#### Volume 1

## PART I. DYNAMICS OF ADVOCACY

## CHAPTER 1. ALIGNMENT OF INTERESTS

§ 1:1	Need for strategy in advocacy—In general
§ 1:1.10	-Effective advocacy strategies for girls
§ 1:1.20	—Criminal defense advocacy
§ 1:2	—Dealing with opponents
§ 1:3	Extension of other kinds of communication
§ 1:4	Stereoscopic alignment of interests—In
3	general
§ 1:5	—Dimensions of alignment
§ 1:6	—View from the other side of the bench
§ 1:7	Importance of incentives—In general
§ 1:8	—Search for truth
§ 1:9	—Need for a sense of importance
§ 1:10	—Need for status
§ 1:11	—The problem of attention
§ 1:12	Importance of the setting
§ 1:13	Relevance of fact skepticism
§ 1:14	Models of communication and their
8	importance—"Common-sense" model of
	communication
§ 1:15	—Alternative communications model
§ 1:16	—Implications of communication models
§ 1:17	Implications of indirect portrayal of facts and
	role of motives
§ 1:18	The advocate as an indirect witness
§ 1:19	Risk/benefit approach to choices—In general
§ 1:20	—Consequences
§ 1:21	Advantages of professionalism—In general
§ 1:22	—Civility and professionalism in legal
	advocacy
§ 1:22.10	—Importance of clients
§ 1:23	Importance of limited human control over
	future events—In general

§ 1:24	—Primacy of measuring device or original goal?
§ 1:25	—Primacy of recordkeeping requirements, original goal, or instructions to distort application of the requirement for regulatory objective?
§ 1:26	Additional references—Overview
§ 1:27	—Generally
§ 1:28	—On professionalism in advocacy

Appendix 1-1. Standards of Professionalism and Civility

# CHAPTER 2. NONVERBAL COMMUNICATION AND ITS PREREQUISITES

- § 2:1 Importance
- § 2:2 Means—Nonverbal communication and persuasion
- § 2:3 —Nonverbal aspects of negotiation, examination, and other communication beyond simple persuasion
- § 2:4 —Nonverbal impact of speech
- § 2:5 Prerequisites
- § 2:6 Exploiting the advantage
- § 2:7 Additional references

#### PART II. COUNSELING

## CHAPTER 3. COUNSELING AGAINST A SHIFTING BACKGROUND

§ 3:1	Counseling first—In general
§ 3:2	—Nontechnical elements in counseling
§ 3:3	—The client who is eager to sue in a
	borderline case
§ 3:3.10	Counseling First—Moral Counseling
§ 3:4	Defining the client's objectives
§ 3:5	Analyzing alternatives
§ 3:6	Counsel "for the situation"—In general
§ 3:7	—Considering the consequences
§ 3:8	—Risks in counseling a nonclient
§ 3:9	—Persuasion by example
§ 3:10	—Technical advice with policy consequences
§ 3:11	—Chief justice Harlan F. Stone's criteria
	where no definitive authorities exist
§ 3:12	—Long-term underlying shifts

§ 3:13	—Underlying assumptions
§ 3:14	Uphill advice
§ 3:15	Non-zero sum games
§ 3:16	Counseling in a wider context: Non-client and pro bono
§ 3:17	Developing additional facts for implementation and verification or at the outset—In general
§ 3:18	—Future-oriented fact preservation
§ 3:19	—Interaction of factual investigation with compliance and ongoing business of the client
§ 3:20	The large transaction or event—In general
§ 3:21	—Checklist of areas potentially relevant to large transactions or events (not necessarily
	in order of importance)
§ 3:22	Relevance of other experts: The lawyer as renaissance generalist?
§ 3:22.10	E-mail communication with clients
§ 3:22.20	Online communication and client confidentiality
§ 3:23	Additional references—In general
§ 3:24	—Media access, influence, and impact on trials and advocacy
§ 3:25	—Terrorism and governmental rights and responses

## PART III. PARTICULAR DISPUTES

#### **CHAPTER 4. PREPARATION**

§ 4:1	Before the event where litigation is likely—In general
§ 4:2	—Creating environments with low litigation risk
§ 4:3	—Recordkeeping
§ 4:4	—Minutes
§ 4:5	Before litigation—Conduct toward the opponent
§ 4:6	—Pre-litigation and pre-motion settlement devices
§ 4:7	—Letters
§ 4:8	—Improper to bypass opposing counsel
§ 4:9	—Ethical issues in client-to-client negotiations
§ 4:10	—Names of parties
§ 4:11	—Issue and case selection
§ 4:12	—Evaluation of cases prior to litigation

§ 4:13	Questioning your own client or witness prior
	to testimony—In general
§ 4:14	—Ethical limits on witness preparation
§ 4:14.10	—Witness preparation and trial consultation
§ 4:15	—Witness fraud and perjury
§ 4:16	—Ethical preparation of witnesses
§ 4:17	—Virtues and vices [Deleted]
§ 4:18	—Ethical rules [Deleted]
§ 4:19	—Practical limits [Deleted]
§ 4:20	—Preparing a witness [Deleted]
§ 4:20.10	Lay witness preparation
§ 4:21	Investigation before testimony is taken:
	Documents and background information—In general
§ 4:22	—Preparation of factual data
§ 4:23	—Witness-related investigation
§ 4:24	Interviewing neutral and hostile witnesses—
	Initial pre-witness selection interviewing
§ 4:25	—Listening
§ 4:26	—The art of building rapport during witness
	interviews—Introduction [Deleted]
$\S 4:27$	——Rapport and the interview [Deleted]
§ 4:28	——Empathy [Deleted]
§ 4:29	——Clueing the witness in [Deleted]
§ 4:30	——Demeanor and body language [Deleted]
§ 4:31	——Eye contact [Deleted]
§ 4:32	——Location of the interview [Deleted]
§ 4:33	— To script or not to script [Deleted]
§ 4:34	——Having a third person at the interview [Deleted]
§ 4:35	——Time [Deleted]
§ 4:36	——Preparation [Deleted]
§ 4:37	——Suggestions, not commandments [Deleted]
§ 4:38	——Conclusion [Deleted]
§ 4:39	—Benefits of digging
§ 4:40	—Don't take all documents affecting witnesses at face value
8 4.41	—Asking to see a neutral or a hostile witness
§ 4:41 § 4:42	
o .	—Joint interviews by opposing parties
§ 4:43	—Opportunities to question opposing witnesses
§ 4:44	—Conducting interviews
§ 4:45	—Persistence
§ 4:46	—Victim services
§ 4:47	—Signed or sworn statements: Two-edged
	sword
§ 4:48	—Informality
§ 4:49	—Pre-trial witness preparation

§ 4:50	Risks in witness interviewing—In general
§ 4:51	—Characterizations
§ 4:52	—Anticipating questioning about the interview
§ 4:53	—Confidentiality
§ 4:54	—Represented opponents
§ 4:55	—Ex parte interviews with opposing
	organizational witnesses or employees
§ 4:56	—Planted witness
§ 4:57	—Risks of secret taping of interviews
§ 4:58	—Ex parte interviews with present or former
	employees of adversary?
§ 4:59	—Imagination and persistence
§ 4:60	Strategies for discovery—In general
§ 4:61	—Document discovery
§ 4:61.50	—E-Discovery
§ 4:61.75	—E-discovery—Social media
§ 4:62	—Discovery concerning experts
§ 4:63	—Physical evidence
§ 4:64	—Discovery taken by others
§ 4:65	—Grand jury materials
§ 4:66	—Rule 45, Federal Rules of Civil Procedure
§ 4:67	—Testimony of adverse party
§ 4:68	—Participation in making of day-in-the-life
	and other newly created demonstrative
_	evidence
§ 4:69	—Alternative approach to discovery disputes
§ 4:70	—Phased discovery
§ 4:71	—Importance of requesting material promptly
§ 4:72	—Surreptitious taping
§ 4:73	—Benefits of adversary's discovery
§ 4:74	—Deposing the opposing party's CEO
§ 4:75	—Voluntary discovery
§ 4:76	—Deferred document disclosure except for
	attorneys' eyes only
§ 4:77	—Judicial Power to modify protective orders
0.4.50	without consent; Treatment of trial material
§ 4:78	—How to handle the witness who wants to lie
§ 4:79	—Providing a remedy for selective memory
§ 4:80	—Keeping information close to the vest versus
8 4.01	a policy of openness
§ 4:81	—Concealment and omission versus disclosure
§ 4:82	-Experts
§ 4:83	—Adverse inferences from discovery defaults
§ 4:84	The impact of computers, the internet, the

	world-wide web on discovery and trial
	preparation, generally
§ 4:84.50	Independent internet research by court as to
	expert qualifications
§ 4:85	Preliminary overall litigation strategies
§ 4:86	Additional references—In general
§ 4:87	—Destruction of evidence
§ 4:88	—Misprison
§ 4:89	—Missing witness inference
§ 4:90	—False exculpatory statements
§ 4:91	—Forms for stipulation options
§ 4:92	—Discovery demands not necessary for dealing
	with merits
§ 4:93	—Abuse of discovery for competitive or other
	non-violent warfare
§ 4:94	—Countervailing situations where entity-wide
	or even industry-wide discovery is necessary
$\S 4:95$	—Extensions of time
§ 4:96	—Trial strategy and preparation generally
§ 4:97	—Trial publicity
§ 4:98	—Use of focus groups
§ 4:99	—Emerging technologies and admissibility
§ 4:100	—Computer records and internet/world wide
	web issues
§ 4:101	Metadata production in electronic discovery
CHAP	TER 5. DIRECT EXAMINATION
§ 5:1	Basic strategy for direct examination—In
	general
§ 5:2	—Focus on the testimony, not the examiner
§ 5:3	—Alert witnesses to critical aspects of direct
	examination
§ 5:3.50	Art of direct examination
§ 5:4	Introducing documents and other exhibits—In
	general
§ 5:5	—Demonstrative exhibits
§ 5:5.50	Expert witness selection
§ 5:6	Qualifying experts and offering novel scientific
	evidence—In general
§ 5:7	—Novel scientific evidence
§ 5:8	—Direct examination of expert witness [Deleted]
§ 5:8.50	—Direct examination of plaintiff's medical
	expert in medical malpractice case
§ 5:9	—Prepare expert for cross examination [Deleted]
§ 5:10	Drama on direct—In general

§ 5:11	—Tactics of when to stop on direct
§ 5:12	—Dress
§ 5:13	—Delegating preparation
§ 5:14	—Preparing for delay
§ 5:15	—Protecting the direct
§ 5:16	—Catastrophic example
§ 5:17	—Cross-examination
§ 5:18	—Responses to similar attack by sophisticated
	or well counselled witness
§ 5:19	—Preemptive direct examination
§ 5:20	—Sponsorship concept
$\S 5:21$	—Failure to cross-examine "friendly" witness
$\S 5:22$	Additional references

## CHAPTER 6. CROSS-EXAMINATION OF TRUTHFUL WITNESSES

§ 6:1	Introduction: Pretrial versus trial examination
§ 6:2	Preparation and flexibility—In general
§ 6:3	Top reasons for cross-examination
§ 6:4	Neutral witness—In general
§ 6:5	—Dealing with characterizations
§ 6:6	"Friendly" witness
§ 6:7	Victim witness
§ 6:8	Mistaken witness
§ 6:9	Embarrassed witness
§ 6:10	Forgetful witness—In general
§ 6:11	—Refreshing recollection
§ 6:12	Opposing expert witness—In general
§ 6:12.20	—Plaintiff's medical expert in medical
	malpractice case
§ 6:12.50	—Defendant's medical expert in automobile accident
_	case
§ 6:13	—Over-reliance on experts seeking to create
0.0.1.	new cottage industries?
§ 6:14	—Appealing to impartiality
§ 6:15	—Unveiling bias
§ 6:15.10	Cross-examination of defense's cigarette manufacturer
8.0.10	expert witness by Plaintiff
§ 6:16	Opposing expert witness—Unveiling bias—
0.015	Turning an opposing expert into your witness
§ 6:17	——Real estate valuation
§ 6:18	——Breach of contract
§ 6:19	——Use of detail
§ 6:20	— — Use of expert's or opponent's media
	interviews

§ 6:21	— The expert's qualifications and possible
	sources of bias—Need for your own expert
§ 6:22	———Questions on the expert's qualifications
§ 6:23	— — Scope of cross-examination on bias
§ 6:24	— — Hypothetical <i>Trower</i> cross-examination
§ 6:25	———Procedure involved
§ 6:26	———Use of power of suggestion
§ 6:27	———Expert qualifications
§ 6:28	——Bases of conclusions and challenges to
	types of evidence
§ 6:29	<ul> <li>— Examination of a statistical expert</li> </ul>
§ 6:30	— Getting the expert to contradict the
	calling party
§ 6:31	Additional references
CHA	PTER 7. NARROWING THE

# CHAPTER 7. NARROWING THE DISPUTE THROUGH CROSS-EXAMINATION

- § 7:1 Confrontation§ 7:2 Specificity in questioning
- § 7:3 —Automobile accident case
- § 7:4 ——Importance of maps or charts for effectiveness of specific questioning
- § 7:5 ——Examination of automobile operator who struck car in side impact accident (adverse witness)
- § 7:6 ——Occurrence of accident
- § 7:7 —Brokerage contract dispute
- § 7:8 Objecting to foundation for exhibit
- § 7:9 Lowering the level of hostility
- § 7:10 Additional references—Statements as equivocal

## CHAPTER 8. EXPOSING THE LYING WITNESS

- § 8:1 Basic strategy—In general
- § 8:2 —Listening to the direct
- § 8:3 —Questions omitted on direct
- § 8:4 —Repetition
- § 8:5 —Standard adages as myths
- § 8:6 —Myth No. 1: Do not ask the question unless you know what the answer will be
- § 8:7 —Myth No. 2: Use leading questions in most instances
- § 8:8 —Myth No. 3: Control the witness

§ 8:9	—Denial of recollection
§ 8:10	—Open-ended questions
§ 8:11	—Emotive/cognitive questions
§ 8:12	—Crucial nature of cross
§ 8:13	—What not to do
§ 8:14	Exposing bias—In general
§ 8:15	—Cooperating witness
§ 8:16	—Scope of examination: Calculated risks
§ 8:17	—Bias on the part of the examiner?
§ 8:18	—Methods and preparation of cross-examination
§ 8:19	—Questions
§ 8:20	—Demeanor
§ 8:21	—Subpoena to friendly witness
§ 8:22	—Bias involving expert witnesses
§ 8:23	Unforeseen detail—"Who else was present?"
§ 8:24	—"Was the contract folded?"
§ 8:25	Sealing off escape routes
§ 8:26	Contradiction by prior statements—In general
§ 8:27	—As to redirect examination
§ 8:28	Contradiction by implication—Overview
§ 8:29	—Generally
§ 8:30	——Prior bad acts; Crimes
§ 8:31	——Silence
§ 8:32	The incredible assertion
§ 8:33	Getting the truth from the witness without the
	witness so intending
§ 8:34	The "true colors" revelation—In general
§ 8:35	—Habitual role of the witness
§ 8:36	—Documents triggering revelations
§ 8:37	—Exploiting the witness's desire to blame others
§ 8:38	—Triggering anger
§ 8:39	Getting the witness to reveal concealment—In general
§ 8:40	—Cross-examination
§ 8:41	—Use of unnecessary interpreter
§ 8:42	Getting the witness to reveal previously hidden
ÿ O.∓Z	documents—In general
§ 8:43	—Alertness to documents
§ 8:44	Additional references—Generally
§ 8:45	—Traces of past events
§ 8:46	—Novel scientific claims
§ 8:47	—Changes in 1993 rules
§ 8:48	—Impeachment and rehabilitation
§ 8:49	—Accomplice witnesses
§ 8:50	—Duty to report opposing lawyer for subornation
3 0.00	zav, to report opposing langer for substitution

§ 8:51	—False exculpatory statements
§ 8:52	—Substitution of party
§ 8:53	—Handling files [Deleted]
§ 8:54	—Nonverbal evidence
§ 8:55	—Weather
§ 8:56	—Names
§ 8:57	—Money laundering provisions
§ 8:58	—Empathy for the witness
§ 8:59	—Revelation of witness's attitudes
§ 8:60	—Inferring the contrary of testimony, and finality of fact-finding based on demeanor
§ 8:61	—Impeaching credibility and exposing bias
§ 8:62	—Witness statements and prior statements
СНА	PTER 9. SPECIFIC TECHNIQUES
§ 9:1	Quit when you are ahead
§ 9:2	What not to ask—In general
§ 9:3	—Single question sometimes enough
_	
§ 9:4	—Opening the door
§ 9:5	—Quitting when behind
§ 9:6	—That final question
§ 9:7	—Accepting and running with the nonresponsive answer
§ 9:8	Do not normally ask for an explanation—"I'm
8 3.0	glad you asked that"
§ 9:9	Leading questions on direct and cross-examination
§ 9:10	Leading questions—"Isn't it a fact "—The
3 0.10	anatomy of a leading question [Deleted]
§ 9:11	—When leading questions are allowed by the court
_	[Deleted]
§ 9:12	—When leading questions are not allowed [Deleted]
§ 9:13	—Conclusions [Deleted]
§ 9:14	—Casenote examples [Deleted]
§ 9:15	—The subtle lead [Deleted]
§ 9:16	—So how do you lead without leading? [Deleted]
§ 9:17	"Give the substance in your own words"
§ 9:18	Avoiding creating sympathy for the witness
§ 9:19	Decision tree
§ 9:20	Order of questioning—In general
§ 9:21	—Easy questions first
§ 9:22	—Contradiction first
§ 9:23	—Choice based on the vulnerability of the witness
§ 9:24	—Delaying disclosure of the examiner's legal
3 U.ZI	theory

§ 9:25	—Choice based on the interests of the tribunal
§ 9:26	—Nonlinear order
§ 9:27	—Based on the need for time
§ 9:28	—Timing the riposte to the incredible answer
§ 9:29	Collateral consequences of testimony—In general
§ 9:30	—Opening the door to redirect examination
§ 9:31	Starting from zero
§ 9:31.10	Cross-examination with learned treatises
§ 9:32	"Eye" examination
§ 9:33	"No questions"—The decision not to cross-examine
§ 9:34	Additional references—Model of choice making
§ 9:35	—Impeaching testimony
§ 9:36	—Cross-examination involving scientific or technical information
§ 9:37	—Other critical techniques

## CHAPTER 10. EXPLORATORY EXAMINATION

§ 10:1	Depositions—Basic strategy
§ 10:2	—Stipulations limiting waivers
§ 10:3	—The forbidden "why?"
§ 10:4	—Order of depositions and document
	requests
§ 10:5	—Documents first: Usually advantageous
§ 10:6	—Total advance exchange
§ 10:7	—Inspection on site
§ 10:8	—"Priority"
§ 10:9	—Problematic types of interrogation
§ 10:10	—Alternate types of depositions
§ 10:11	—Basic approach
§ 10:11.50	Sequestration of witnesses during depositions
§ 10:12	Depositions—Basic approach—"What
	happened?"
§ 10:13	<ul> <li>—Asking about documents brought</li> </ul>
§ 10:14	——"Are there any tapes?"
§ 10:15	——Boxing versus judo
§ 10:16	— — — Depositions of experts
§ 10:17	———"Theater of one"
§ 10:18	———Canned questions?
§ 10:19	— — —Inherent vulnerabilities
§ 10:20	— —Stipulations
§ 10:21	——"Speaking objections"

§ 10:22	— — Evaluation of the issue
§ 10:23	— — — Alternative responses
§ 10:24	— — Relevancy
§ 10:25	Grand jury testimony—In general
§ 10:26	—Uses of the grand jury
§ 10:27	Interrogation
§ 10:28	Advice on the right to silence
§ 10:29	Additional references—Generally
§ 10:30	—Asking questions without knowing the
	answer
§ 10:31	—Depositions
§ 10:32	—Court reporter as deposition witness
§ 10:33	—Witness immunity from suit
§ 10:34	—Inferences from silence
§ 10:35	—Suspect's right to talk without risks except adverse inference?

# CHAPTER 11. DEALING WITH TACTICS DESIGNED TO SABOTAGE CROSS-EXAMINATION

§ 11:1	Evasion—In general
§ 11:2	—Murder conspiracy case
§ 11:3	—Payola case: Shifting meanings of ambiguous terms
§ 11:4	—Evasive witnesses—Handling evasive witness or argumentative lawyer at deposition
§ 11:5	— — Understand the witness's perspective [Deleted]
§ 11:6	— —Know when less is more [Deleted]
§ 11:7	Filibuster
§ 11:8	The "cluster bomb" defense
§ 11:9	Obstruction by opposing counsel—Overview
§ 11:10	—Generally
§ 11:11	Constriction of cross-examination by the tribunal—Overview
§ 11:12	—Generally
§ 11:13	——Abuse of discretion
§ 11:14	Constriction of re-direct
§ 11:15	Tribunal's questioning of witnesses
§ 11:16	Additional references—Generally
§ 11:17	—Medical Experts
§ 11:18	—Other experts

## CHAPTER 12. EXAMPLES OF MULTIPLE TECHNIQUES

§ 12:1 Product failure case—In general

§ 12:2	—Use of "unfavorable" testimony to attack credibility
§ 12:3	—Taking advantage of adverse rulings
§ 12:4	—Use of handwritten notes
§ 12:5	—Taking advantage of adverse limiting instructions
§ 12:6	—Emphasis on dates
§ 12:7	—Exposing the witness's internal mental landscape
§ 12:8	—Jargon
§ 12:9	"Violence in the hallway" case
§ 12:10	Sex discrimination case—In general
§ 12:11	—Asking for an explanation: Calculated risk
§ 12:12	—"Why?"
§ 12:13	—Cross-examination of a superior who failed to promote plaintiff in a sex discrimination case
§ 12:14	—Background
§ 12:15	—Hiring decision and policy
§ 12:15.50	Self-Driving Technology Product Liability
§ 12:16	Additional references—Generally

## CHAPTER 13. THE FUTURE OF CROSS-EXAMINATION

- § 13:1 The challenge to cross-examination
- § 13:2 Cross-examination in unofficial forums
- § 13:3 Additional references

## CHAPTER 14. REPRESENTING AND PREPARING A WITNESS

§ 14:1	The importance of witness preparation; Tailoring preparation to witness needs and types
§ 14:2	The job of the witness—Importance of protection and advice to witnesses
§ 14:3	—Erasing distractions
§ 14:4	—Recalling substance
§ 14:5	—Giving facts, not conclusions
§ 14:6	—Coming to terms with what happened
§ 14:7	—Self-image of the witness
§ 14:8	—Easing into difficult areas
§ 14:9	—Cross-examination of opposing expert as example
§ 14:10	—Counseling example

§ 14:11	—Presuppositions
§ 14:12	—Dress, mannerisms, analogies
§ 14:13	—Witness preparation checklist
§ 14:14	Risks confronting a truthful witness—Anger
§ 14:15	—Insulting questions
§ 14:16	—Stop if there is an objection
§ 14:17	—The valuable but limited standard adages:
	"Never volunteer" and "just answer yes or no"
§ 14:18	—Accepting the cross-examiner as an
0	authority figure
§ 14:19	—Lack of recollection of details
§ 14:20	—Speed
§ 14:21	—Partial answers subject to
Ü	misinterpretation
§ 14:22	—Compound questions
§ 14:23	—The ambiguous phrase
§ 14:24	—Confusing questions about testimony with
	questions about facts
§ 14:25	—Characterization of prior testimony
§ 14:26	—Awareness of procedural traps
§ 14:27	—Creating an impression of evasiveness
§ 14:28	—Questions about preparation
§ 14:29	—Handling ignorance
§ 14:30	—Resorting to retorts
§ 14:31	—Pinpointing and combating
	counterproductive witness habits
§ 14:32	—Appearance of evasiveness
§ 14:33	—Countervailing importance of limiting
	answers where appropriate
§ 14:34	—Relevance of record
§ 14:35	—Overpreparation
§ 14:36	—Showing witnesses documents involved in
	disputed events not previously seen by
	witness
§ 14:37	—Discussions with other witnesses, or
	revelations of their recollections by counsel
§ 14:38	—Protecting the witness from innuendos
§ 14:39	—Language used by witnesses
§ 14:40	—"The truth, the whole truth, and nothing
	but the truth"
§ 14:41	—Prior statements
§ 14:42	—The off-the-cuff commitment
§ 14:43	—Marathon examination
§ 14:44	—Impeachment by assertion of what others
	not called would say

§ 14:45	—Media interviews
§ 14:46	—Televised trials
§ 14:47	—Media access to discovery
§ 14:48	—Advice on talking to the other side
§ 14:49	Points for prospective witnesses
§ 14:50	Points for deposition witnesses
§ 14:51	Anticipating the cross: "Cross during the direct"
§ 14:52	Redirect examination
§ 14:53	Objections—In general
§ 14:53.50	—Trial—Advocacy
§ 14:54	—Excessive objections
§ 14:55	—Effective use of objections
§ 14:56	—The "old railroad lawyer" trick
§ 14:57	Objecting to testifying at all
§ 14:58	Refusals to answer
§ 14:59	The witness who wants to lie
§ 14:60	Responses to hostile examination—In general
§ 14:61	—"Limiting" questions
§ 14:62	—Attempt to rush witness
§ 14:62.50	—Coaxing answers from hostile witnesses
§ 14:63	The "home run"
§ 14:64	Summary
§ 14:65	Additional references—In general
§ 14:66	—Restricting recess consultation
§ 14:67	—Grand jury
§ 14:68	—Criminal aspects

# CHAPTER 15. SELECTION OF ARGUMENTS

§ 15:1	Interests of the tribunal itself—In general
§ 15:2	—Consistency as a value for the tribunal
§ 15:3	—Expeditiousness
§ 15:4	—Effective use of time
§ 15:5	—Protection of the tribunal from deception
§ 15:6	—Limiting workload versus establishing authority
§ 15:7	—Preserving the effectiveness of the tribunal
§ 15:8	—Establishing precedents
§ 15:9	Broader interests—In general
§ 15:10	—Particularized justice
§ 15:11	—Generalized justice
§ 15:12	—Importance of tacit underlying concepts

§ 15:13	—Economic assumptions—Use and neutralization
§ 15:14	—Use of consultants, computers, and formal
	systems
§ 15:15	Integration of interests—In general
§ 15:16	—Three pronouncements of chief justice stone: Most powerful legal concepts?
§ 15:17	—No way out?
§ 15:18	—Does technical law mean literalistic law?
§ 15:19	—Higher level options
§ 15:20	—Particularized versus generalized justice
§ 15:21	—Case one: One party had the opportunity to structure a situation and the other was injured
§ 15:22	—Case two: Injured party primarily responsible for injury
§ 15:23	—Case three: Risk was not foreseeable nor within reasonable control
§ 15:24	—Case four: Person assumes risk of legitimate activity which could probably not be conducted at all otherwise
§ 15:25	—Case five: Criminal sues victim of crime
§ 15:26	—Morality and law
§ 15:27	—Intelligent nonlawyer as judge of argument
§ 15:28	—Case law and issue selection
§ 15:29	—Interpretation of appellate and trial-level opinions in motion practice
§ 15:30	—Form and substance; Business purpose
§ 15:31	—"Tune of the time"
§ 15:32	—Turning adversity to advantage
§ 15:33	—Prior decisions of sitting judge
§ 15:34	Uses of history
§ 15:35	Alignment of arguments with interests of the tribunal—In general
§ 15:36	—Advance sheets
§ 15:37	—Attitudes of the tribunal
§ 15:38	—Argument to a literalistic tribunal
§ 15:39	—Argument to a interansite tribunal
§ 15:40	Extent of obligations
§ 15:40	—"Where do you draw the line?"
§ 15:41	—What is "proof"?—The persuasiveness of
	circumstantial evidence
§ 15:43	—Potential implications of developing constitutional doctrines
§ 15:44	—Protectionism, Carolene and hamilton's Federalist

§ 15:45	—Equal protection and individualized tax
§ 15:46	benefits —Discrimination against military personnel and
\$ 10.40	their children based on low educational
	expenditure in locality where base is sited
§ 15:47	—A new look at the establishment clause:
	Neutrality rather than anti-entanglement?
§ 15:48	Establishment clause: Neutrality rather than
	anti-entanglement?
§ 15:49	Alignment of arguments with interests of the
	tribunal—Uphill arguments
§ 15:50	Additional references—General principles and
0 15.51	concrete cases
§ 15:51	The either-it-is-illegal-or-it-isn't argument
§ 15:52	<ul><li>—Winston churchill on litigious distinctions</li><li>—Greater includes the lesser?</li></ul>
§ 15:53 § 15:54	
§ 15:54 § 15:55	—Some statements not "major pronouncements" —Unanimous opinions are not always more
8 10.00	persuasive
§ 15:56	—Overlapping specific and general provisions
§ 15:57	—Purpose interpretation
§ 15:58	—Federal law absorbed by state law
§ 15:59	—Accepted commercial or ethical standards
	absorbed into general federal or state
	provisions
§ 15:60	—Values implicit in the bill of rights and other
	constitutional clauses
§ 15:61	—"Hard look"
§ 15:62	—Legislative history
§ 15:63	—Expressio unius?
§ 15:64	—Intent as evidence of effect
§ 15:65	—Circumstantial evidence
§ 15:66	—Inaction as action
§ 15:67	—Currency
§ 15:68	—Professional advice
§ 15:69	—Additional sources of authority
§ 15:70	—Citation of authority
CITAT	
	PTER 16. MANNER OF ARGUME
§ 16:1	The time of the tribunal—In general
§ 16:2	—Under- and over-preparation

#### ENT

§ 16:1	The time of the tribunal—In general
§ 16:2	—Under- and over-preparation
§ 16:3	—When to quit while you're ahead—Or even when behind
§ 16:4	—When to continue arguing
§ 16:5	Belief in the case—Importance

§ 16:6	—Relevance of ambiguity
§ 16:7	—Showing belief in one's case
§ 16:8	—Taking advantage of adversity to secure full attention of decision makers
§ 16:9	—Dedication to merits, not partisan
3 20.0	distortion?
§ 16:10	—Showing confidence by not playing close to the vest
§ 16:11	—Contradictory favorable witnesses
§ 16:12	—Concentration
§ 16:13	—The inevitable surprise: <i>Your</i> reaction may be key
§ 16:14	—Avoid unnecessary objections
§ 16:15	—Announcing a test case?
§ 16:16	—Witness contradictions?
§ 16:17	Sensing the opening
§ 16:18	Restatement of opposing arguments
§ 16:19	Attack on opponent or opposing argument
§ 16:20	Simplification of argument
§ 16:21	Finding the core of the case—In general
§ 16:22	—Factual argument
§ 16:23	Argument as conversation—In general
§ 16:24	—Use and abuse of notes
§ 16:25	—The 95 per cent principle
§ 16:26	—Understatement
§ 16:27	—Getting attention through confrontation
§ 16:28	—Starting from where the audience is
§ 16:29	—"Come, you can't do that"
§ 16:30	—Know your audience—And respect it
§ 16:31	—Deliberate and effective effort
§ 16:32	—The multi-media imperative
§ 16:33	—Prior assumptions
§ 16:34	—Additional options for jury consideration of
6 10 05	a case
§ 16:35	—Juror participation as a concept
§ 16:36	—Juror notetaking
§ 16:37	—Basic criterion: Talking to the person
§ 16:38	—Showing respect for the audience?
§ 16:39	—Language
§ 16:40	—Nonverbal impact
§ 16:41	—Tone of voice
§ 16:42	—Mechanical aspects
§ 16:43	—Risks of overdoing it
§ 16:44	—The team itself as persuasion
§ 16:45	—Client participation

_	
§ 16:46	—Uphill arguments
§ 16:47	—Adverse rulings
§ 16:48	—Assumptions in litigation
§ 16:49	—Theme and detail
§ 16:50	—Means of conveying belief in the case
§ 16:51	—How to obscure your belief in the case
§ 16:52	—The "powerful" vs. "ordinary" people
§ 16:53	—Tailgating mentality in litigation
§ 16:54	—Other analogies
§ 16:55	—Browbeating via "literalism"
§ 16:55.10	—Advocacy and emotion
§ 16:55.20	Art of persuasion
§ 16:56	The record
§ 16:57	Additional references—In general
§ 16:58	—Non-annoying and gender-neutral writing

Appendix 16-1. Criteria for credibility

Appendix 16-2. Advocacy as Demonstrative Evidence

### CHAPTER 17. TYPES OF ARGUMENTS

§ 17:1	Openings—Functions of the opening
§ 17:2	—Openings to juries as a prelude
§ 17:3	—Preparation of opening statements
§ 17:4	—Develop a theory of your case [Deleted]
§ 17:5	—Select a key theme [Deleted]
§ 17:6	—Tell a story [Deleted]
§ 17:6.10	——Elements of opening stories
§ 17:7	—Be brief and be vivid
§ 17:8	—Use visual aids
§ 17:9	—Establish trust
§ 17:10	—Prepare and rehearse
§ 17:11	—Prohibited comments
§ 17:12	—Conclusion
§ 17:13	Argument to the court—Distinctive aspects
§ 17:14	—Questions from the bench
§ 17:15	—Distinguishing prior rulings as an
	affirmative strategy
§ 17:16	—Conversational approach
§ 17:17	—When to quit
§ 17:18	—Twelve don'ts for argument to a court
§ 17:19	—Some critical do's in argument to a court
§ 17:20	Argument to a jury—In general
§ 17:21	—The problem of the adversary's
	characterizations
§ 17:22	—Six no-no's

0 4 = 00	D 1
§ 17:23	—Beware of attacks on any group—Even
	unintentionally
§ 17:24	—Jurors' questions
§ 17:25	—Try the argument on an intelligent
	nonlawyer
§ 17:26	—Overt vouching
$\S 17:27$	—Treating the case as simple
§ 17:28	—Role of jury
§ 17:29	—Juror questions
§ 17:30	—Some don'ts in arguing to a jury
§ 17:30.10	—Name-calling in closing argument
§ 17:31	—Jurors' questions—"Short trial"
	summations
§ 17:32	——Defamation case
§ 17:33	——Bank fraud case
§ 17:34	— —False financial statements case
§ 17:35	——Attacking a cooperating witness
§ 17:36	——Overcoming sympathy
§ 17:37	——"Transparency"
§ 17:38	— — Trial run before nonlegal audience
§ 17:39	———Use of common experience
§ 17:40	— — —Length
§ 17:41	— — Multiple techniques
§ 17:42	— —Analyzing opposing arguments
§ 17:42 § 17:42.10	— —Analyzing opposing arguments Closing Argument on behalf of Martha Stewart
	——Analyzing opposing arguments Closing Argument on behalf of Martha Stewart Summation to a court
§ 17:42.10	Closing Argument on behalf of Martha Stewart Summation to a court
§ 17:42.10 § 17:43	Closing Argument on behalf of Martha Stewart
\$ 17:42.10 \$ 17:43 \$ 17:44	Closing Argument on behalf of Martha Stewart Summation to a court First versus second argument Interaction of oral and written advocacy—
\$ 17:42.10 \$ 17:43 \$ 17:44	Closing Argument on behalf of Martha Stewart Summation to a court First versus second argument
§ 17:42.10 § 17:43 § 17:44 § 17:45	Closing Argument on behalf of Martha Stewart Summation to a court First versus second argument Interaction of oral and written advocacy— Immediacy versus completeness —Risks of last-minute revisions
§ 17:42.10 § 17:43 § 17:44 § 17:45 § 17:46	Closing Argument on behalf of Martha Stewart Summation to a court First versus second argument Interaction of oral and written advocacy— Immediacy versus completeness
\$ 17:42.10 \$ 17:43 \$ 17:44 \$ 17:45 \$ 17:46 \$ 17:46.50	Closing Argument on behalf of Martha Stewart Summation to a court First versus second argument Interaction of oral and written advocacy— Immediacy versus completeness —Risks of last-minute revisions —Improving written advocacy —Citations
\$ 17:42.10 \$ 17:43 \$ 17:44 \$ 17:45 \$ 17:46 \$ 17:46.50 \$ 17:47	Closing Argument on behalf of Martha Stewart Summation to a court First versus second argument Interaction of oral and written advocacy— Immediacy versus completeness —Risks of last-minute revisions —Improving written advocacy
\$ 17:42.10 \$ 17:43 \$ 17:44 \$ 17:45 \$ 17:46 \$ 17:46.50 \$ 17:47 \$ 17:47.50 \$ 17:48	Closing Argument on behalf of Martha Stewart Summation to a court First versus second argument Interaction of oral and written advocacy— Immediacy versus completeness —Risks of last-minute revisions —Improving written advocacy —Citations — Persuasion through use of legal citation —Nonsexist language
\$ 17:42.10 \$ 17:43 \$ 17:44 \$ 17:45 \$ 17:46 \$ 17:46.50 \$ 17:47 \$ 17:47.50	Closing Argument on behalf of Martha Stewart Summation to a court First versus second argument Interaction of oral and written advocacy— Immediacy versus completeness —Risks of last-minute revisions —Improving written advocacy —Citations — Persuasion through use of legal citation —Nonsexist language —Complementary use of oral and written
\$ 17:42.10 \$ 17:43 \$ 17:44 \$ 17:45 \$ 17:46 \$ 17:46.50 \$ 17:47 \$ 17:47.50 \$ 17:48 \$ 17:49	Closing Argument on behalf of Martha Stewart Summation to a court First versus second argument Interaction of oral and written advocacy— Immediacy versus completeness —Risks of last-minute revisions —Improving written advocacy —Citations — —Persuasion through use of legal citation —Nonsexist language —Complementary use of oral and written argument
\$ 17:42.10 \$ 17:43 \$ 17:44 \$ 17:45 \$ 17:46 \$ 17:46.50 \$ 17:47 \$ 17:47.50 \$ 17:47.50 \$ 17:48 \$ 17:49	Closing Argument on behalf of Martha Stewart Summation to a court First versus second argument Interaction of oral and written advocacy— Immediacy versus completeness —Risks of last-minute revisions —Improving written advocacy —Citations — Persuasion through use of legal citation —Nonsexist language —Complementary use of oral and written argument —Use of appendixes
\$ 17:42.10 \$ 17:43 \$ 17:44 \$ 17:45 \$ 17:46 \$ 17:46.50 \$ 17:47 \$ 17:47.50 \$ 17:48 \$ 17:49	Closing Argument on behalf of Martha Stewart Summation to a court First versus second argument Interaction of oral and written advocacy— Immediacy versus completeness —Risks of last-minute revisions —Improving written advocacy —Citations — —Persuasion through use of legal citation —Nonsexist language —Complementary use of oral and written argument
\$ 17:42.10 \$ 17:43 \$ 17:44 \$ 17:45 \$ 17:46 \$ 17:46.50 \$ 17:47 \$ 17:47.50 \$ 17:48 \$ 17:49 \$ 17:50 \$ 17:51	Closing Argument on behalf of Martha Stewart Summation to a court First versus second argument Interaction of oral and written advocacy— Immediacy versus completeness —Risks of last-minute revisions —Improving written advocacy —Citations — Persuasion through use of legal citation —Nonsexist language —Complementary use of oral and written argument —Use of appendixes —Confusion of technical and nontechnical terminology
\$ 17:42.10 \$ 17:43 \$ 17:44 \$ 17:45 \$ 17:46 \$ 17:46.50 \$ 17:47 \$ 17:47.50 \$ 17:48 \$ 17:49 \$ 17:50 \$ 17:51 \$ 17:51	Closing Argument on behalf of Martha Stewart Summation to a court First versus second argument Interaction of oral and written advocacy— Immediacy versus completeness —Risks of last-minute revisions —Improving written advocacy —Citations — Persuasion through use of legal citation —Nonsexist language —Complementary use of oral and written argument —Use of appendixes —Confusion of technical and nontechnical terminology —Texts of documents
\$ 17:42.10 \$ 17:43 \$ 17:44 \$ 17:45 \$ 17:46 \$ 17:46.50 \$ 17:47 \$ 17:47.50 \$ 17:49 \$ 17:50 \$ 17:51 \$ 17:52 \$ 17:53	Closing Argument on behalf of Martha Stewart Summation to a court First versus second argument Interaction of oral and written advocacy— Immediacy versus completeness —Risks of last-minute revisions —Improving written advocacy —Citations — Persuasion through use of legal citation —Nonsexist language —Complementary use of oral and written argument —Use of appendixes —Confusion of technical and nontechnical terminology —Texts of documents —Pejorative comments in writing
\$ 17:42.10 \$ 17:43 \$ 17:44 \$ 17:45 \$ 17:46 \$ 17:46.50 \$ 17:47 \$ 17:47.50 \$ 17:49 \$ 17:50 \$ 17:51 \$ 17:52 \$ 17:53 \$ 17:54	Closing Argument on behalf of Martha Stewart Summation to a court First versus second argument Interaction of oral and written advocacy— Immediacy versus completeness —Risks of last-minute revisions —Improving written advocacy —Citations — Persuasion through use of legal citation —Nonsexist language —Complementary use of oral and written argument —Use of appendixes —Confusion of technical and nontechnical terminology —Texts of documents —Pejorative comments in writing Common errors in motion practice
\$ 17:42.10 \$ 17:43 \$ 17:44 \$ 17:45 \$ 17:46 \$ 17:46.50 \$ 17:47 \$ 17:47.50 \$ 17:48 \$ 17:49 \$ 17:50 \$ 17:51 \$ 17:52 \$ 17:53 \$ 17:54 \$ 17:55	Closing Argument on behalf of Martha Stewart Summation to a court First versus second argument Interaction of oral and written advocacy— Immediacy versus completeness —Risks of last-minute revisions —Improving written advocacy —Citations —Persuasion through use of legal citation —Nonsexist language —Complementary use of oral and written argument —Use of appendixes —Confusion of technical and nontechnical terminology —Texts of documents —Pejorative comments in writing Common errors in motion practice Sentencing—In general
\$ 17:42.10 \$ 17:43 \$ 17:44 \$ 17:45 \$ 17:46 \$ 17:46.50 \$ 17:47 \$ 17:47.50 \$ 17:49 \$ 17:50 \$ 17:51 \$ 17:52 \$ 17:53 \$ 17:54	Closing Argument on behalf of Martha Stewart Summation to a court First versus second argument Interaction of oral and written advocacy— Immediacy versus completeness —Risks of last-minute revisions —Improving written advocacy —Citations — Persuasion through use of legal citation —Nonsexist language —Complementary use of oral and written argument —Use of appendixes —Confusion of technical and nontechnical terminology —Texts of documents —Pejorative comments in writing Common errors in motion practice

§ 17:58	—Departure
§ 17:59	—Long-term viability of guidelines?
§ 17:60	—Treatment of sophisticated criminal activity
§ 17:61	—Probation report phase
§ 17:62	—Securities case example
§ 17:63	—Request for hearing
§ 17:64	—Fine related to gain or loss
§ 17:65	—Death penalty issue
§ 17:66	—Favorable to the penalty in some cases
§ 17:67	—Unfavorable to the penalty
§ 17:68	—Title Eight of the Violent Crime Control
	Act of 1994: Departures from otherwise
	mandatory minimum sentences
§ 17:69	—Additional options
§ 17:70	—Risks of freeing cooperating criminals
	because of Sentencing Guidelines § 5K.1 and
	witness protection programs
§ 17:71	—Areas of weakness where threat to the
	public exists
§ 17:72	—Perjury penalties or sentencing
	enhancement for alleged falsity in self-defense?
0 1 5 5 0	bell defelled.
§ 17:73	—Evils of and reasons for survival of
C 1 7 7 4	mandatory sentencing
§ 17:74	Additional references—Overview
§ 17:75	—Generally
§ 17:76	—Using demonstrative materials

#### CHAPTER 18. APPELLATE ADVOCACY

§ 18:1	How appellate advocacy differs from trial advocacy—In general
§ 18:1.10	Appellate Advocacy
§ 18:2	How appellate advocacy differs from trial advocacy—Options for the court
§ 18:3	—Questions from the bench
§ 18:4	—Agreements for opposite reasons
§ 18:5	—Rebuttal
§ 18:6	—The quotable and applicable phrase
§ 18:7	—Risk of abandonment
§ 18:8	—Deadlines for filing
§ 18:9	—Limitation of issues
§ 18:10	—Style
§ 18:11	—Importance of oral argument
§ 18:12	—Effective appellate advocacy
§ 18:13	The jugular—In general

#### Advocacy

§ 18:14	—"Hot" or "cold" bench
§ 18:15	—Facts and "importance" of the case
§ 18:16	—Simplistic approach if justified
§ 18:17	—"Moot court"
§ 18:18	—Rereading briefs
§ 18:19	—Being prepared for surprises
§ 18:20	—Amicus participation
§ 18:20.10	——Briefs—Court's perspective
§ 18:21	Additional references—In general
§ 18:22	—Undisputed historical facts
§ 18:23	—Scientific issues
§ 18:24	—Discretionary review
§ 18:25	—Checklist for appellate advocacy
§ 18:26	—Federal appellate practice
§ 18:27	—Waiver of right to appeal
§ 18:28	—Pendent appellate jurisdiction

#### **CHAPTER 19. TRIAL STRATEGIES**

§ 19:1	Central theme—In general
§ 19:2	—"Why"
§ 19:3	—Staffing
§ 19:4	—Litigation consultants
§ 19:4.1	—Use of social media and Internet
§ 19:5	—Delusive exactness, cost and delay?
§ 19:6	Strategies in pleading
§ 19:7	Pretrial phase: Discovery and establishing relationship with opposing counsel—In general
§ 19:8	—Cataloguing of documents
§ 19:9	—Indexing or grouping
§ 19:10	—Use and abuse of interrogatories
§ 19:11	—Arbitration
§ 19:12	—Challengeable material
§ 19:13	—Handwritten notations added
§ 19:14	—Investigative issues for prosecutors
§ 19:15	—Advance sheets and discovery
§ 19:16	Selection of tribunal
§ 19:17	—Jury selection
§ 19:17.50	<ul> <li>—Systematic selection and supplemental questionnaire</li> </ul>
§ 19:18	——Limitations on peremptory challenges
§ 19:19	— Aiding jurors in deciding the case
§ 19:20	<ul><li>—Sequestration of juries</li></ul>
§ 19:21	— —Alternate jurors

§ 19:22	—Jury waivers
§ 19.22 § 19:23	— Early focus on central issues
§ 19.23 § 19:24	
•	——Relevance of summary judgment
§ 19:25	——Summary judgment and discovery
§ 19:26	— What is a count?
§ 19:27	——Shift in focus on concept of "suits at
	common law" as of 1791 for purposes of jury trial
§ 19:28	Selection of evidence—In general
§ 19:29	—Otherwise inadmissible evidence
§ 19:30	—Use of stipulations
§ 19:31	—Use and abuse of repetition
§ 19:32	—Business record rule
§ 19.32 § 19:33	—Innoculating against bad facts [Deleted]
§ 19.34	—Inoculating against bad facts [Deteted] —Inoculation theory [Deleted]
§ 19:35	Timing and length of trial—In general
§ 19:36	Eight likely ways to delay (or lose) your
3 10.00	case
§ 19:37	Combatting delay, accelerating cases and
5 ==	rules for the court—In general
§ 19:38	—Use of prior delays
§ 19:39	—Iranian case example
§ 19:40	—Scope of problem and attempted responses
§ 19:41	—Delay and procedure
§ 19:42	—Expedited motion procedure
§ 19:43	—Magna carta provision
§ 19:44	—Settlement, settlement, and settlement!
§ 19:45	—Early settlements
§ 19:46	—Expediting the trial by anticipating
	unnecessary delays
§ 19:47	—Summary disposition
§ 19:48	—Options for accelerating litigation by
	consent
§ 19:49	—Delay of litigation because of attorney fee
	disputes
§ 19:50	—Procedural complexity
§ 19:51	Preliminary relief—In general
§ 19:52	—Changing attitudes
§ 19:53	—Interaction with other procedural issues
§ 19:54	—Injunctions and the public interest
§ 19:55	—Injunction bonds
§ 19:56	—Client signature
§ 19:57	—Appeals concerning bonds
§ 19:58	—Legal fees in antitrust injunctive suits
§ 19:59	—Modification

§ 19:60	—More on intervention issues
§ 19:61	—Hearing combined with merits: Fed R Civ
	P 65(a)(2)
§ 19:62	—Ex parte orders
§ 19:63	—Preferences for injunctive relief in certain
	circumstances
§ 19:64	—Injunctions against criminal conduct
§ 19:65	—Additional remedies
§ 19:66	—Reverse impact of cooperation even during
8 10.67	litigation
§ 19:67	<ul> <li>—Injunctions, permanent or temporary, at the behest of governmental bodies</li> </ul>
§ 19:68	—All deliberate speed
§ 19:69	—Imprisonment
§ 19:70	—Least intrusive option
§ 19:71	Use and abuse of correspondence—In
3 10.11	general
§ 19:72	—Dealing with abuse of correspondence
§ 19:73	—Written agreements with opposing counsel
§ 19:74	—Sending papers by hand to the tribunal
	but by mail to the adversary
§ 19:75	—Avoiding wars of correspondence
§ 19:76	Defense strategy—Where the merits are
	strong
§ 19:77	—Where the defense is vulnerable
§ 19:78	Counterclaims
§ 19:79	Strategic issues in criminal defense—In
_	general
§ 19:80	—Role of informants and cooperating
8 40 04	witnesses
§ 19:81	—Relationship of need for and abuses by informants
¢ 10.00	
§ 19:82	—Under what circumstances is an adverse inference "compulsion"?
§ 19:83	—Notice under the Fourth Amendment
§ 19:84	—Informant and cooperating witness crime
§ 19:85	—Prosecutive ethics
§ 19:86	—Availability of internal manuals
§ 19:87	—Retention of grand juries
§ 19:88	—Threat to impartiality of prosecution
§ 19:89	—Importance of creative defense counsel
§ 19:90	—Identification based on characterizations
5 10.00	of ethnicity rather than description of
	actual observations?
§ 19:91	—Releasing the innocent?

§ 19:92	—Defense option in interrogation where
	privilege against self-incrimination
	inappropriate
§ 19:93	—Threat to Impartiality of prosecution—
	Strategies for prosecutors
§ 19:93.10	Leadership in Trial Advocacy
§ 19:94	Psychology of trial advocacy—State of mind
	of the advocate
§ 19:95	——Defining the valid claims of the party
§ 19:96	— — The power of suggestion and expecting
	the unexpected
§ 19:97	———The unexpected
§ 19:98	———Elbowing the agent
§ 19:99	<ul> <li>—Strategy and psychology of trial</li> </ul>
	objections—Purposes of objections
§ 19:100	— — —Vulnerable objectives
§ 19:101	— — Protective devices
§ 19:102	———Avoid controversy over off-record
	discussions
§ 19:103	———Warning jurors not to consider
	assumptions in questions
§ 19:104	———Offers of proof as tools for either
	side
§ 19:105	———Privileges in federal cases
§ 19:106	———Philosophy of evidentiary rules
§ 19:107	— Meeting the unfair move and
	counter-hardball
§ 19:108	———Involving the tribual
§ 19:109	— — —Antidotes to risks
§ 19:110	— — — Timing
§ 19:111	———Morality and strategy
§ 19:112	— — —Be prepared—Or surprised
§ 19:113	———If both sides are vulnerable
§ 19:114	———Uses of moral indignation
§ 19:115	——Types of responses to unfair
	litigation tactics
§ 19:116	———Major types of unfair litigation
	tactics
§ 19:117	— — Tactic 1: Falsehoods—Questions
	relevant to responses
§ 19:118	————Marginal exaggeration or
	distortion
§ 19:119	————Direct assertions by counsel or
	characterizations not in evidence
§ 19:120	———Tactic 2: Failure to furnish

	reasonably requested relevant evidence or
	answers—Questions relevant to responses
§ 19:121	———Tactic 3: Excessively burdensome
	requests for material or witnesses—
	Questions relevant to responses
§ 19:122	———Tactic 4: Obstruction by elaboration
	of contentions and submissions—Questions
	relevant to responses
§ 19:123	— — Tactic 5: Generic abuse: Attempts to
0.10.10.1	browbeat
§ 19:124	——Tactic 6: Provocation
§ 19:125	— — — Counter-hardball
§ 19:126	———Category A: Folklore of petulance
§ 19:127	———Category B: Alternative folklore of
6 10 100	counter-hardball
§ 19:128	———Tenacity in the face of hardball
§ 19:129	———Combatting the better staffed
\$ 10,120	opponent
§ 19:130	— — — Utilizing flexibility
§ 19:131	— — —Counter-hardball: Situation-specific weapon not universal solvent
§ 19:132	— — Risks of vendettas
§ 19.132 § 19:133	— ——Itisks of vendettas  — —Attitude toward the tribunal
§ 19.133 § 19:134	
§ 19:154	— — — Attitude toward clerks, court
§ 19:135	reporters, and other officers — — —Importance of background
8 19.199	knowledge
§ 19:136	———Multiple tradeoffs influenced by
§ 13.100	anticipated judicial reaction
§ 19:137	— — What the case is about
§ 19:138	— — —Lack of time to prepare
§ 19:139	——————————————————————————————————————
§ 19:140	———A peek at the defense  ———Ambush?
§ 19.140 § 19:141	— ——Ambusii: — — —Public interest
§ 19.141 § 19:142	
-	— — —Injunction bond
§ 19:143	——Expedited trial
§ 19:144	— ——Summary judgment
§ 19:145	——Rule 11
§ 19:146	——Jury waiver?
§ 19:147	— — —Argus v Kodak
§ 19:148	———Direct negotiations
§ 19:149	——Price fixing
§ 19:150	———Expedited discovery
§ 19:151	———Dismissal without prejudice
§ 19:152	— — Simple adjournment

0 10 150	40 4 1 4
§ 19:153	——40 per cent solution
§ 19:154	———Client approval
§ 19:155	———Cafeteria of options
§ 19:156	———Payment by certified check
§ 19:157	— — — Unmentioned arguments
§ 19:158	— — Mitigation
§ 19:159	———Banning references to negotiating
0.10.100	history
§ 19:160	———Parol evidence
§ 19:161	———"Trump card" settlement
§ 19:162	———Attitude of the court
§ 19:163	— — Where an unpopular stance is
\$ 10.164	necessary
§ 19:164	<ul> <li>— Dealing with a hostile tribunal or tribunal with preconceptions</li> </ul>
§ 19:165	——Constructive use of anger
§ 19:166	——Generally
§ 19:167	——Generally ——Incorporation of potentially opposed
§ 13.107	elements
§ 19:168	——Personality conflicts
§ 19:169	Reliance on opponent's facts
§ 19:170	Risks to even the skilled advocate despite
3 10.110	the merits of the case
§ 19:171	Identification and selection of constitutional
0	issues—Overview
§ 19:172	—Generally
§ 19:173	Additional references—Professionalism and
	psychology of trial advocacy
§ 19:174	—Psychology of trial advocacy
§ 19:175	—Trial strategy
§ 19:175.50	Cyberjuries
§ 19:176	Additional references—Jury selection,
	conduct, and practices
§ 19:177	—Professionalism
§ 19:178	—Jury selection
§ 19:179	-"Suits at common law"
§ 19:180	—Specific contexts
§ 19:181	—Other strategic aspects
§ 19:182	—Criminal cases
§ 19:183	Forty-nine don'ts—And critical do's—In
3 20.200	litigation before a single judge for all
	purposes (and often before others as
	well)—Prefiling phase
§ 19:184	—Initial filing phase
§ 19:185	—Pretrial phase

§ 19:186	—Voir dire
§ 19:187	—Trial phase
§ 19:188	—Post-trial phase
§ 19:189	Seizing the advantages of a single judge
	assigned for all purposes

# CHAPTER 20. STRATEGIC IMPACT OF NEW RULES AND ABUSE OF LITIGATION The strategy of change and impact on strategy— The strategy of the strateg

§ 20:1	Directions of change and impact on strategy— Private Securities Litigation Reform Act of 1995
§ 20:2	—Impact of 1993 Amendments to Rule 11, Federal Rules of Civil Procedure
§ 20:3	—Impetus for collegiality
§ 20:4	—Development of adverse inference as principal weapon against litigation abuse
§ 20:5	Issues raised by expansion of sanctions—In general
§ 20:6	—Importance of independence of the bar
§ 20:7	—Ethics opinion
§ 20:8	—"Ordinary" costs
§ 20:9	—Inherent sanction authority
§ 20:10	—"Objective" test
§ 20:11	—Impact of assumptions behind the rules
§ 20:12	Issues raised by of sanctions—Substantive merit of litigation
§ 20:13	—Prosecution for fraud in litigation
$\S 20:14$	—Published criticism of counsel as sanction
§ 20:15	Abuse of litigation or threats—In general
§ 20:16	—Abusive threats of litigation
$\S 20:17$	—Retaliatory litigation
§ 20:18	—Self-executing sanctions
§ 20:19	—Other nonsanction sanctions
§ 20:20	—Threats of suit for improper purposes
§ 20:21	—Breach of prior settlement
§ 20:22	—Toward a new folklore of self-reliance?
§ 20:23	Additional references—Overview
§ 20:24	—Generally
§ 20:25	<ul> <li>Need for basis for prayers for large damages in federal complaints subject to Federal Rule</li> <li>11 and similar state rules</li> </ul>
§ 20:26	—American rule
§ 20:27	—Barring the courthouse door: The facts still happened

#### Volume 2

## PART IV. ALTERNATIVES TO LITIGATION

#### **CHAPTER 21. NEGOTIATION**

§ 21:1	Defining objectives, basic approach and
3 21.1	capturing attention—In general
§ 21:2	—Prerequisite: Objectives and tentative
0	overall strategy
§ 21:3	—Questioning in negotiation
§ 21:4	—Need for attention
§ 21:5	—Listening fully
§ 21:6	—Taking the unexpected position
§ 21:7	—Surprise through unequivocal, if partial,
	agreement
§ 21:8	—Communication by deed
§ 21:9	—Nonverbal communication
§ 21:10	—Creating or using social relationships
§ 21:11	Dynamics of positions of parties—In general
§ 21:12	—Nonbinding accommodations
§ 21:13	—"Bathtub" or "lifeboat" bargaining
§ 21:14	—Counterpoint to meltsner & schrag
§ 21:15	—Synthesis of the positions
§ 21:16	—Do the parties need a fight before an
	agreement?
$\S 21:17$	—If you do it, get credit
§ 21:18	—Damages when a party will not pay
	damages
§ 21:19	—Verdict information
§ 21:20	—Colgate provision
§ 21:21	—Attorney blockage of settlements; Duty to
	transmit settlement offers
§ 21:22	—Contacting represented governmental
	adversary to negotiate
§ 21:23	—Ex parte witness interviews?
§ 21:24	The importance of information—In general
§ 21:25	—Getting information from the other side
§ 21:26	—Use of videotapes and other evidence
§ 21:27	<ul> <li>Pre-filing attempt at settling pharmacy malpractice case and pitfalls</li> </ul>
§ 21:28	The "sign of weakness" versus "willingness to negotiate" dilemma—In general

§ 21:29	—Advance work
§ 21:30	—How will your gambit look to the other
	side? On not cornering the tiger—Or
	seeming to run away
§ 21:31	—Absurd initial offers
§ 21:32	—Bypassing the problem: Making the
	negotiating partner your ally
§ 21:33	—The <i>must</i> negotiation
§ 21:34	The "sign of weakness" versus "willingness to negotiate" Dilemma—Difficult
0.01.05	negotiators
§ 21:35	Maintaining communication channels
0 01 00	through postponing confrontation
§ 21:36	Delay
§ 21:37	Multidimensional bargaining
§ 21:38	Unwritten settlements
§ 21:39	Issues in drafting
§ 21:40	Specific provisions in agreements— Statements of purpose
§ 21:41	—Recitals
§ 21:42	—Remedies
§ 21:43	—Street-wise drafting
§ 21:44	—Plain language
$\S 21:45$	—Baseball arbitration
§ 21:46	—Good faith negotiation provisions
$\S 21:47$	—Banning reference to history of
	discussions
§ 21:48	—Parol evidence
§ 21:49	—Wider options
$\S 21:50$	—Long-term contracts
$\S 21:51$	—Cash-short companies
$\S 21:52$	—Anti-assignment clauses
§ 21:53	<ul><li>—Automatic deliveries or self-executing offers</li></ul>
§ 21:54	—Judicial jurisdiction to enforce settlements
§ 21:55	<ul><li>—Internal enforcement or expediting function</li></ul>
§ 21:56	<ul> <li>Confidentiality and return or nonreturn of discovery materials</li> </ul>
§ 21:57	— — Options in agreements
§ 21:58	Third-party settlement—In general
§ 21:59	—Facilitated negotiation [Deleted]
§ 21:60	—What is facilitated negotiation? [Deleted]
§ 21:61	—Why a facilitator? [Deleted]
§ 21:62	—Rules and tips for a successful facilitated negotiation [Deleted]

§ 21:63	—Controlling the process [Deleted]
§ 21:64	—The format of a facilitated negotiation [Deleted]
§ 21:64.50	Online Dispute Resolution—Deception in computer-
	facilitated negotiation and dispute resolution
§ 21:65	Third-party settlement—The use of experts
Ü	[Deleted]
§ 21:66	Incommunicado plenipotentiaries
-	(mini-trial)—In general
§ 21:67	—Impact of Judicial Improvements Act of
0	1990
§ 21:68	"High noon"—In general
§ 21:69	—Psychological techniques
§ 21:70	"Shadow litigation"
§ 21:71	"Fight-talk" strategy
§ 21:71 § 21:72	Extreme positions—In general
§ 21.72 § 21:73	—The 100 per cent phenomenon
-	
§ 21:74	Binding versus nonbinding agreements—In general
\$ 01.75	
§ 21:75	—The "just cut it out" option
§ 21:76	—No-agreement agreement coordination
§ 21:77	—International relevance
§ 21:78	—Agreements barring oral agreements
§ 21:79	—Reliance on enforceability or reputation
	for reliability
§ 21:80	Slicing
§ 21:81	Creation of novel procedures
§ 21:82	"Expanded pie"
§ 21:83	Formalized feedback
§ 21:84	The option of no agreement
§ 21:85	Client's hovering veto versus plenipotentiary
3 21.00	power
§ 21:86	"Third-party reviewed" negotiations—In
3 21.00	general
§ 21:87	—Third-party chair or observer
§ 21:88	Negotiation as conversation
§ 21:88.10	
	—E-mail dealmaking
§ 21:89	—Escalation of hostility or defusing it
§ 21:89.10	——Emotions in negotiation
§ 21:90	——Coping with the difficult lawyer in
0.01.01	settlement negotiations
§ 21:91	——Beat them in a round or two
§ 21:92	——Communicate a detailed offer in
	writing
§ 21:93	——Play the waiting game
§ 21:94	——Romance the opposing lawyer

§ 21:94.10	— —Use of apology
§ 21:95	——Make the other side put their offers in
	writing
§ 21:96	— —Rule 68 offer of judgment
§ 21:97	——Threaten them with someone much
	worse than you
§ 21:98	—Raising the level of abstraction or
	lowering it
§ 21:99	—Debating past history
§ 21:100	—Conversation at the professional level
§ 21:100.10	Negotiation as healing process
§ 21:101	Additional references—In general
§ 21:102	—Business and commercial negotiation
§ 21:103	—Other
§ 21:104	Procedural and substantive options for
	settlement of litigation—Backdrop: How
	settlement negotiations during litigation
	differ from other negotiations
§ 21:105	—Twenty settlement opportunities and
	options in the litigation context—Pre-filing
0.01.100	phase
§ 21:106	——Immediate post-filing stage
§ 21:107	——Potentially advantageous provisions
§ 21:108	——Procedures for expediting settlement
0.01.100	after litigation is initiated
§ 21:109	——Additional important opportunities for
0.01.110	settlement
§ 21:110	—Honesty in settlement negotiations
§ 21:111	Settlement Advocacy

## CHAPTER 22. ALTERNATIVE DISPUTE RESOLUTION

§ 22:1	Informal options
§ 22:2	Impartial umpire selected by the parties—In general
§ 22:3	—Courts as arbitrators by consent: In fact but not in name
§ 22:4	—What clients must know about mediation
§ 22:4.10	—Models of mediation
§ 22:5	—Slam dunks are rare
§ 22:6	—The parties' mediation roles
§ 22:7	—Who must be present?
§ 22:8	—Preparing for mediation
§ 22:9	—Costs: Mediation v. Trial Costs
§ 22:10	—Mediation timing

§ 22:11	—Getting the other party on board
§ 22:12	—Documenting the agreements
§ 22:13	—The need for closure and commitment
§ 22:14	—Facilitative mediation
§ 22:14.30	—Mediation advocacy
§ 22:14.50	-E-Neutrals
§ 22:15	Arbitration administered by a private tribunal—In general
§ 22:16	—Arguing arbitrations
§ 22:17	—High court widens scope of Federal Arbitration Act
§ 22:17.50	Predispute arbitration provisions
§ 22:18	Court-Annexed arbitration leading to nonbinding award
§ 22:19	Other nonbinding options
§ 22:20	Pre-commitment clauses
§ 22:21	Large-scale controversies—In general
§ 22:22	—Use of ADR to implement settlement [Deleted]
§ 22:23	Government disputes
$\S~22:24$	Additional references—In general
§ 22:25	—Private judging
§ 22:26	—Mediation
§ 22:27	—Arbitration
§ 22:28	——Case law: Nature and form of arbitration

#### **CHAPTER 23. PREPARED POSITIONS**

§ 23:1	Determining objectives
§ 23:2	Communication of prepared options—In general
8 99.9	0
§ 23:3	—Statements of policy
§ 23:4	—Disclosures affecting credibility
§ 23:5	—Assertion of nonexistent contractual
	obligation
§ 23:6	—Bad faith denial of obligation
§ 23:7	—Delegation of duties not an excuse
§ 23:8	—Regulatory requirement of contract terms
§ 23:9	—Issue of unfair surprise to less
	knowledgeable party
§ 23:10	—Erroneous self-serving legal advice
§ 23:11	—Bond indentures and other restraints on
	corporate expenditures or transactions
§ 23:11.50	—Liquidated damages provisions—Encourage breach?
00010	
§ 23:12	Plain language—In general
§ 23:13	—Comprehension of audience

#### Advocacy

§ 23:14	—When non-English language may be required
§ 23:15	—Plain language movement and the bar
§ 23:16	Feedback—In general
§ 23:17	—Uses of dissent
§ 23:18	Additional references—Overview
§ 23:19	—Generally
§ 23:20	—Insurance
§ 23:21	—Real property or lease agreements
§ 23:22	—Criminal law; Victim impact statements
§ 23:23	—Other specific agreements
_	PTER 24. COMPLIANCE
STRA	ATEGIES
§ 24:1	The need—In general
§ 24:2	—Seeking interpretations or revisions
§ 24:3	—Elements of compliance programs
§ 24:4	—Expanding enterprises
§ 24:5	Compliance audits
§ 24:6	Understanding the purposes of legal requirements
§ 24:7	If you don't comply: Challenging penalties because of lack of understandability of requirements—In general
§ 24:8	—Examination of a regulatory expert
§ 24:9	—Use of experts to testify to workings of industry or regulatory scheme
§ 24:10	—Consumer cases
§ 24:11	—Computer errors
§ 24:12	<ul> <li>False statements as a way of bypassing vulnerable laws or regulations</li> </ul>
§ 24:13	—Attempts to penalize citizens who object to governmental projects
§ 24:14	Additional references—In general
§ 24:15	—Sentencing commission compliance program guidelines
§ 24:16	—Public health and bioterrorism compliance
§ 24:17	—Immigration
§ 24:18	—Intellectual property/capital
8 24:19	—Real property and leases

# PART V. ADVOCACY TO A PUBLIC OR PRIVATE INSTITUTION

## CHAPTER 25. ADVOCACY FROM OUTSIDE AN ORGANIZATION

§ 25:1	How agencies differ from courts—In general
§ 25:2	—Restrictions
§ 25:3	—Negotiated rulemaking
§ 25:4	—Lobbying for grants
§ 25:5	—Following own procedures
§ 25:6	—Accelerating procedure
§ 25:7	—Staff information
§ 25:8	—Relevant factors
§ 25:9	—Advisory committees
§ 25:10	—Addition to administrative procedures
§ 25:11	Initial contact with an agency—In general
§ 25:12	—Level of approach
$\S 25:13$	—Expediting procedure
§ 25:14	—What to submit
§ 25:15	—Timing
§ 25:16	—Follow-up
§ 25:17	—Second round?
§ 25:18	——As recipient of agency inquiry—Initial steps
§ 25:19	— — On-site inspection
§ 25:20	— — — Availability of information to third
	parties
§ 25:21	— — — Witness interviews
§ 25:22	———Taking creative risks
$\S 25:23$	———Reaching the real decisionmakers
$\S 25:24$	———Reaching accomodation with an agency
$\S 25:25$	— — Higher-level review
§ 25:26	— — — Media contact
$\S 25:27$	——Race between settlement and litigation
$\S 25:28$	— — Right to Financial Privacy Act
$\S 25:29$	———Reverse privacy? Governmental officials'
	financial disclosures
$\S 25:30$	Role of delay
$\S 25:31$	Special aspects of agency litigation—In general
§ 25:32	—Contacting agency personnel as well as counsel?
§ 25:33	Judicial review of agency action—In general
§ 25:34	—Roots of review

§ 25:35	—Nonacquiescence in judicial decisions
§ 25:36	—Agency action reversing hearing officer
	rulings; Agency inaction
$\S 25:37$	—Consent decrees
$\S 25:38$	—Suing the right party?
$\S 25:39$	—Appellate counsel
$\S 25:40$	—Exhaustion
§ 25:41	—Authority of officers
$\S 25:42$	—Scope of review
$\S 25:43$	Private organizations as forums
$\S 25:44$	Additional references—In general
$\S 25:45$	—Takings implications
$\S 25:46$	—Exhausting parties by adding procedure
$\S 25:47$	—Information laws
$\S 25:48$	—Square corners?
$\S 25:49$	—Jury trials for administrative civil penalties?
$\S 25:50$	-Magna Charta ch 48: Citizen review of
	administrative rules and practices?

## CHAPTER 26. ADVOCACY FROM INSIDE AN ORGANIZATION

§ 26:1	From the "working level"
§ 26:2	The risk-safety spectrum—In general
§ 26:3	—Technical advice
§ 26:4	—The outer limit of the spectrum?
§ 26:5	—Importance of playing dumb at the right time
§ 26:6	Impact of organizational styles—In general
§ 26:7	—Coalition building at all levels
§ 26:8	—Basic concepts
§ 26:9	—Technological disasters
§ 26:10	—Play in the joints
§ 26:11	—Beaverbrook doctrine
§ 26:12	—Reorganization as a response to deeper
	problems
§ 26:13	—Formal systems can work in reverse
§ 26:14	—Job descriptions and performance evaluations
§ 26:15	—Program budgeting
§ 26:16	—Accounting for the cost of paperwork?
§ 26:17	—Bloom doctrine
§ 26:18	—Substituting requests for more authority for
	action in some cases
§ 26:19	—Pecksniffian virtue and the folklore of
0.0000	bureaucracy
§ 26:20	—The other side of ethics in government

8 O.C. 01	Duralinana
§ 26:21	Preclearance
§ 26:22	Supervisory options—In general
§ 26:23	—Dealing with obstacles to decisions
§ 26:24	—Assistants with their own constituencies
§ 26:25	—Creating new organizations
§ 26:26	—Reward systems
§ 26:27	—Tendency of means to become ends
§ 26:28	—Corollary of murphy's law?
§ 26:29	—Using dissent
§ 26:30	—Dealing with grievances
§ 26:31	—Single litmus test?
§ 26:32	—Complex contracting rules: What is the
6 00 00	primary goal of the public sector?
§ 26:33	—Single litmus test?—Importance of layers of
8 96.94	decision
§ 26:34	— — —Tendency to excessive individualized interference in lieu of central direction
§ 26:35	— — Bottleneck factor
§ 26:36	— ——Purposes of review
§ 26:37	— — Peer review
§ 26:38	— — "Negative option"
§ 26:39	— — Volunteers
§ 26:39 § 26:40	— — Expanding role of office of management
8 20.40	and budget (OMB)
§ 26:41	— — — Advisory committees
§ 26:42	— — Ombudsman
§ 26:43	— — — Municipal Administrative Procedure Act
§ 26:44	———Catalytic agents
§ 26:45	———Issues in management training
§ 26:46	— — Problem employees
§ 26:47	——Options to be considered
§ 26:48	——Surviving and contributing in a
3 20.10	machiavellian atmosphere?
§ 26:49	— "Open door" policy
§ 26:50	Deliberate failure—In general
§ 26:51	—Role of the media and oversight
§ 26:52	Inertia or change—In general
§ 26:53	—Legislative oversight of the bureaucracy
§ 26:54	Strategy and tactics—In general
§ 26:55	—Laws of bureaucracy: Corollaries to
8 20.55	parkinson's law
§ 26:56	-Overcoming counterproductive bureaucratic
g 40.00	tendencies
§ 26:57	—Responses—Effective and ineffective
§ 26:58	—Laws of bureaucratic enforcement
3 40.00	—Laws of bureauctanic elliorcement

#### ADVOCACY

§ 26:59	—Controlling negative aspects of bureaucracy
§ 26:60	Additional references—Generally
§ 26:61	—"Whistle blowers"
§ 26:62	—Means of tracing circulated and other
	materials
§ 26:63	—Relevance of function of agency
§ 26:64	—Risks of whistleblower protections themselves
§ 26:65	—Outer limits of authority of public sector
	agencies

Appendix 26-1. Internal Bureaucratic Structure of Agencies

# PART VI. LEGISLATIVE ADVOCACY

### CHAPTER 27. LEGISLATIVE TACTICS

CHAI	TER 27. LEGISLATIVE TACTICS
§ 27:1	Strategic options—Interests
§ 27:2	—Alternatives
§ 27:3	—Characterization of the issue
§ 27:4	—Impact of small numbers
§ 27:5	—Utilizing existing provisions
§ 27:6	—Creative inaction and/or upstream approaches
§ 27:7	—Catalysts
§ 27:8	—Sidestepping ideological barriers
§ 27:9	—Convergence of interests in a technological society
§ 27:9.50	Strategic Options—Impact of Social Media on Passage of Congressional Bills
$\S 27:10$	Strategic options—Widening the cafeteria
§ 27:11	—Ability to point out a problem
$\S 27:12$	—Demands for concessions prior to talks
$\S 27:13$	—Advance public education or attempted
	preemption of opposition
$\S 27:14$	—Toehold strategy
$\S 27:15$	—Talking about the issue
$\S 27:16$	—Catchwords
$\S 27:17$	—Raising a point even if you lose
$\S 27:18$	—Going against the grain—Or with it
$\S 27:19$	—Leveraged intervention
$\S 27:20$	—Removing removable problems
$\S 27:21$	—Polling
§ 27:22	—Litigation as means to industry-wide discovery?

$\S 27:23$	—Legislative advocacy
$\S 27:24$	—Legislative lawyer skills
$\S 27:25$	Legislation: Objectives and alternatives
§ 27:26	Planning the campaign—Judging the facts needed
§ 27:27	—Timing
§ 27:28	—Procedural issues
§ 27:29	—Importance of accuracy and reliability
§ 27:30	Agency rulemaking compared to legislation
§ 27:31	Use of sunshine and freedom of information
§ 27:32	Obtaining organizational support—Evaluation of risks and benefits of involvement
§ 27:33	—Identifying decisionmakers
§ 27:34	—Advantages of disclosure of the objective
§ 27:35	—Internal political structure
§ 27:36	—"Negative option" procedures
§ 27:37	—Parliamentary rules
§ 27:38	—Conflict strategies
§ 27:39	—Relevance of organizational tradition
§ 27:40	—Obtaining committee support
§ 27:41	—Calling before writing
§ 27:42	—Use of drafts
§ 27:43	—"Diagonal" approach
§ 27:44	—"Completed staff work"
§ 27:45	—Weight of organizational endorsements
$\S 27:46$	—Spectrum of representation
$\S 27:47$	"Constituency politics"
$\S 27:48$	Importance of coalitions—In general
$\S 27:49$	—Governmental agencies
$\S 27:50$	—Splitting and combining issues
§ 27:51	—Utilizing an overarching concept: Forest
	emergency example
$\S 27:52$	—Intergroup coalitions
$\S 27:53$	—Forest emergency example
$\S 27:54$	—"Merchant rules"
$\S 27:55$	—Financing methods
§ 27:56	—Consumer preference in business bankruptcies
§ 27:57	—Family values as a potential basis for coalitions
§ 27:58	<ul><li>—Accidental, upstream and downstream coalitions</li></ul>
$\S 27:59$	—Coalition drafting
§ 27:60	—Coalition partners as sources of information

#### ADVOCACY

§ 27:61	—Use of drafts as persuasion tool and to
° 07 00	accelerate bargaining
§ 27:62	— — Mining law illustration
§ 27:63	——Institutional dynamics
§ 27:64	——Pendulum effects
§ 27:65	——Concentrated and dispersed coalitions
§ 27:66	— — Further reference
§ 27:67	Use of the threat of action
§ 27:68	Use of the power of the purse—In general
§ 27:69	—Riders
§ 27:70	—Presidential power
$\S 27:71$	Opposition strategy—Basic approach
§ 27:72	—Common errors of lobbyists
$\S 27:73$	—Drafting strikers in 1946
$\S 27:74$	—One person one vote
§ 27:75	—The adrenalin element
$\S 27:76$	Phases of legislative campaigns—In general
§ 27:77	—Use of leaks
§ 27:78	—Legislative climate in the nineties
§ 27:79	—Possible reactions to these trends
§ 27:80	——Drafting
§ 27:81	———Common drafting issues
§ 27:82	<ul> <li>— Introduction of legislation and "dear</li> </ul>
	colleague" letters
$\S 27:83$	— —Committee consideration
$\S 27:84$	— —Hearings
$\S 27:85$	——Markup and reports
$\S 27:86$	— —Floor action
$\S 27:87$	— —Conference committees and leadership
	bargains
§ 27:88	——Massive legislative packages
§ 27:89	— —One-to-a-customer legislation—Overview
§ 27:90	———Equal protection and separation of
8.05.01	powers objections
§ 27:91	———Reduced leverage of dispersed interests
\$ 07.00	and judicial responses
§ 27:92	— — Remedies to restore equal protection
§ 27:93	— — — Unforeseen consequences
§ 27:94	— —Fast track procedures—Nonamendable bills
§ 27:95	— — Judicial review
§ 27:95 § 27:96	— — — Judicial review — — — Effect on interpretation
§ 27:96 § 27:97	
8 21:91	<ul> <li>— Executive action and its potential expansion</li> </ul>
	Capansion

§ 27:98	———Separate veto of nongermane
	provisions?
$\S 27:99$	— — — Riders
$\S 27:100$	— — —Nonbinding enactments
$\S 27:101$	———Amending process
$\S 27:102$	———Termination of programs
$\S 27:103$	— Post-enactment implementation
$\S 27:104$	Additional references—Generally
$\S 27:105$	—Confrontation
$\S 27:106$	—Litigation/legislation strategy
$\S 27:107$	—Anniversaries
§ 27:108	—Legislative rules
§ 27:109	—State procedure
§ 27:110	—World view versus laundry list
§ 27:111	—Particular lobbying interests/groups

# CHAPTER 28. PROLONGED LEGISLATIVE CAMPAIGNS

§ 28:1	Ignoring "impossibility"—In general
§ 28:2	—Expanding limits of possibility
§ 28:3	—Elements of the campaign
§ 28:4	—Advocacy to the public
§ 28:5	—Alignment of relevant interests
§ 28:6	—Massive public intervention
§ 28:7	—Simplicity
§ 28:8	—Balance of benefits and sacrifices
§ 28:9	—Rhetoric for uphill positions decisionmakers
	know may be right but to be unpopular in the
	short run
§ 28:10	—Role of the media
§ 28:11	Role of litigation programs—Overview
§ 28:12	—Generally
§ 28:13	—Combined strategies
§ 28:14	—Specialized courts
§ 28:15	References on types of legislative outcomes—
	Funds available until expended
§ 28:16	—Budget processes
§ 28:17	—Marshall plan
§ 28:18	—Grant statute drafting
§ 28:19	—Financing mechanisms
§ 28:20	—Third-party benefit programs
§ 28:21	—Licensing
§ 28:22	—Problems connected with references to other
	laws by section number or similar designations

	when amended—Experience under state constitutional ban
§ 28:23	—National common market
•	—End run
	—Simplification of the legal system
	—Options concerning problematic technologies
	—Leveraged intervention
-	—Selection of agency to enforce or apply statute
	—State and federal law
§ 28:30	—Changes in sources of authority
§ 28:31	—Codification
§ 28:32	—Tax incentives
§ 28:33	—Sunshine
-	—Exponential fines
	—Self-help
	—Use of contract clause
§ 28:37	
	—National service
§ 28:39	—Recordkeeping
-	Additional references
· ·	. 90 1 Frigting I am Not to Do Made Applicable

Appendix 28-1. Existing Law Not to Be Made Applicable by Reference

### PART VII. ECONOMIC ARGUMENT

# CHAPTER 29. UNDERSTANDING AND TAKING PART IN ECONOMIC ARGUMENT

### I. INTRODUCTION

§ 29:1	Scope—In general
§ 29:2	-Potential expansion of effectiveness of monetary
	policy
§ 29:3	—Increasing risks
§ 29:4	Importance—Importance of underlying concepts
§ 29:5	—Litigation and legislative significance

### II. NATURE OF ECONOMIC ARGUMENT

§ 29:6 Rational behavior analysis—Overview§ 29:7 —Generally

§ 29:8	Empirical data—Overview
§ 29:9	—Generally
§ 29:10	The open marketplace—Overview
§ 29:11	—Generally
§ 29:12	—Efficiency
§ 29:13	Major types of approaches—Overview
§ 29:14	—Generally
§ 29:15	—The marketplace as self-regulating
§ 29:16	—Keynesian economics
§ 29:17	-Marxist theories, their weaknesses, and
	dilemmas of de-bureaucratizing economies—
	Impact of collapse of the communist empire
§ 29:18	——De-bureaucratizing economies
§ 29:19	——Paradoxes in the shift
§ 29:20	——Shifting economic concepts in the open
0.00.01	society
§ 29:21	— — Obstacles to efforts to de-bureaucratize a
8 00.00	bureaucratic economy
§ 29:22	<ul> <li>— The still photograph and efforts to dismantle bureaucracy</li> </ul>
§ 29:23	— — Dilemma of inflationary pressure
§ 29:24	— — Long-term prospects
§ 29:25	——Post-mortem for marxism as an ideology
§ 29:26	— The next phase in market economics?
§ 29:27	——Interim emergency measures for
8 25.21	de-bureaucratizing?
§ 29:28	——Toward an overall assessment of the failed
3 20.20	ideology
§ 29:29	Theories seeking promotion of openness or
3 20.20	balance
§ 29:30	Participating in economic argument—In general
§ 29:31	—Dynamic or static equilibrium?
§ 29:32	—The modern economy: Inherently dynamic, not
0	static
§ 29:33	—Dynamic equilibrium
§ 29:34	—Limits to growth?
§ 29:35	—Inferences from personal economics to
	functioning of an economy
§ 29:36	—Historical interest rates
§ 29:37	—Multiple effects of events
§ 29:38	—Sources of distortion
§ 29:39	—Lay evaluation of economic experts
§ 29:40	—Public comprehension
§ 29:41	—Supply and demand diagrams
§ 29:42	—Statistics

§ 29:43	Economic argument in a changing context—In general
§ 29:44	—Shifts in public focus on economic issues
§ 29:44 § 29:45	—End of the era of automatic productivity
5 20.40	dividends
§ 29:46	—Shift in climate
§ 29:47	—Importance of inflationary pressures—And
Ü	means used to control them
§ 29:48	—Legal issues and spillovers
§ 29:49	—Countervailing tidal waves of the nineties?
§ 29:50	——Impact on litigation, legislation,
	negotiation, and counseling—Litigation
§ 29:51	— — —Legislation — — —Negotiation
§ 29:52	— — Negotiation
§ 29:53	———Counselling
§ 29:54	——Dilemmas of major interest groups
§ 29:55	———Generally
§ 29:56	———Dilemmas of the business community
§ 29:57	— — Labor and its allies
§ 29:58	——Farm interests
§ 29:59	— — —Younger generations — — —The middle class
§ 29:60	
§ 29:61	— — — Older citizens
§ 29:62	— — —Ethnic and other groups affected by present or past discrimination
§ 29:63	——Alternate overviews and legal implications
§ 29:64	———The static equilibrium model
§ 29:65	— — The static equinibilitin model  — — — The automatic productivity dividend
§ 29.00	model
§ 29:66	— — Litigation and legislative advocacy
\$ 20.00	implications of the two major models
§ 29:67	— — — Alternate overview: Dynamic balanced
3 20.01	economy
§ 29:68	——Emergency options
§ 29:69	———Crisis 1: Escalating unemployment
§ 29:70	———Crisis 2: Inflation
§ 29:71	———Crisis 3: The longer-term emergency of
0	loss of productivity and competitiveness
§ 29:72	———Crisis 4: Chaos in potentially friendly
ū	nations or trade war
§ 29:73	Additional references
Appendi	x 29-1. Role of Corporate Directors
11ppciidi2	20 1. Trote of Corporate Directors

### CHAPTER 30. SOME BASICS OF INTERNATIONAL ECONOMICS

§ 30:1 Introduction

§ 30:2	Effects of interdependence—In general
§ 30:3	—Significance of worldwide trading
	arrangements
§ 30:4	—Foreign judgments
§ 30:5	—Consolidated monetary systems
§ 30:6	—Nations with financial problems including initiated by prior dictatorial regimes
§ 30:7	—Problems involved in assistance from international monetary fund
§ 30:8	—Unnecessary hostility between nations
§ 30:9	—Long-lasting traditions
§ 30:10	—Derivatives and international finance
§ 30:11	Effects of legal policy
§ 30:12	Condensed summary of historical development
§ 30:13	Legal ramifications of dilemmas confronting international economies—In general
§ 30:14	—Third world debt
§ 30:15	—Costs and risks of austerity
§ 30:16	—Dilemma of export-oriented economies
§ 30:17	—Promotion of new low-wage competition?
§ 30:18	—Balance of emphasis in an economy: Fulfilling demand or disposing of output
§ 30:18.50	Additional references—Generally
§ 30:19	—Impact of austerity as economic prescription in developing or de-
8 20.20	bureaucratizing economies  —Contraband interdiction
§ 30:20	—Contraband interdiction

# PART VIII. THE SURVIVAL OF ADVOCACY

# CHAPTER 31. THE IMAGE OF ADVOCACY

§ 31:1	Advocacy as conflict and cooperation—In
	general
§ 31:2	—The public image of a lawyer
§ 31:3	—Listening skills for attorneys
§ 31:4	—Pretrial listening [Deleted]
§ 31:5	—Listening at trial [Deleted]
§ 31:6	—Generally
§ 31:7	Public-private practice—In general
§ 31:8	—Formal specialization
§ 31:9	Law enforcement in the "crack" era—Youth
	crime

#### ADVOCACY

§ 31:10	—Evidence of religion as antidote to crime
§ 31:11	—No-nonsense component
§ 31:12	—Drug-related crime
§ 31:13	—Demand side
§ 31:14	—Importance of jobs
§ 31:15	—Prison and incentives
§ 31:16	—Injunctions barring criminal conduct by
	facilitating acts
§ 31:17	-Awards of large amounts of money to crime
	perpetrators?
§ 31:18	—Misplaced pro bono activity?
§ 31:19	-Education, incentives, and vital outlets for
	energy?
§ 31:20	—Fairer administrative treatment of
	prisoners?
§ 31:21	—Positive outlets for aggression
§ 31:22	—Permitting deterrence and protection by
	others
§ 31:23	—Recognizing cross-gender violence against
	woman—As a sign of weakness
§ 31:24	—Challenge to gender identity
§ 31:25	—Deterrence of crime
§ 31:26	—Deeper psychological aspects
§ 31:27	—Need for risk
§ 31:28	—Gender and sedentary education
§ 31:29	—Other sources—Media glamorization of
	crime
§ 31:30	—Attitudes
§ 31:31	—Addiction: Excuse for crime?
§ 31:32	—Need to compete
§ 31:33	—Serious law enforcement?
§ 31:34	—Risk of cosmetic reforms
§ 31:35	—Focusing enforcement resources
§ 31:36	—Stopping more crime on the scene: Role of
	the citizen?
§ 31:37	—Legislative and related matters—Self-
	defense under the fourteenth amendment
§ 31:38	——Discussion of basis for congressional
	action
§ 31:39	——Self-defense concepts
§ 31:40	——Role of publicity concerning victims'
0.04.44	options
§ 31:41	—Interaction with firearms controls
§ 31:42	—Issues regarding weapons
§ 31:43	—Unlicensed weapons not involved in self-defense

§ 31:44	—Community role
§ 31:45	—Importance of criminal prosecutions as
	anti-crime measure or underestimated?
§ 31:46	—Interrogation and 18 U.S.C.A. § 1001
§ 31:47	—Random weapon searches
§ 31:48	—Accelerated investigation and action
§ 31:49	—Means of detection
§ 31:50	—Interrogation
§ 31:51	—Search and seizure: Exclusionary rule
§ 31:52	—Reinterpretation of probable cause
§ 31:53	—Per se reasonable search for weapons?
§ 31:54	—Technological assistance
§ 31:55	—Search and seizure issues
§ 31:55.50	Law enforcement in the "crack" era—Future of
	privacy and free speech in age of social media
§ 31:56	Law enforcement in the "crack" era—Citizen
	observation and videotaping
§ 31:57	—Videotaping of searches by police—Benefits
	to law enforcement
§ 31:58	——Benefits to search subjects
§ 31:59	——Potential drawbacks of videotaping
	searches
§ 31:60	—Filming in public places vs going in
0.01.01	disguise upon the highway
§ 31:61	—Prosecution and trial
§ 31:62	—Hearsay exceptions for murdered or
\$ 21.62	intimidated witnesses
§ 31:63	—Prevention of anticipated crimes before committed?
§ 31:64	—Juvenile offenses and incipient offenses
§ 31:65	—Narrow interpretations in criminal law and
§ 01.00	procedure?
§ 31:66	—Roles of participants in criminal justice
§ 31:67	—Simplification of criminal justice in
3 3 2 7 3 7	operation
§ 31:68	—Consequences of interpretation of legal
	doctrines without regard to objectives and
	side effects?
§ 31:69	—Importance of large numbers of small
	offenses
§ 31:70	—Importance of use of broad statutes
§ 31:71	—Problems in establishing effective criminal
0.04.55	justice
§ 31:72	—Making better use of judicial resources
§ 31:73	—Jury composition
§ 31:74	—Making jury procedures work

#### ADVOCACY

§ 31:75	—Attorney requests for commitments during voir dire
§ 31:76	—Voir dire
§ 31:77	Practical considerations in jury selection
-	
§ 31:78	Law enforcement in the "crack" era—Jury selection and voir dire in federal court—
¢ 01.70	Frequently encountered issues
§ 31:79	— — Tips for procedural success
§ 31:80	— —Judicial defined violations
§ 31:81	——Discussion with attorneys
§ 31:82	——New reasonable doubt?
§ 31:83	——Distortions of the fifth amendment
	privilege?
§ 31:84	——Effective sentencing and related issues
$\S 31:85$	——Cooperation
§ 31:86	——Avoiding lighter sentences for kingpins
§ 31:87	— —Protections for the innocent
§ 31:88	——Absolute discretion of jurists in
	settlement in a proper case
§ 31:89	——Insanity defense?
§ 31:90	——Doubtful expert characterizations as
	defenses?
§ 31:91	—Killing witnesses
§ 31:92	—Intimidation of jurors
§ 31:93	—Sentencing
§ 31:94	—Injunctions
§ 31:95	—Corrections
§ 31:96	—"Megan's law" and other post-release
3 01.00	restrictions apart from probation?
§ 31:97	—Injunctions barring criminal behavior or
, 01.01	facilitative conduct
§ 31:98	—Upgrading the role of the police
§ 31:99	—Improvement of police assignments and
3 01.00	detection
§ 31:100	—Police note-taking at the time of
3 01.100	observation of suspects
§ 31:101	—Avoiding counterproductive use of police
3 01.101	efforts
§ 31:102	—Over-emphasis on formal treatment of
3 01.102	minor infractions
§ 31:103	—Deferred sentences
§ 31:103	—Corruption
-	—Use of military forces and facilities
§ 31:105	
§ 31:106	—Internal and external source interdiction
§ 31:107	—Expedited trials on a fast track with
	trade-offs?

§ 31:108	—Co	mbining trials involving related acts in
	mor	e than one jurisdiction
§ 31:109	—Re	asons for lack of action
§ 31:110	—Th	e issue of cost
§ 31:111		emmas of criminal procedures:
§ 31:112		ore effective law enforcement and ucing objectionable methods
§ 31:113	—Ор	ening toward downgrading reliance on rmants
§ 31:114	—Ov	eruse of informants
§ 31:115	—Fa	cilitating factors
§ 31:116	—Dis	sclosed law enforcement surveillance
§ 31:117	—Ov	er-reliance on witnesses
§ 31:118	—Ris	sks of abuse by cooperating witnesses
§ 31:119	—"Ta	argets of the investigation?"
§ 31:120	—"In	vestigation" as a technical concept?
§ 31:121	—Str	ategies against corruption
§ 31:122		stortions relating to media coverage of ninal justice
§ 31:123		tional references
Appendix 3	1-1.	Simplification of Criminal Justice [Task Force on Simplification of the Law]
Appendix 3	1-2.	Measures Relating to Organized Crime [Subcommittee of the United States Senate]
Appendix 3	1-3.	Vincent L. Broderick in the Role of the Police

## CHAPTER 32. THREATS TO ADVOCACY AND RESPONSES

$\S 32:1$	Threats to trial advocacy—In general
§ 32:2	—Dealing with crime
§ 32:3	—Problems in debt collection suits
§ 32:4	—Small claims
§ 32:5	—Business, bankruptcy, and the consumer
§ 32:6	—Differential interpretation of documents based on legal sophistication of parties
§ 32:7	—Bankruptcy cases
§ 32:8	—Mandatory pro bono
§ 32:9	——"Sources close to the investigation"
§ 32:10	— — Televising trials
§ 32:11	— —Liability for nonfrivolous litigation
§ 32:12	——"No citation" opinions

#### Advocacy

§ 32:13	——Trend toward allowing citation of
	unpublished opinions if served
§ 32:14	———Gag rules preventing judges from
	submitting to private publishers opinions
	unapproved by official state reporters
§ 32:15	Combination of prosecutor and judge
§ 32:16	Screening rulemakers from advocacy
§ 32:17	Discretionary justice—In general
§ 32:18	—Time limits governing right to appeal running from internal agency filing of its own decision
§ 32:19	—Customary investigations of predecessors in office?
§ 32:20	—Regulation of charities
§ 32:21	—Delegation of governmental power to private groups
§ 32:22	Protecting the opportunity for constitutional
	advocacy
§ 32:23	Legislative processes
§ 32:24	Campaign and lobbying regulation
§ 32:25	Nominating processes—In general
§ 32:26	—Electoral college
§ 32:27	—Risks of proportional representation
§ 32:28	Additional references—Free press—Fair trial
§ 32:29	—Threat to history
§ 32:30	—Amending process
§ 32:31	—Combination of prosecutor and judge
§ 32:32	—Discretionary justice
§ 32:33	—Nominating processes

## CHAPTER 33. COMMENTS ON EDUCATION FOR ADVOCACY

§ 33:1	Origins—In general
§ 33:2	—Root issue: The nature of learning
§ 33:3	—Problems of testing
§ 33:4	—Dilemmas of educational costs
§ 33:5	—Litigation and legislative implications
§ 33:6	—Longer-term overall options?
§ 33:7	Specifics—In general
§ 33:8	—Relevance of testing issues to bar examinations
§ 33:9	<ul> <li>—Alternative to test scores or academic achievement as such in initial selection of employees</li> </ul>
§ 33:10	—United Nations Universal Declaration of Human Rights

§ 33:10.50 Additional references—Generally
§ 33:11 —The need for alternatives for those who fail to complete formal education
§ 33:12 —Free exercise/establishment clause issue
Appendix 33-1. Private Vocational Schools
Appendix 33-2. Consultation Concepts

### Volume 3

### PART IX. INTERACTION OF ADVOCACY AND OTHER DISCIPLINES

### CHAPTER 34. ADVOCACY AND INTERGROUP ATTITUDES

111/11/11	IGHOUL ALLITODES
§ 34:1	Importance—In general
§ 34:2	—Franklin thomas concept
§ 34:3	—Basic approaches
§ 34:4	—Facing up to the consequences of the past
§ 34:5	—Labelling issue
§ 34:6	—Discriminatory impact of testing instruments
§ 34:7	—Disparate impact and qualitative criteria
§ 34:8	—Job description conundrum
§ 34:9	—Benign individualized departures from non-
	discrimination norms?
§ 34:10	—Overview
§ 34:11	—Specific targeted noncontroversial steps?
§ 34:12	—Dilemmas of age discrimination, generational
	inequity, and needs of senior citizens
§ 34:13	Negative dynamics
§ 34:14	Effects of differences in power
§ 34:15	Challenge to the advocate—In general
§ 34:16	—New stages for intergroup relations
§ 34:17	—Problem of use of such terms as "male black,"
	"male hispanic" in identifications in criminal cases
§ 34:18	Examples of individual efforts of two brothers
§ 34:19	—Intergroup collaboration embracing broader
3 0 1.10	issues
§ 34:20	—The most critical roadblock
§ 34:21	—Lessons from bitter experience

§ 34:22	—Political separations on a worldwide scale and intergroup relations
§ 34:23	—Individual defendants in organizational cases
§ 34:24	—Insults against women and other hostile
5 01.21	behavior toward co-workers based on race,
	creed, gender or national origin as grounds for
	dismissal by employer
§ 34:25	—Facts discovered after adverse personnel
5	action?
§ 34:26	—Adverse inferences from pretextual grounds
Ü	for adverse actions?
§ 34:27	—Largely ignored fatal fallacies of statistical
	comparisons of ethnic and other groups
§ 34:28	—Invidious and unnecessary discrimination
	against those without financial accounting and
	related skills
§ 34:29	—Circumstances necessary to overcome
	intergroup hostility: On the local, national or
0.01.00	international level
§ 34:30	—Prejudice and the police
§ 34:31	—Hostility to foreigners and the inevitable
6.04.00	overlap
§ 34:32	Dynamics of cases under antidiscrimination laws
§ 34:33	Discrimination as an element in other cases
§ 34:34	Gender stereotypes in litigation—Overview
§ 34:35	—Gender bias in legal profession
§ 34:36	Additional references—Overview
§ 34:37	—Generally
§ 34:38	—Americans with Disabilities Act
§ 34:39	—CIRRA § 9
§ 34:40	—Disruptive pupil issue—Honig v Doe
§ 34:41	—Neutrality principle in state-religion relations?
§ 34:42	—Employment cases and paperwork
§ 34:43	—Handicap discrimination and ability to
60444	perform
§ 34:44	—Drug and alcohol abuse
§ 34:45	—Constitutional rather than sociological
	grounds for Brown v. Board

Appendix 34-1. Statements of Rev. Leon Sullivan

### CHAPTER 35. DYNAMICS OF ADVOCACY IN SELECTED AREAS OF SPECIALIZED EXPERTISE

§ 35:1 Divergences of terminology and interests—In general

§ 35:2	Managing rods and underlying goals
§ 35.2 § 35:3	<ul><li>—Measuring rods and underlying goals</li><li>—Reintegration?</li></ul>
§ 35.3 § 35:4	Experts and lay compliance
§ 35.4 § 35:5	—Falling between disciplinary lines
§ 35.5 § 35:6	—Scientific evidence
§ 35.0 § 35:7	
-	—Coming computer-human interaction issues
§ 35:8	—Computerized legal decisionmaking? —Selected source materials
§ 35:9	—Role of mathematics
§ 35:10	
§ 35:11	—Institutional neutrality?
§ 35:12	—Delusive exactness
§ 35:13	Dynamics of some medical-legal issues—In general
§ 35:14	<ul> <li>Major contemporary changes transforming medical-legal relationships</li> </ul>
§ 35:15	—Expansion of interests involved
§ 35:16	—Options for safety without proof of effectiveness
§ 35:17	—Blocking patents and medicines
§ 35:18	—Possibilities of expanded options for health
0	care, and means of handling financial barriers
§ 35:19	Psychiatric categories—Overview of the problem
§ 35:20	—Selected source materials
§ 35:21	—Involuntary administration of mind-
3 00.21	altering medications
§ 35:22	—Related risks in compulsory psychiatric treatment
§ 35:23	—Dial-a-porn issue
§ 35:24	—Obscenity and promotion of violence— Public forum concepts
§ 35:25	—Damages for alleged consequences of media violence
§ 35:26	—Application to national endowment for the arts?
§ 35:27	—Mass media, marketing, and public pressure
§ 35:28	—1990 antitrust exemption for industry concerning television violence
§ 35:29	—Others adjacent to pornography purveyors
§ 35:30	Advocacy, psychology, and the thirst for
	identity—In general
§ 35:31	—Advocacy to those focusing narrowly on personal gain
§ 35:32	Additional references—Generally

#### Advocacy

§ 35:33	—Impact of statistics
§ 35:34	—Relevance of long-range goals
§ 35:35	—Psychiatric issues
§ 35:36	—Environmental litigation
§ 35:37	—Personal injury and related insurance
	issues
§ 35:38	—Real property litigation
§ 35:39	—Landlord/tenant litigation
§ 35:40	—Defamation
§ 35:41	—Contracts, generally
§ 35:41.50	Formation of electronic real estate contracts
§ 35:42	Additional references—Computers,
	technology, and the internet
§ 35:43	—Family law
§ 35:44	—Estates and trusts
§ 35:45	—Labor law; Employee benefits; Workers'
	compensation; Unemployment compensation
§ 35:46	—Civil rights
§ 35:47	—Damages
§ 35:48	—Other specialized areas of practice

# CHAPTER 36. ADVOCACY FOR THE OPEN SOCIETY

SUCIETI
Exploiting the advantages of an open society—A new climate?
Scientific and technological advance—Generally
—Two potential types of breathtaking advances
— —Technological and economic challenge and opportunity
11 0
— — —Malleable, accordion-like nature of the modern economy
———Massively suboptimal effective research
and development?
———Experience in second world war
— — — Illustrative examples of potential new
industries
— —Institutional alternatives
— — Obstacles to breakthroughs
— — Nonproductive uses of credit
— — —Antitrust aspects
— —Bubble up versus trickle down concept
— — High option
— — Technological disaster fallout
— —The NCR Act
———Risk of "over-inclusiveness"?

§ 36:18	———Wider implications of NCR Act
§ 36:19	— —Joint research under the rule of reason
§ 36:20	———Risks of joint research
§ 36:21	— — Governmental approval or participation
§ 36:22	——Need for innovation from the public
	viewpoint
§ 36:23	———Bar proposal for impartial private
	positive technology assessment process
§ 36:24	——Consequences of lagging rate of innovation
§ 36:25	——Definition of national goals
§ 36:26	——History and types of affirmative promotion
§ 36:27	— — — National technology development bank, fund, or corporation
§ 36:28	———Encouragement of research by
	contractors
§ 36:29	— — Joint manufacturing
§ 36:30	———Henry adams' law of acceleration
§ 36:31	——Risks in excessive reliance on peer review
§ 36:32	— —Long-term implications
§ 36:33	——Potential major goals
§ 36:34	Survival—In general
§ 36:35	—Broader historic perspective
§ 36:36	——Concept of stewardship
§ 36:37	Additional references—In general
§ 36:38	—Long-term perspectives
§ 36:39	—Implications for the open society and its survival
§ 36:40	—Generally
§ 36:41	—Peacekeeping and potential aggressors
§ 36:42	—Importance of national defense in the post- cold war era
§ 36:43	—Relevant criteria
§ 36:44	—Is the current risk akin to that of the era of
J	appeasement of the 1930s?
§ 36:45	—Terrorism and governmental rights and responses

### PART X. CAREER CHALLENGES FOR LAWYERS; ORGANIZATIONAL DILEMMAS FOR FIRMS AND LAW DEPARTMENTS

### CHAPTER 37. CAREER CHALLENGES

§ 37:1	Choice of law as a profession—In general
§ 37:1.10	Starting legal career
§ 37:2	Choice of law as a profession—Law as most
	important tool
§ 37:3	—"Country doctor" aspect
§ 37:4	—Law as a vocation [Deleted]
§ 37:5	—Encouraging law students to engage in vocational reflection [Deleted]
§ 37:6	—Deciding to become a lawyer [Deleted]
§ 37:7	—Career choices and changes checklist
§ 37:7.10	—Changing structure of legal profession
§ 37:8	Initial public sector practice
§ 37:8.50	Career Law Clerk
§ 37:9	Firm practice: Associates and partners—
	Overview
§ 37:10	—Generally
§ 37:10.50	—Professional challenges in large law firms
§ 37:11	Solo practitioner—In general
§ 37:11.50	Social media as a tool for solos and small firms
§ 37:12	Solo practitioner—Contract attorney
§ 37:13	—Determining if contract lawyering is right for you
	[Deleted]
§ 37:14	—Marketing yourself as a contract lawyer [Deleted]
§ 37:15	—Conclusion [Deleted]
§ 37:16	Public and nonprofit—In general
§ 37:17	—Choosing a career in public service
§ 37:18	Additional references

### CHAPTER 38. ORGANIZATIONAL DILEMMAS

§ 38:1	Pressures on firms and responses—Overview
§ 38:2	—Generally
§ 38:3	—Folklore and institutional attitudes in law
	firms
§ 38:4	—Financial success/professionalism
§ 38:5	—Success on the merits in litigation,
	negotiating, and other efforts

§ 38:6	—The issue of "hardball"
§ 38:7	—Delay
§ 38:8	—Time
§ 38:9	—Role models
§ 38:10	—Client partner/specialist
§ 38:11	—Recruitment
§ 38:11.50	Social media marketing in lawfirms
§ 38:12	Pressures on firms and responses—Attitudes
	toward support staff
§ 38:13	—Law office management
§ 38:14	—Risks of bureaucratic measurement
	methods and external attempts to require
	promotion to clients?
§ 38:14.50	—Office dress codes
§ 38:15	Law departments
§ 38:16	Additional references

### CHAPTER 39. CLIENTS' VIEWPOINT

§ 39:1	Choosing counsel—In general
§ 39:1.10	-Making yourself the obvious choice for a client
§ 39:2	—Corporate client's guide to choosing outside legal counsel [Deleted]
§ 39:2.10	—Client service
§ 39:3	—Generally
§ 39:4	Supervising counsel
§ 39:5	Additional references—Adequacy of representation
§ 39:6	—Methods to maximize client recovery

# CHAPTER 40. OUTLOOK FOR PROFESSIONALISM 8 40.1 Strands of tradition—Definition of professionalism

§ 40:1	Strands of tradition—Definition of professionalism
	[Deleted]
§ 40:2	—Avoiding distractions; Flexibility
§ 40:3	—Ability to dispense with credit
§ 40:4	—Professionalism and analogies for perception
§ 40:5	—Professionalism: A necessary component of
	successful lawyer's performance
§ 40:5.50	Professionalism in elder law
§ 40:6	Threats to professionalism—In general
§ 40:7	—Causes of declining professionalism
§ 40:8	—Recommendations for professionalism [Deleted]
§ 40:8.10	—Sabotaging Unprofessionalism
§ 40:9	Renaissance?—In general
§ 40:10	—Professionalism and effectiveness

mage
e
mage

## CHAPTER 41. SELECTED USES AND ABUSES OF LEGAL ETHICS

§ 41:1	Interactions of ethics, professionalism, and law—In general
§ 41:1.10	—The professionalization of ethics
§ 41:2	—Fee splitting
§ 41:3	—Fee disputes
§ 41:3.50	—Using social networking websites in legal investigations
§ 41:4	Conflict of interest—In general
§ 41:5	—Practical ways to avoid conflicts of interest
§ 41:6	—What to look for
§ 41:7	—Representation directly adverse to existing client
§ 41:8	—Representation limited by responsibilities to other clients
§ 41:9	—Representation where the attorney may be limited materially by his or her own interests
§ 41:10	—Representation adverse to a former client
§ 41:11	Contact with represented party—In general
§ 41:12	—Client-client communication
§ 41:13	—Direct contact with government agency officials bypassing agency counsel?
§ 41:14	—Contact of federal prosecutors with represented defendants: U.S. v. Hammad, the "thornburgh memo," the "reno rule," and the McDade amendment
§ 41:15	—Relevance of litigation?
§ 41:16	—Employees and former employees of adversary
§ 41:17	Contact with tribunal
§ 41:18	The profession and the public—In general
§ 41:19	—Practical ways in making professionalism a part of your life [Deleted]
§ 41:20	—Professionalism above client interests [Deleted]
§ 41:21	Additional references—Overview
§ 41:22	—Generally

§ 41:23 —Bar admission procedures	
§ 41:24 —Analysis of character committee	
questionnaire [1993 New York version]	
§ 41:25 —Professionalism	
§ 41:26 —Trial misconduct	
§ 41:27 —Tampering, spoliation, and failure or refe	usal
to disclose evidence	
§ 41:28 —Continuing legal education requirements	\$

### **APPENDIXIES**

- Appendix A. Overview of Some Economic Issues Involved in Common Legal Disputes
- Appendix B. Selectively Annotated Glossary of Some Economic Terms
- Appendix C. Some Sources for Industry Background Information
- Appendix D. Some Constitutional Provisions Having Particular Economic Significance
- Appendix E. Chronological Outline of Selected Major Events Relevant to the Legal Structure for the American Economy
- Appendix F. Market Concepts and Applications
- Appendix G. Producer-Distributor and Competitor— Competitor Interactions
- Appendix H. Reported Decisions Used in Examples
- Appendix I. Legal Complexity and Industrial Competitiveness

**Table of Laws and Rules** 

**Table of Cases**