value of explanation and repetition—Brain injuries
- § 17:13 Use of x-rays
- § 17:14 Classical symptom
- § 17:15 Subjective symptoms of plaintiff
- § 17:16 Specific daily instances—Arthritis
- § 17:17 Nonapplicable “other causes”

### **II. DIRECT AND COLLATERAL ATTACK**

- § 17:18 The direct versus collateral attack
- § 17:19 The direct attack
- § 17:20 Discrepancies between testimony and medical reports
- § 17:21 Doctor fails to bring his office records
- § 17:22 —Where doctor claims he thought records  
unimportant
- § 17:23 Admissibility of hospital records
- § 17:24 Using medical textbooks
- § 17:25 Failure to make a complete examination
- § 17:26 “Other causes”—Differential diagnosis

## TABLE OF CONTENTS

§ 17:27	Cross-examination as to qualifications
§ 17:28	Qualifications—The deactivated practitioner
§ 17:29	Medical textbooks as a basis for cross-examination
§ 17:30	—Specific objection necessary
§ 17:31	Where doctor, on direct examination, bases his opinion on a named medical text
§ 17:32	Doctor's own writings
§ 17:33	Where doctor admits certain texts are authoritative and in general use
§ 17:34	—Cross-examination of the medical expert using authoritative text
§ 17:35	Forcing the expert to admit that his knowledge is based in part from reading
§ 17:36	Where doctor admits that his knowledge is based in part on what the attorney has told him
§ 17:37	Forcing doctor to acknowledge he has evaluated medical authorities
§ 17:38	Forcing doctor to admit others as authorities in the field
§ 17:39	—If a witness is a specialist in his field, use some of the following questions
§ 17:40	Show that the doctor disagrees with all authorities in the field
§ 17:41	—Where doctor is a specialist and certified by a specialty board
§ 17:42	Admissibility of medical textbooks
§ 17:43	Cross-examination of the known charlatan or faker (incompetent)
§ 17:44	Cross-examination as to subjective symptoms
§ 17:45	“Poor showmanship”—Affects credibility
§ 17:46	Collateral attack
§ 17:47	Cross-examination on examination, treatment, and diagnosis
§ 17:48	Complete examination—Orthopedic and neurological
§ 17:49	—Gave general neurological examination—Not a neurologist
§ 17:50	—The orthopedic examination
§ 17:51	Knee injury cross-examination
§ 17:52	Medical negligence—The proof
§ 17:53	—Proof of standard of care
§ 17:54	—Cross-examination of neurosurgeon—Admissions
§ 17:55	— —Deviation from the standard of care
§ 17:56	— —Proof of proximate cause
§ 17:57	Cross-examination to prove other causes of claimed injuries
§ 17:58	Cross-examination of radiologist—Malpractice
§ 17:59	Redirect examination
§ 17:60	Making points in closing arguments

## Volume 4

### CHAPTER 18. HYPOTHETICAL QUESTIONS

- § 18:1 In general
- § 18:2 Value
- § 18:3 Federal rules of evidence
- § 18:4 State rules
- § 18:5 Preparing in advance
- § 18:6 Knowing facts and theory of case
  - Modifying to support evidence
- § 18:7 —Maximizing psychological value
- § 18:8 —Discussing with expert
- § 18:9 —Length of question
- § 18:10 —Picturization
- § 18:11 Contents of hypothetical question—Material facts
- § 18:12 —Disputed facts
- § 18:13 —Sufficient facts upon which to base opinion
- § 18:14 —Undisputed facts
- § 18:15 —Development on cross-examination
- § 18:16 —Court's discretion
- § 18:17 —Exaggeration, partisanship or misleading facts
- § 18:18 —Assuming facts not in evidence
- § 18:19 Elements of the hypothetical question
- § 18:20 —Commencement—"Hypothetical" in form
- § 18:21 —"As you testified"—Improper form
- § 18:22 —Limiting use of word "assume"
- § 18:23 —Body
- § 18:24 Judicially noticed facts
- § 18:25 Elements of a hypothetical question—Conclusion
- § 18:26 —Forms of conclusions
- § 18:27 Answers to hypothetical question
- § 18:28 —Several opinions on same hypothesis
- § 18:29 Basis for the opinion
- § 18:30 Opinion on opinion
- § 18:31 Outline in personal injury case
- § 18:32 —Assume—Description of person
- § 18:33 —Prior condition of health and activities
- § 18:34 —Scene
- § 18:35 —How it happened through eyes of plaintiff
- § 18:36 —Plaintiff's condition immediately after injury
- § 18:37 —Subsequent condition and medical care
- § 18:38 —Conclusion and basis
- § 18:39 Omitting proper names
- § 18:40 Developing previous discussions with expert
- § 18:41 Objections
- § 18:42 —Noting all objections
- § 18:43



## TABLE OF CONTENTS

§ 18:44	—Copies of hypothetical questions
§ 18:45	—Having question reread
§ 18:46	—Motion to strike
§ 18:47	—Modifying question after objection sustained
§ 18:48	Using opponent's hypothetical question with own expert
§ 18:49	Cross-examination as to hypothetical questions
§ 18:50	—Omitted facts in evidence
§ 18:51	—Showing witness prepared or familiar with question
§ 18:52	—Emphasizing hypothetical nature of question
§ 18:53	—Requesting opponent's hypothetical question
§ 18:54	—Additional facts not in evidence
§ 18:55	—Disproved facts
§ 18:56	—Unnecessary elements in question
§ 18:57	—Where expert has not examined injured person
§ 18:58	—Testing recollection
§ 18:59	—Testing each detailed fact—Sanity and testamentary capacity
§ 18:60	—Illustration (will contest)
§ 18:61	—Another illustration (will contest)
§ 18:62	—Threshold argument
§ 18:63	Defining technical language
§ 18:64	Compound fractures of foot and leg—Postconcussion symptoms
§ 18:65	Fracture of femur—Proper nursing care
§ 18:66	Posttraumatic psychosis
§ 18:67	Brain injury
§ 18:68	Contact dermatitis
§ 18:69	Phthisis bulbi (shrinkage of eyeball)
§ 18:70	Cause of death—Accidental burns or syphilis
§ 18:71	Will contest
§ 18:72	Abortion—Criminal case

## CHAPTER 19. THE CARDINAL PRINCIPLES OF CROSS-EXAMINATION

### I. INTRODUCTION

§ 19:1	In general
§ 19:2	—Court may ask questions
§ 19:3	—Court's witness
§ 19:4	—Counsel's assumption of facts in question
§ 19:5	—Contradiction on immaterial fact
§ 19:6	—Insulting or argumentative questions
§ 19:7	—Repetition
§ 19:8	—Refreshing Memory
§ 19:9	The federal rules of evidence

- § 19:10 Right to cross-examine
- § 19:11 Scope of cross-examination
- § 19:12 Counsel's Position during cross-examination
- § 19:13 The manner of cross-examination
- § 19:14 Purposes of cross-examination
- § 19:15 —The primary purpose
- § 19:16 — —Illustration (insurance disability claim)
- § 19:17 — —Illustration (paternity case)
- § 19:18 Examination of adverse party
- § 19:19 Illustration of adverse examination (auto case)
- § 19:20 The secondary purpose
- § 19:21 Where the witness repeats questions
- § 19:22 Using the cardinal principles of cross-examination

## II. THE "DO'S" OF CROSS-EXAMINATION

- § 19:23 Preparation—The cardinal principle of cross-examination
- § 19:24 Outlining the proposed cross-examination
- § 19:25 A planned cross-examination to show improbabilities
- § 19:26 —Illustration (civil case)
- § 19:27 Illustration (criminal case)
- § 19:28 Determining whether or not to cross-examine
- § 19:29 Listening carefully to the direct examination
- § 19:30 —Making notes during direct examination
- § 19:31 Using simple language in cross-examination
- § 19:32 Keep your objective hidden
- § 19:33 Avoiding too broad cross-examination
- § 19:34 Leaving well enough alone
- § 19:35 Closing argument may be most important part of cross-examination
- § 19:36 "Bit-by-bit" procedure
- § 19:37 —Illustration (automobile accident)
- § 19:38 —Using narrow questions permitting only narrow answers
- § 19:39 Leading questions
- § 19:40 Making your big points—Avoiding small triumphs
- § 19:41 Covering important subjects early in cross-examination
- § 19:42 Have you talked with anyone about this case?
- § 19:43 —Illustration
- § 19:44 Evasions by the witness
- § 19:45 Cross-examination of women and children
- § 19:46 Leading the perjurer on
- § 19:47 —Illustration (will contest)
- § 19:48 Cross-examination as to improbabilities
- § 19:49 —Increasing the improbabilities

## TABLE OF CONTENTS

§ 19:50	— —“Have you talked with anyone about this case?”
§ 19:51	— —“When did you talk with him?”
§ 19:52	— —“Where did the conversation take place?” “Who was present?”
§ 19:53	— —“That was when you learned you were to be a witness in the case?”
§ 19:54	— —“At the time of the occurrence you did not know there would be a lawsuit concerning it, is that correct?”
§ 19:55	— —Illustration (mental incompetence of testator)
§ 19:56	— —Illustration (delivery of package)
§ 19:57	Getting one witness to contradict another
§ 19:58	Showing that witnesses are telling identical stories
§ 19:59	Dramatizing your case on cross-examination
§ 19:60	Illustration (explosion and fire)
§ 19:61	“I don’t remember”
§ 19:62	The apparently “after-thought” question
§ 19:63	Surprises for the witnesses
§ 19:64	—Color blindness
§ 19:65	—Distances
§ 19:66	—Hearing
§ 19:67	—Vision
§ 19:68	—Directions
§ 19:69	—Time
§ 19:70	—Quantities
§ 19:71	“On both horns of a dilemma”
§ 19:72	—Illustration (competency of grantor)
§ 19:73	End on a note of triumph

## III. THE “DON’TS” OF CROSS-EXAMINATION

§ 19:74	Never ask a question unless you know answer will be favorable
§ 19:75	Do not have story told on direct examination repeated
§ 19:76	The memorized story
§ 19:77	“Isn’t it a fact”—“As a matter of fact”
§ 19:78	Do not be diverted from your objective
§ 19:79	Do not let witness run over you
§ 19:80	Do not permit interruptions by counsel
§ 19:81	Do not insist on witness answering “yes” or “no”
§ 19:82	Do not insist upon an answer
§ 19:83	Press for an answer when you know it will be favorable
§ 19:84	Limit each question to one subject
§ 19:85	Do not lose your temper
§ 19:86	Do not misstate or distort evidence
§ 19:87	Do not assume anything not in evidence

- § 19:88 Do not open door to ruinous redirect examination
- § 19:89 Do not argue with witness
- § 19:90 “Have you been subpoenaed?”
- § 19:91 Do not ask questions as to exact time, speed or distance
- § 19:92 When judge asks questions, use discretion
- § 19:93 “Remember you are under oath”
- § 19:94 Ask few questions rather than many
- § 19:95 Beware of “baiting” by your opponent
- § 19:96 Mastery of art of cross-examination

## CHAPTER 20. IMPEACHMENT

- § 20:1 Introduction
- § 20:2 Applying cardinal principles of cross-examination to impeachment
- § 20:3 Secondary purpose of cross-examination
- § 20:4 Foundation for impeachment—Necessity for foundation
  - Party as a witness
- § 20:6 Objections to foundations for impeachment
- § 20:7 —Should an objection be raised when foundation for impeachment is being laid
- § 20:8 Preliminary foundational questions
- § 20:9 Failure to complete impeachment
- § 20:10 —Illustration (failure to complete impeachment)
- § 20:11 —Another illustration (failure to complete impeachment)
- § 20:12 Impeachment must be material
- § 20:13 What is “collateral?”
- § 20:14 Impeaching statement must be inconsistent or contradictory
- § 20:15 The right to impeach one’s own witness
- § 20:16 —Hostile and surprise witnesses
- § 20:17 —Adverse parties
- § 20:18 —Court’s witness
- § 20:19 The right to impeach a testifying defendant
- § 20:20 The closing argument
- § 20:21 The court’s instruction or charges
- § 20:22 —Illustration (jury instruction on impeachment by prior inconsistent statement or conduct)
- § 20:23 The Court’s instruction or charge—Illustration (Jury Instruction on evaluation of witness credibility)
- § 20:24 —Illustration (Jury Instruction on impeachment by Proof of Conviction)
- § 20:25 Proof available unless direct admission made
- § 20:26 —Proof necessary
- § 20:27 When impeaching proof is made

## TABLE OF CONTENTS

§ 20:28	Disinterested witnesses—To prove contrary facts
§ 20:29	The form of questions used in making impeaching proof
§ 20:30	Impeaching proof not substantive evidence
§ 20:31	Impeaching documents and the jury
§ 20:32	Rehabilitating the witness
§ 20:33	—Illustration—Notice to municipality
§ 20:34	— —Check forgery
§ 20:35	Types of impeachment
§ 20:36	Former oral contradictory statements
§ 20:37	—Illustration—Criminal case
§ 20:38	Former contradictory written statements
§ 20:39	—Greater efforts to secure signed statements
§ 20:40	—The basic problem in the use of written contradictory statements
§ 20:41	— —Illustration (witness' signature on document)
§ 20:42	— —Is this procedure objectionable?
§ 20:43	— —Right to see exhibits after they have been shown to witnesses
§ 20:44	— —Where signature only is identified
§ 20:45	—Laying the foundation—Written contradictory statement
§ 20:46	The problem of the insurance investigator
§ 20:47	—Where party admits his signature
§ 20:48	—Where witness admits signature but denies making included statement
§ 20:49	Proving authenticity of statement
§ 20:50	Claims of the impeached witnesses
§ 20:51	—Witness' sketch of intersection and collision
§ 20:52	—Witnesses who deny their signatures
§ 20:53	— —Illustration (multiple signatures)
§ 20:54	— —Court has right to order witness to sign
§ 20:55	—Completing the foundation—Procedure
§ 20:56	— —Illustration (automobile collision)
§ 20:57	—Offering all or part of the impeaching document
§ 20:58	Former contradictory sworn testimony in previous trial or hearing
§ 20:59	—The foundation
§ 20:60	— —“You were a witness in the prior trial of this case, is that right?”
§ 20:61	— —“You were sworn to tell the truth on that occasion?”
§ 20:62	— —“You did tell the truth?” (prior favorable statement)
§ 20:63	— —“At that time and place didn't you say. . .?”
§ 20:64	— —Illustration (foundation for impeachment)
§ 20:65	—The impeaching proof

- § 20:66 Ending on a note of triumph
- § 20:67 Former inconsistent or contradictory sworn testimony at inquest
  - Illustration (inquest)
- § 20:68 —The impeaching proof—Inquest
- § 20:69 Impeaching witness—Court reporter
- § 20:70 Qualification and examination of court reporter
- § 20:71 —Where objection is made to the form of final question
- § 20:72 —Cross-examination of the court reporter
- § 20:73 Impeachment by failure to state facts, i.e., impeachment by omission
- § 20:74 Impeachment by discovery deposition
- § 20:75 —The impeaching proof
- § 20:76 Impeachment by pleadings
- § 20:77 Impeachment by sworn applications—Affidavits
- § 20:78 —Use of sworn applications to disprove denial of ownership
- § 20:79 Should a witness who has made favorable admissions on cross-examination be impeached?
- § 20:80 Should cross-examination start by laying foundation for impeachment?
- § 20:81 Narcotics addiction
- § 20:82 Intoxication
- § 20:83 Bias
  - Illustration (friendship with a party to the lawsuit)
- § 20:84 —Illustration (family relation with a party to the lawsuit)
- § 20:85 —Illustration (financial interest of witness)
- § 20:86 General reputation—Bad
- § 20:87 —Good reputation
- § 20:88 —Selection of character witnesses
- § 20:89 —Proving reputation
- § 20:90 —Illustration (criminal case)
- § 20:91 —Discussing reputation
- § 20:92 —Preparing character witnesses
- § 20:93 —“Would you believe him under oath?”
- § 20:94 — —Illustration (proving bad reputation)
- § 20:95 —Cross-examining adverse character witness
- § 20:96 —Using opponent’s witness
- § 20:97 Impeachment with a former conviction
- § 20:98 —Arrests, indictments, etc
- § 20:99 —Conviction of felony
- § 20:100 —Proof of conviction where probation granted
- § 20:101 —Admission as to conviction
- § 20:102 —Cross-examination as to former conviction

## TABLE OF CONTENTS

- § 20:105 —Illustration (proof of former conviction)
- § 20:106 —Old convictions
- § 20:107 Religious beliefs or opinions
- § 20:108 Witness exchanging testimony for leniency

## CHAPTER 21. REDIRECT EXAMINATION

### I. REDIRECT EXAMINATION; IN GENERAL

- § 21:1 Overview
- § 21:2 Purposes of redirect examination
- § 21:3 Scope of redirect examination
- § 21:4 —Discretion of court
- § 21:5 Preparation for redirect
- § 21:6 —Preparation of witness
- § 21:7 — —Illustration
- § 21:8 — —“Signaling” by witness
- § 21:9 — — —Illustrations of “signals”
- § 21:10 — — —“Signaling” is not improper behavior
- § 21:11 Restoring confidence of witness
- § 21:12 Leading questions
- § 21:13 Leaving well enough alone
- § 21:14 Avoiding minor details
- § 21:15 Beware of “traps”
- § 21:16 “Opening the door”
- § 21:17 Waiving redirect

### II. ILLUSTRATIONS OF REDIRECT EXAMINATIONS

- § 21:18 Refreshing memory
- § 21:19 —Forgotten conversation—Illustration
- § 21:20 —Mistake about lost time from work—Illustration
- § 21:21 —Memory refreshed prior to testifying
- § 21:22 —“That is all I remember”
- § 21:23 Question forgotten during direct examination
- § 21:24 Question remembered during cross-examination
- § 21:25 Question remembered after cross completed;  
requesting permission to go beyond scope
- § 21:26 Explaining “contradiction” about speed; illustration
- § 21:27 Rebutting “bias” developed on cross; illustration

## CHAPTER 22. REBUTTAL EVIDENCE

- § 22:1 Definition
- § 22:2 Importance
- § 22:3 Determining necessity of rebuttal
- § 22:4 General scope of rebuttal

- § 22:5 —Within discretion of court
- § 22:6 —New matter
- § 22:7 —Matters in issue
- § 22:8 —Rebuttal of immaterial, irrelevant evidence
- § 22:9 —Case-in-chief
- § 22:10 —Testimony on cross-rebuttal not necessary
- § 22:11 Witnesses
- § 22:12 —Parties as rebuttal witnesses
- § 22:13 “Withholding” evidence for rebuttal
- § 22:14 Surrebuttal
- § 22:15 Direct and leading questions
- § 22:16 —Illustration—Denial of specific statement
- § 22:17 — —Proving specific statement was made

## **PART VI. CLOSING ARGUMENT**

### **CHAPTER 23. CLOSING ARGUMENT**

#### **§ 23:1 Introduction**

#### **I. THE LAW**

- § 23:2 Right to make closing argument
- § 23:3 —Matters of discretion
- § 23:4 Right to open and close (rebuttal)
- § 23:5 Time limitations
- § 23:6 Scope of the arguments
- § 23:7 —Reference to pleadings
- § 23:8 —Conduct of parties and witnesses
- § 23:9 —Vouching for witnesses
- § 23:10 —Failure of party to testify (civil case)
- § 23:11 —Failure of criminal defendant to testify
- § 23:12 —Failure to produce witnesses or evidence
- § 23:13 — —Instructions
- § 23:14 — —Argument without instruction
- § 23:15 —Judicial notice, common knowledge and historical facts
- § 23:16 —Personal knowledge or opinion of attorney
- § 23:17 —Personal animosity of attorney
- § 23:18 —Damages in injury cases
- § 23:19 — —Per diem argument
- § 23:20 —Commenting on the law
- § 23:21 — —Reference to jury instructions
- § 23:22 —Reference to jurors by name
- § 23:23 —Appeals to sympathy
- § 23:24 —Reference to previous trials
- § 23:25 —Comments upon court’s rulings



## TABLE OF CONTENTS

§ 23:26	—Matters not in evidence
§ 23:27	—Note-taking by jurors
§ 23:28	—Rebuttal
§ 23:29	—Special interrogatories
§ 23:30	—Appeals to passion and prejudice
§ 23:31	—Reference to insurance
§ 23:32	—Reference to financial status of parties
§ 23:33	—Violation of “golden rule” doctrine
§ 23:34	—Retaliatory remarks
§ 23:35	—Use of demonstrative or real evidence
§ 23:36	—Reading documentary evidence
§ 23:37	—Printed material not in evidence
§ 23:38	—Trial and deposition transcripts
§ 23:39	Improper arguments—Objections and motions for mistrials
§ 23:40	—Motions to strike and instructions to disregard
§ 23:41	— —Response by argument
§ 23:42	—Plaintiff’s rebuttal argument—Defense approach

## II. THE OUTLINE

§ 23:43	Outline for closing argument (all cases)
§ 23:44	—Compared to opening statement outline
§ 23:45	—General approach
§ 23:46	—Defendant’s approach
§ 23:47	—Maximizes impact of evidence
§ 23:48	Salutation and introduction
§ 23:49	Parties and key witnesses
§ 23:50	—Minors and wards of court
§ 23:51	Scene
§ 23:52	Instrumentalities
§ 23:53	Practices and procedures
§ 23:54	Weather
§ 23:55	Date and time
§ 23:56	Damages (defendant’s approach)
§ 23:57	—“Obligation” to discuss all issues
§ 23:58	—Argument through or “on behalf” of codefendant
§ 23:59	—Reflects on liability issue
§ 23:60	—Argue damage aspects early
§ 23:61	—Avoid apologies
§ 23:62	Issue—Question to be decided
§ 23:63	—Taking issue with “the issue” (defendant’s approach)
§ 23:64	How it happened—Picturization through eyes of client
§ 23:65	—Flashback technique
§ 23:66	Basis of liability or nonliability

§ 23:67	Corroboration
§ 23:68	—Your client
§ 23:69	—Witnesses
§ 23:70	—Exhibits
§ 23:71	— —Handling exhibits
§ 23:72	— —Tangible objects
§ 23:73	—Common sense and human nature
§ 23:74	—Physical facts
§ 23:75	Opponent's claims and contention—Refutation
§ 23:76	Instructions—Favorable and unfavorable
§ 23:77	—General cautionary instructions
§ 23:78	—When to argue instructions
§ 23:79	—Probabilities and improbabilities
§ 23:80	Damages (plaintiff's approach)—Request for verdict
§ 23:81	—Personal injury cases
§ 23:82	— —Elderly plaintiff
§ 23:83	Conclusion
§ 23:84	Rebuttal argument
§ 23:85	—Outline for rebuttal
§ 23:86	—Illustration of rebuttal argument
§ 23:87	—Separate trials—Liability and damages
§ 23:88	Study outstanding closing arguments
§ 23:89	Advance preparation
§ 23:90	Testing closing argument
§ 23:91	Request for reasonable time
§ 23:92	Waiver by defense
§ 23:93	Emphasize own case
§ 23:94	Personalization of client
§ 23:95	—Corporate clients
§ 23:96	Humor
§ 23:97	Poetry and literature
§ 23:98	Analogies and stories
§ 23:99	—Circumstantial evidence—Support
§ 23:100	— —Discrediting
§ 23:101	Avoid minor triumphs
§ 23:102	Challenging the jury
§ 23:103	Unfair opening arguments
§ 23:104	Defendant's last chance to argue
§ 23:105	Overstatement and exaggerations
§ 23:106	Series of questions posed—Meeting challenge
§ 23:107	Counterclaims and third-party actions
§ 23:108	Standard of reasonable person
§ 23:109	—Contributory negligence
§ 23:110	— —Contributory behavior or conduct distinguished
§ 23:111	—Negligence of defendant
§ 23:112	—Wilful, wanton and malicious conduct

## TABLE OF CONTENTS

§ 23:113	Nonjury cases
§ 23:114	Avoid reading or memorizing argument
§ 23:115	Rhetorical questions
§ 23:116	Adequate notes
§ 23:117	Clarity of language
§ 23:118	Voice tone
§ 23:119	Eye contact
§ 23:120	Distracting habits
§ 23:121	Notes of opponent's argument
§ 23:122	Murder—Prosecution—Confession
§ 23:123	—Defense—Self-defense
§ 23:124	Aggravated assault—Defense—Self-defense
§ 23:125	Bribery—Defense—Immunized witnesses
§ 23:126	Personal injury actions—Plaintiff
§ 23:127	— —Damages only
§ 23:128	—Defendant
§ 23:129	Wrongful death—Plaintiff—Damages
§ 23:130	Will contest—Testamentary capacity—Contestants
§ 23:131	— —Respondents
§ 23:132	Life insurance—Double indemnity—Plaintiff
§ 23:133	— —Defendant

## PART VII. APPELLATE PRACTICE

### CHAPTER 24. APPELLATE PRACTICE

§ 24:1	Introduction
§ 24:2	—Preserving the record in the trial court
§ 24:3	—Remembering your audience
§ 24:4	—Reading the rules
§ 24:5	Deciding whether to file appeal
§ 24:6	—Can you appeal?
§ 24:7	—Economic considerations
§ 24:8	—Postponing the inevitable
§ 24:9	—Jeopardizing client's present position
§ 24:10	Appealable orders
§ 24:11	—Final orders—Definition
§ 24:12	— —When is final order final?
§ 24:13	—Non-final orders
§ 24:14	— —Multiple parties
§ 24:15	— —Multiple causes of action
§ 24:16	— —Motions regarding jurisdiction and venue
§ 24:17	— —Irreparable harm
§ 24:18	— —Certified questions
§ 24:19	Posttrial motions
§ 24:20	—Preserving issues on appeal

- § 24:21 —Successful posttrial motions
- § 24:22 —Dress rehearsal for appeal
- § 24:23 —Staying time for appeal
- § 24:24 Notice of appeal
- § 24:25 —Timeliness
- § 24:26 — —Late notice of appeal
- § 24:27 — —Cross-appeals
- § 24:28 Content of Notice of Appeal
- § 24:29 —Illustration
- § 24:30 Docketing statements
- § 24:31 —Illustration
- § 24:32 Record on appeal
- § 24:33 —Bystander's report
- § 24:34 —Certified record
- § 24:35 —Determining time of filing record
- § 24:36 — —Typical rule
- § 24:37 —Variation in requirements
- § 24:38 Motions after appeal has been filed
- § 24:39 —Preventing execution of judgment
- § 24:40 — —Money judgments
- § 24:41 — — —Bond—Illustration
- § 24:42 — —Nonmoney judgments
- § 24:43 — —Motions to stay—Reviewing court
- § 24:44 —Motion for extension of time
- § 24:45 — —Illustration
- § 24:46 —Motion to dismiss
- § 24:47 —Motions citing additional authority
- § 24:48 Order assessing costs
- § 24:49 —Federal rule on costs
- § 24:50 The brief
- § 24:51 —Timeliness of brief
- § 24:52 —Examining applicable appellate rules
- § 24:53 — —Typical rule—Illustration
- § 24:54 Reviewing the record
- § 24:55 —Table of contents of Record on Appeal—Illustration
- § 24:56 —Certificate of interest
- § 24:57 — —Illustration
- § 24:58 —Statement of facts
- § 24:59 — —Citing facts to record—Illustration
- § 24:60 — —Detail depends on issues
- § 24:61 —Nature of case
- § 24:62 — —Illustration
- § 24:63 —Jurisdictional statement
- § 24:64 — —Illustration
- § 24:65 —Issues on review
- § 24:66 — —Illustration

## TABLE OF CONTENTS

§ 24:67	—Points and authorities
§ 24:68	— —Illustration
§ 24:69	—Argument
§ 24:70	— —Remember your audience
§ 24:71	— —Order and style
§ 24:72	— —Citations—Be accurate
§ 24:73	—Conclusion
§ 24:74	— —Illustration
§ 24:75	Appellee’s brief
§ 24:76	Reply briefs
§ 24:77	Oral arguments
§ 24:78	—Will arguments be allowed?
§ 24:79	—Federal rule
§ 24:80	—Preparation
§ 24:81	—Content of oral argument
§ 24:82	Responding to questions by court
§ 24:83	—Impassionate arguments
§ 24:84	—Time limitations on arguments
§ 24:85	Further appeals
§ 24:86	—Petitions for rehearing
§ 24:87	— —Length of petition
§ 24:88	— —Response to petition for rehearing
§ 24:89	— —Decision to file petition for rehearing
§ 24:90	— —Tone and manner
§ 24:91	—Appeal to higher state court
§ 24:92	— —Petition for leave to appeal
§ 24:93	— —Response to petition for leave to appeal
§ 24:94	—Writs of certiorari
§ 24:95	— —Illustration

## Index