#### Volume 1

#### PREPARATION FOR TRIAL PART I.

#### 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
- —Corroborating evidence § 1:14
- § 1:15 —Anticipating adverse party's claims
- —Advising the client of legal alternatives § 1:16
- § 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
- —Client interview forms § 1:21
- § 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
- ——Hourly fees § 1:28
- § 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

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

§ 1A:8 —Relaxation techniques § 1A:9 —Abdominal breathing § 1A:10 Listening § 1A:11 —Distractions to effective listening § 1A:12 — —Environmental ——Distractions created by the speaker § 1A:13 § 1A:14 — —Listener source distractions § 1A:15 —Listening with empathy —Suspending judgment § 1A:16 § 1A:17 —Active listening § 1A:18 —Organizing information § 1A:19 —Evaluating information -Nonverbal cues § 1A:20 § 1A:21 -Review § 1A:22 Feedback § 1A:23 Verbal communication —Analyzing your "audience" § 1A:24 § 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 —The vocal mechanism § 1A:46 § 1A:47 -Articulation -Pitch and inflection § 1A:48 § 1A:49 --Volume § 1A:50 -Resonance § 1A:51 Varying delivery -Voice production § 1A:52 -Nonverbal § 1A:53

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

# CHAPTER 2. THE PERSONAL INJURY CASE

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
$\S 2:14$	—Form
$\S 2:15$	Sample first letter to plaintiff-client
§ 2:16	Contact the defendant
$\S 2:17$	—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
$\S 2:25$	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

——Sample authorization letter to obtain police

-Written standards, codes, rules and regulations

§ 2:30

§ 2:31

records

#### 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					
$\S 2:45$	—Interviewing witnesses					
§ 2:46	——Automobile accident cases					
$\S 2:47$	—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					
§ 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					
3	records—Conferences with medical witnesses					
§ 2:66	—Preparing hypothetical questions					
§ 2:67	—Electronic research					
§ 2:68	Defendant's investigation of plaintiff's prior medical					
, <b>2.</b> 00	history					
§ 2:69	Medical bibliography for lawyers					
§ 2:70	Checklist—Investigation					
§ 2:70	—Sample personal injury investigation checklist No.					
3 <b>4.1</b> I	1					
§ 2:72	Sample personal injury investigation checklist No. 2					

#### GOLDSTEIN TRIAL TECHNIQUE

§ 2	2:73	—Sample automobile accident investigation checklist No. 3
§ 2	2:74	Demonstrative evidence—Visual aids
-	2:75	——Blackboards
-	2:76	——Sketch pads
-	2:77	——Printed charts
-	2:78	— — Medical illustrations, skeletons, models and
Ü		manikins
§ 2	2:79	— — Motion pictures and videotape
§ 2	2:80	— —Color photographs
§ 2	2:81	Weather reports
§ 2	2:82	—Sample letter requesting weather report
§ 2	2:83	Lab reports and x-ray films
§ 2	2:84	—Radiologist or x-ray technician
§ 2	2:85	—Presentation of x-rays—Illumination box or positive
		prints
§ 2	2:86	Damages
	2:87	—Preexisting ailments, aggravation
_	2:88	—Obtain paid bills
§ 2	2:89	——Request for bills
§ 2	2:90	—Obtain bills—Request for bills—Sample letter
		requesting copies of medical bills
§ 2	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	2:96	——Sample authorization to review employment
6 0	0.7	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	2:111	—Collateral source rule
§ 2	2:112	— —Earnings
§ 2	2:113	Checklist—Case file

 $\begin{array}{lll} \S~2:114 & ---- Sample ~ file ~ checklist ~ No.~ 1 \\ \S~2:115 & ---- Sample ~ file ~ checklist ~ No.~ 2 \\ \S~2:116 & Diagram ~ of ~ a ~ personal ~ injury ~ case \\ \S~2:117 & ---- Sample ~ diagram \\ \end{array}$ 

#### 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
$\S 4:29$	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
CHA	PTER 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
§ 5.0 § 5:7	——Sample party designations
§ 5.1 § 5:8	—Introduction
§ 5.6 § 5:9	—Characterizing the parties
8 0.3	—onaracterizing the parties

§ 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

8 e:T	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

D.	
§ 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

4	. 7	г.	$\alpha$	1era	1
		ın	( ÷ei	าคหล	ı

8 6:11	Gener	allv

- § 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

xxii

# 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. PHYSICIAL 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
8	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
8	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
2		motion to strike
8	7:12	——Sample motion to strike and motion in limine
	7:13	——Sample plaintiff's memorandum in support of
o		motion in limine
Ş	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
Ş	7:19	—Undue influence—Inhabitants prejudiced
-	7:20	Motion to withdraw as attorney of record
8	7:21	Motion to substitute attorneys
Ş	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
Ş	7:34	—Federal rules
_	7:35	—State rules
_	7:36	—Affidavits
_	7:37	—Multiple issues
_	7:38	—Counterclaims
o		

§ 7:39	—Sample notice of motion for summary judgment
§ 7:40	
§ 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	
§ 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
TTT	CDIMINIAL CACEC

### 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 —Client's unrealistic value of case § 7A:11 § 7A:12 —Avoiding opinion on value § 7A:13 —Settlement discussions —Explaining how case will progress § 7A:14 § 7A:15 —Gaining confidence of client § 7A:16 Communication with client A "reasonable" investigation—Controlling expenses § 7A:17 § 7A:18 —Investigation checklist § 7A:19 Preparing for trial § 7A:20 Commencement of negotiations § 7A:21 Face to face negotiations Where to negotiate—The "home turf advantage" § 7A:22 Negotiating personal injury cases § 7A:23

—Avoiding "piecemeal" submission of documents

§ 7A:24

§ 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 —"Mary Carter" agreements § 7A:39 § 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 Mediations and Settlement Conferences § 7A:50

### 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

xxviii

TABLE O	F CONTENTS
\$ 9:27 \$ 9:28 \$ 9:29 \$ 9:30 \$ 9:31 \$ 9:32 \$ 9:33 \$ 9:34 \$ 9:35	<ul> <li>—Peremptory challenges</li> <li>— Batson v. Kentucky and its progeny</li> <li>— Exercising challenges tactfully</li> <li>— Keeping record of peremptory challenges</li> <li>—Challenge to array (entire venire)</li> <li>Asking jurors to hypothesize</li> <li>Questions concerning law</li> <li>—Preventing statements on the law—Illustration</li> <li>Introductory remarks</li> </ul>
III.	METHODS OF EXAMINATION OF JURORS
\$ 9:36 \$ 9:37 \$ 9:38 \$ 9:39 \$ 9:40	Examination by judge —Preparing list of questions Judge initiating and attorneys supplementing the examination Examination by attorneys Watching jurors as they take seat and respond to questions
IV.	GENERAL SUGGESTIONS
\$ 9:41 \$ 9:42 \$ 9:43 \$ 9:44 \$ 9:45 \$ 9:46 \$ 9:47 \$ 9:48 \$ 9:49 \$ 9:50	Accepting, tendering and breaking the panel Challenges after tender or acceptance Examining jurors in panels of four or twelve Discussing insurance Discussing tort reform Types of jurors—Theories —For plaintiff in personal injury cases —For defendant in personal injury cases —For prosecution in criminal cases —For defendant in criminal cases
v. w	THAT NOT TO DO
\$ 9:51 \$ 9:52 \$ 9:53 \$ 9:54 \$ 9:55 \$ 9:56 \$ 9:57 \$ 9:58 \$ 9:59 \$ 9:60 \$ 9:61	Avoiding display of brilliancy Unfairness Affectations Embarrassing prospective juror Avoiding the word "accident"—Plaintiff's attorney One-man jury—The "expert" juror —Law, medicine or other professions —Unfair tactic to challenge opponent Prejudice, bias—Feeling Not an inquisition Questioning all jurors in detail
§ 9:62 § 9:63	—Sacrificing goals 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
- O ODIMINIAI GAGEG

#### 2. CRIMINAL CASES

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

### 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"
- —Opponent objecting to "argument" § 10:48
- § 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
- Visual aids—Effective use § 10:54
- § 10:55 Gestures
- § 10:56 General denial
- § 10:57 Short or long opening statement—How much detail?
- —Inarticulate or technical witnesses § 10:58
- § 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 Noniury 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

xxxii

§ 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

LAA	IINATION-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

xxxiii

§ 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
Ş	11:79	Dying declarations
Ş	11:80	Harmful evidence—Anticipating cross-examination
8	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
Ş	11:86	—Calling adverse party as witness—Strategy
8	11:87	Court's witnesses
8	11:88	—Federal rule
-	11:89	—Court appointed experts
Š	11:90	Identifying persons
Š	11:91	Conversations—Face to face
Š	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
o		

§ 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

211111111111111111111111111111111111111	
§ 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	<ul> <li>—Experimental evidence involving automobiles</li> </ul>
§ 11:172	<ul> <li>— Experimental evidence to determine chemical or physical qualities of substance</li> </ul>
§ 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 § 11:200 § 11:201 § 11:202	<ul> <li>Use of deposition de bene esse</li> <li>Depositions for perpetuating testimony</li> <li>Evidence deposition in criminal trials</li> <li>Physician's evidence deposition</li> </ul>
§ 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	<ul> <li>—Requesting instruction and argument</li> </ul>
§ 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	<ul> <li>—Authenticating handwritten or signed</li> </ul>
	documents—Basic methods
§ 12:20	— — First method—Witness signed instrument
	first
§ 12:21	———Second method—Witness signed instrument
0.10.00	after party being charged
§ 12:22	— — Third method—Conversations and activities
	prior to execution proved

xxxviii

#### 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

#### GOLDSTEIN TRIAL TECHNIQUE

	GOLDSTEIN TIME TE
§ 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
§ 12.56	—Offer of proof
§ 12.50 § 12:97	—Outline of testimony for introduction of recording
§ 12.97 § 12:98	Diagrams, maps, plats, charts, drawings and models
§ 12.98 § 12:99	—Model (not to scale) qualified by layperson
8 14.33	— model (not to scale) qualified by layperson

§ 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
8 10.105	relevancy
§ 12:105	Paid bills for repairs or services
§ 12:106 § 12:107	—For repairs
8 12:107	——Illustration direct examination (automobile repairs)
§ 12:108	—For services
§ 12:100 § 12:109	Unpaid bills and estimates
§ 12:103 § 12:110	—Illustration direct examination (automobile
8 12.110	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
8 10.104	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
2 10 100	expiration notice)
§ 12:133	——Illustration (bookkeeping records to show
§ 12:134	amount due)
g 14.10 <del>4</del>	<ul> <li>— Illustration (adverse party's sales data broken down by area)</li> </ul>
§ 12:135	——Illustration (introduction of computer printouts)
2 17.100	independent (introduction of computer printouts)

Mortality tables
Corporate minutes
Learned treatises
Notice to city before suit
Laws, statutes and ordinances—Judicial notice
—Proof of ordinances
Public records
—Marriage certificates
——Introducing marriage certificate into evidence
—Birth and death certificates
Police reports
—Illustration direct examination (police report as past recollection recorded)
Refreshing present recollection
—Illustration direct examination (refreshing present recollection)
Past recollection recorded

# Volume 3

### **CHAPTER 13. OBJECTIONS**

### I. GENERAL LAW AND TACTICS

§ 13:1	In general
§ 13.1 § 13:2	8
-	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

§ 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	<ul> <li>— Attacking and supporting credibility of declarant</li> </ul>
§ 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
          Improper remarks or conduct of court or counsel
§ 13:66
§ 13:67
          —Improper conduct
          Authentication and identification
§ 13:68
§ 13:69
          —Self-authentication
          "Best evidence" or "original document" rule
§ 13:70
§ 13:71
          -Federal rules
§ 13:72
          — —Definitions
          --- Requirement of original
§ 13:73
§ 13:74
          ——Admissibility of duplicates
          — —Admissibility of other evidence of contents
§ 13:75
§ 13:76
          — —Public records
          ---Summaries
§ 13:77
§ 13:78
          — Testimony or written admission of party
§ 13:79
          — —Functions of court and jury
§ 13:80
          Beyond scope of examination
          Immaterial and irrelevant
§ 13:81
          —Federal rules
§ 13:82
§ 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
          — — — Cumulative evidence
§ 13:88
§ 13:89
          Improper impeachment
§ 13:90
          —Impeaching own witness
§ 13:91
          — Federal Rule 607, who may impeach
§ 13:92
          Parol evidence rule
          Privileged or confidential communications
§ 13:93
§ 13:94
          —Preliminary questions—Federal rule
§ 13:95
          -Conflicts of law
          — Federal rule
§ 13:96
§ 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
```

§ 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

Federal Rule 705; Disclosure of facts or data underlying expert opinion
Hypothetical questions
ULTIMATE ISSUE
Invading province of jury Federal Rule 704; Opinion on ultimate issue
LEARNED TREATISES
Generally Use on direct examination Use on cross-examination Federal Rule 803(18); Learned treatises
CROSS-EXAMINATION OF EXPERT
Generally Eliciting opinions
COURT-APPOINTED EXPERTS
Generally Federal Rule 706; Court appointed experts
LAY OPINIONS
Generally Subjects of lay opinions Federal Rule 701; Opinion testimony by lay witnesses
ENERAL CONSIDERATIONS
SELECTION AND PREPARATION OF EXPERT
Selection of expert; Generally Source of experts —Paid experts —Using opposing expert's superior as witness Preparation of expert; Generally Areas of special preparation Attorney must prepare self
EDUCATING THE JURY
Generally Develop qualifications effectively —Qualifications essential to summation —"Dig" for credentials

§ 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?

	GOLDSTEIN TRIAL T	
§ 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 WITNESSE		

#### ES

§ 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
- Handwriting expert—Questioned document examiner  $\S 16:2$
- § 16:3 Federal courts

§ 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
2 1 0 0 1	cross-examination
§ 16:21	—Defendant's expert—Illustration of direct and cross-examination
8 16.99	
§ 16:22	Surveyors
§ 16:23 § 16:24	—Illustration of direct and cross-examination —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
g 10.5∠	cross-examination
§ 16:33	—Mechanical engineer for plaintiff (rebuttal
, 10.00	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

	GOLDSTEIN TRIAL TECH		
§ 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		

3 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
3 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
7:38	Forcing doctor to admit others as authorities in the
	field
7:39	—If a witness is a specialist in his field, use some of
	the following questions
3 17:40	Show that the doctor disagrees with all authorities in
	the field
7:41	—Where doctor is a specialist and certified by a
17.40	specialty board
§ 17:42 § 17:43	Admissibility of medical textbooks
11:43	Cross-examination of the known charlatan or faker (incompetent)
17:44	-
17:44	Cross-examination as to subjective symptoms "Poor showmanship"—Affects credibility
17:45 17:46	Collateral attack
§ 17.40 § 17:47	Cross-examination on examination, treatment, and
3 17:47	diagnosis
17:48	Complete examination—Orthopedic and neurological
17:49	—Gave general neurological examination—Not a
3 11.40	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
, 11.01	injuries
17:58	Cross-examination of radiologist—Malpractice
17:59	Redirect examination
17:60	Making points in closing arguments
,	0 1 · · · · · · · · · · · · · · · · · ·

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

§ 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
3 10.11	come one contained printiples of cross chammation
II. TH	HE "DO'S" OF CROSS-EXAMINATION
§ 19:23	Preparation—The cardinal principle of
3 10.20	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
\$ 10.00	cross-examination
§ 19:36	"Bit-by-bit" procedure
§ 19:37	—Illustration (automobile accident)
§ 19:38	—Using narrow questions permitting only narrow
3 10.00	answers
§ 19:39	Leading questions
§ 19:40	Making your big points—Avoiding small triumphs
§ 19:41	Covering important subjects early in
5 10.11	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)
§ 19:47 § 19:48	
8 15:40	Cross-examination as to improbabilities

§ 19:49 —Increasing the improbabilities

6 10 50	«TT 4 11 1 141 1 411 97
§ 19:50	v
§ 19:51	v
§ 19:52	
	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
g - · · ·	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 "Isn't it a fact"—"As a matter of fact" § 19:77 § 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 Press for an answer when you know it will be § 19:83 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

Ş	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
Ü		distance
§	19:92	When judge asks questions, use discretion
8	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
_	X	
	CHAP	TER 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
§	20:5	—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)
8	20:12	Impeachment must be material
_	20:13	What is "collateral?"
_	20:14	Impeaching statement must be inconsistent or
0	20.11	contradictory
§	20:15	The right to impeach one's own witness
_	20:16	—Hostile and surprise witnesses
8	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
Ü		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
9		1 01

### 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
§ 20:33 § 20:40	—The basic problem in the use of written
§ 20.40	contradictory statements
§ 20:41	——Illustration (witness' signature on document)
§ 20:42	——Is this procedure objectionable?
§ 20:42	— Right to see exhibits after they have been
§ 20.40	shown to witnesses
§ 20:44	— —Where signature only is identified
§ 20:45	—Laying the foundation—Written contradictory
3 20.10	statement
§ 20:46	The problem of the insurance investigator
§ 20:47	—Where party admits his signature
§ 20:48	—Where witness admits signature but denies
3 20.10	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	——————————————————————————————————————
§ 20.50 § 20:57	, , ,
•	—Offering all or part of the impeaching document
§ 20:58	Former contradictory sworn testimony in previous trial or hearing
\$ 20.50	S
§ 20:59	—The foundation
§ 20:60	——"You were a witness in the prior trial of this
8 00.01	case, is that right?"
§ 20:61	——"You were sworn to tell the truth on that occasion?"
\$ 20.60	
§ 20:62	— —"You did tell the truth?" (prior favorable statement)
\$ 20.62	
§ 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
§ 20:68	—Illustration (inquest)
§ 20:69	—The impeaching proof—Inquest
§ 20:70	Impeaching witness—Court reporter
§ 20:71	Qualification and examination of court reporter
§ 20:72	—Where objection is made to the form of final question
§ 20:73	—Cross-examination of the court reporter
§ 20:74	Impeachment by failure to state facts, i.e.,
0	impeachment by omission
§ 20:75	Impeachment by discovery deposition
§ 20:76	—The impeaching proof
§ 20:77	Impeachment by pleadings
§ 20:78	Impeachment by sworn applications—Affidavits
§ 20:79	—Use of sworn applications to disprove denial of
	ownership
§ 20:80	Should a witness who has made favorable
	admissions on cross-examination be impeached?
§ 20:81	Should cross-examination start by laying foundation
0.00	for impeachment?
§ 20:82	Narcotics addiction
§ 20:83	Intoxication
§ 20:84	Bias
§ 20:85	—Illustration (friendship with a party to the
8 00 00	lawsuit)
§ 20:86	—Illustration (family relation with a party to the lawsuit)
§ 20:87	—Illustration (financial interest of witness)
§ 20.87 § 20:88	General reputation—Bad
§ 20.88 § 20:89	—Good reputation
§ 20.89 § 20:90	—Selection of character witnesses
§ 20.90 § 20:91	—Proving reputation
§ 20.91 § 20:92	—Illustration (criminal case)
§ 20.92 § 20:93	—Discussing reputation
§ 20.93 § 20:94	—Preparing character witnesses
-	
§ 20:95	—"Would you believe him under oath?"
§ 20:96	——Illustration (proving bad reputation)
§ 20:97	—Cross-examining adverse character witness
§ 20:98	—Using opponent's witness
§ 20:99	Impeachment with a former conviction
§ 20:100	—Arrests, indictments, etc
§ 20:101	—Conviction of felony
§ 20:102	—Proof of conviction where probation granted
§ 20:103	—Admission as to conviction
§ 20:104	—Cross-examination as to former conviction

§ 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
$\S 21:21$	—Memory refreshed prior to testifying
$\S 21:22$	—"That is all I remember"
§ 21:23	Question forgotten during direct examination
§ 21:24	Question remembered during cross-examination
$\S 21:25$	Question remembered after cross completed;
	requesting permission to go beyond scope
$\S 21:26$	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	
	· · · · · · · · · · · · · · · · · · ·	

### GOLDSTEIN TRIAL TECHNIQUE

```
§ 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
          Opponent's claims and contention—Refutation
§ 23:75
§ 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
          Rebuttal argument
§ 23:84
§ 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
          Humor
§ 23:96
§ 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
          -Negligence of defendant
§ 23:111
§ 23:112
          -Wilful, wanton and malicious conduct
```

§ 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 —Defense—Self-defense § 23:123 § 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 Appealable orders § 24:10 § 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 --- Motions regarding jurisdiction and venue § 24:16 § 24:17 ——Irreparable harm ——Certified questions § 24:18 Posttrial motions § 24:19 § 24:20 -Preserving issues on appeal

### GOLDSTEIN TRIAL TECHNIQUE

```
§ 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
         —Bystander's report
§ 24:33
§ 24:34
         —Certified record
§ 24:35
         —Determining time of filing record
§ 24:36
         — Typical rule
§ 24:37
         —Variation in requirements
         Motions after appeal has been filed
§ 24:38
§ 24:39
         -Preventing execution of judgment
§ 24:40
         — — Money judgments
         ———Bond—Illustration
§ 24:41
§ 24:42
         — — Nonmoney judgments
         — — Motions to stay—Reviewing court
§ 24:43
§ 24:44
         -Motion for extension of time
§ 24:45
         — —Illustration
§ 24:46
         —Motion to dismiss
         -Motions citing additional authority
§ 24:47
§ 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
         — — Detail depends on issues
§ 24:60
§ 24:61
         —Nature of case
§ 24:62
         — —Illustration
§ 24:63
         —Jurisdictional statement
§ 24:64
         — —Illustration
         -Issues on review
§ 24:65
§ 24:66
         --- Illustration
```

```
-Points and authorities
§ 24:67
§ 24:68
         — —Illustration
         —Argument
§ 24:69
§ 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
         —Will arguments be allowed?
§ 24:78
         —Federal rule
§ 24:79
§ 24:80
         -Preparation
         —Content of oral argument
§ 24:81
§ 24:82
         Responding to questions by court
         -Impassionate arguments
§ 24:83
§ 24:84
         —Time limitations on arguments
§ 24:85
         Further appeals
         —Petitions for rehearing
§ 24:86
§ 24:87
         ——Length of petition
§ 24:88
         --- Response to petition for rehearing
         — Decision to file petition for rehearing
§ 24:89
§ 24:90
         — Tone and manner
§ 24:91
         —Appeal to higher state court
§ 24:92
         ——Petition for leave to appeal
         — Response to petition for leave to appeal
§ 24:93
         —Writs of certiorari
§ 24:94
§ 24:95
         --- Illustration
```

Index