

Table of Contents

PART I. INTRODUCTION AND OVERVIEW

CHAPTER 1. INTRODUCTION AND OVERVIEW

- § 1:1 Introduction
- § 1:2 Attorneys' professional independence and effective advocacy
- § 1:3 The trial lawyer as story-teller
- § 1:4 The theory of the case
- § 1:5 The trial and the search for the truth
- § 1:6 Jury trials and non-jury trials

PART II. PRETRIAL PREPARATION

CHAPTER 2. MOTION PRACTICE

- § 2:1 Overview of pre-trial motion procedure
- § 2:2 Technology and legal writing
- § 2:3 Discovery
- § 2:4 —Discovery of *Brady* material
- § 2:5 — —Materiality
- § 2:6 — —Government's obligation to learn of *Brady* materials
- § 2:7 — —Timing of disclosure
- § 2:8 — —Applicability to plea-bargaining process
- § 2:9 — —Relationship between *Brady* and prosecutors' ethical obligations
- § 2:10 —Discovery of *Jencks* material
- § 2:11 —Discovery of confidential or privileged information
- § 2:12 — —Inadvertent waiver of privilege
- § 2:13 —Discovery of informant's identity
- § 2:14 —Discovery of writing used to refresh a witness's recollection

EXAMINATION OF WITNESSES

- § 2:15 —Specialized discovery requests
- § 2:16 —Sanctions for discovery violations in criminal cases
- § 2:17 —Protective orders
- § 2:18 Civil discovery—Generally
- § 2:19 —Electronically stored information
- § 2:20 Civil discovery sanctions—Generally
- § 2:21 —For a failure related to electronically stored information
- § 2:22 Discovery—Motions for bills of particulars
- § 2:23 In limine motions—General considerations
- § 2:24 Discovery—Waiver of objection considerations
- § 2:25 —Expert testimony
- § 2:26 —Similar acts evidence
- § 2:27 —Similar acts and other crimes, wrongs, or acts evidence—Extent of notice required under Rule 404(b)
- § 2:28 — — —Offers to stipulate
- § 2:29 Similar acts and other crimes, wrongs, or acts evidence—Extent of Notice Required Under Rule (404)(b)—Federal Rules of Evidence 413 to 415
- § 2:30 — —Criminal cases; deposition testimony of unavailable witnesses
- § 2:31 Issues specific to particular kinds of witnesses—Seeking immunity for defense witnesses
- § 2:32 —Attempts to prevent or dissuade witness from testifying
- § 2:33 Attempts to prevent or dissuade witness from testifying—Equal right of access to witnesses—Generally
- § 2:34 — —Plea agreements
- § 2:35 —Applicable Rules of Professional Conduct
- § 2:36 Indigent defendants
- § 2:37 Motion for mental examination in criminal case
- § 2:38 Motion for stay of proceedings
- § 2:39 Motion to sever/bifurcate
- § 2:40 Motion to close or seal proceedings or documents
- § 2:41 Motion to disqualify opposing counsel
- § 2:42 How the use of AI may impact attorney-client and work-product privileges

TABLE OF CONTENTS

**CHAPTER 3. PRE-TRIAL WITNESS
PREPARATION**

I. OVERVIEW

§ 3:1 Overview and identification of objectives

II. PREPARING A WITNESS TO TESTIFY

- § 3:2 Ethical considerations
- § 3:3 Importance of timely preparation
- § 3:4 Place of preparation
- § 3:5 Witness's role
- § 3:6 Eliciting witness's story
- § 3:7 Preparing the witness's testimony
- § 3:8 Interrupted trial testimony

III. STYLES OF INTERROGATION

- § 3:9 Generally
- § 3:10 Narrative and question/answer modes
- § 3:11 Leading mode

**IV. SPECIFIC TECHNIQUES FOR PREPARING
A WITNESS'S TESTIMONY**

- § 3:12 "Sandpapering," coaching and legal ethics
- § 3:13 Reviewing depositions/statements
- § 3:14 Avoiding over-preparation
- § 3:15 Allaying anxiety
- § 3:16 Phrasing answers
- § 3:17 Witness mannerisms and clothing
- § 3:18 Subpoenas and sequestration
- § 3:19 Anticipating memory lapses
- § 3:20 Anticipating cross-examination

**V. ISSUES SPECIFIC TO PARTICULAR KINDS
OF WITNESSES**

- § 3:21 Expert witnesses
- § 3:22 Character witnesses
- § 3:23 Adverse or hostile witnesses
- § 3:24 Child witnesses
- § 3:25 Non-English speakers

- § 3:26 Witnesses in prison garb and/or physical restraints
- § 3:27 Witnesses and emoticons

CHAPTER 4. CREATING A CLIMATE FOR EFFECTIVE WITNESS EXAMINATION: JURY SELECTION, OPENING STATEMENT, ORGANIZING TRIAL MATERIALS, AND USING TECHNOLOGY

I. JURY SELECTION AND OPENING STATEMENT

- § 4:1 Jury selection
- § 4:2 Sample memorandum of law in support of motion for suggested voir dire procedures
- § 4:3 Voir dire questions—Sample #1
- § 4:4 —Sample #2
- § 4:5 —Sample #3
- § 4:6 Opening statement

II. TRIAL MEMORANDA

- § 4:7 Generally

III. TRIAL NOTEBOOK

- § 4:8 Introduction and organization
- § 4:9 Jury selection materials
- § 4:10 Opening statement
- § 4:11 Witnesses
- § 4:12 Exhibits
- § 4:13 Closing argument
- § 4:14 Jury instructions
- § 4:15 To-do list

IV. USE OF TECHNOLOGY IN THE COURTROOM

- § 4:16 Introduction
- § 4:17 Use of technology in organizing and referencing trial materials

TABLE OF CONTENTS

- § 4:18 Use of technology in presenting exhibits
- § 4:19 —Foundation issues

PART III. TRIAL

CHAPTER 5. INTRODUCTION

- § 5:1 Examination in the courtroom
- § 5:2 Examination during depositions
- § 5:3 Leading questions
- § 5:4 —What the rules permit
- § 5:5 —Preliminary or non-controversial matters
- § 5:6 —Establishing a foundation
- § 5:7 —Adverse or hostile witness
- § 5:8 —Witness with recollection problems
- § 5:9 —Witness with comprehension problems
- § 5:10 —Witness with articulation problems
- § 5:11 Practicing interrogation skills

CHAPTER 6. DIRECT EXAMINATION

I. IN GENERAL

- § 6:1 Introduction
- § 6:2 Exclusion of witnesses
- § 6:3 Order of witnesses
- § 6:4 Oath
- § 6:5 Anticipating and addressing credibility issues
- § 6:6 Use of deposition or prior recorded testimony
- § 6:7 Impeaching one's own witness
- § 6:8 Questioning by judge
- § 6:9 Examination through interpreters
- § 6:10 Interference with right of an accused to present witnesses

II. ORGANIZING PRESENTATION

- § 6:11 In general
- § 6:12 Chronological organization
- § 6:13 Topical organization

III. PRESENTATION PROBLEMS

- § 6:14 In general

EXAMINATION OF WITNESSES

- § 6:15 Witness unavailability
- § 6:16 —Constitutional considerations
- § 6:17 — —Application of *Crawford* in particular circumstances
- § 6:18 Multi-witness foundations; chain of custody
- § 6:19 Suspicion of false testimony by your witness

IV. REFRESHING RECOLLECTION

- § 6:20 In general
- § 6:21 Additional preparation during recess
- § 6:22 —Ethical considerations
- § 6:23 —Judge’s admonitions
- § 6:24 Leading questions
- § 6:25 Present recollection refreshed
- § 6:26 Past recollection recorded
- § 6:27 Other techniques
- § 6:28 —Hypnosis
- § 6:29 —Narco-interrogation

V. LAY WITNESS OPINIONS

- § 6:30 In general
- § 6:31 Evidentiary considerations
- § 6:32 Establishing foundation
- § 6:33 Eliciting opinion
- § 6:34 Times and distances
- § 6:35 Ultimate issue
- § 6:36 Other examples

CHAPTER 7. TYPES OF NON-EXPERT WITNESSES

I. OCCURRENCE WITNESSES

A. INTRODUCTION

- § 7:1 In general
- § 7:2 Purposes and objectives of direct examination

B. ORGANIZATIONAL FORMATS

- § 7:3 Introduction
- § 7:4 Chronological format

TABLE OF CONTENTS

- § 7:5 —Illustrations
- § 7:6 Topical format
- § 7:7 —Illustrations

C. PRELIMINARY MATTERS

- § 7:8 Introduction
- § 7:9 Witness identification
- § 7:10 —Personalizing witness
- § 7:11 —Witness's background
- § 7:12 Witness relationship to case
- § 7:13 —Party
- § 7:14 —Interested witness
- § 7:15 —Disinterested witness
- § 7:16 Witness called or evidence offered to establish
guilt of alternate perpetrator
- § 7:17 Setting scene
- § 7:18 —Establishing competency
- § 7:19 —Informal accreditation
- § 7:20 —Date, time, and place
- § 7:21 Description of event
- § 7:22 —Dramatic effect, climax and conclusion

II. CHARACTER WITNESSES

A. INTRODUCTION

- § 7:23 In general

B. EVIDENCE

- § 7:24 Evidentiary considerations
- § 7:25 Opinion
- § 7:26 Reputation
- § 7:27 Specific instances of behavior

CHAPTER 8. CROSS-EXAMINATION

I. CROSS-EXAMINATION IN GENERAL

A. OVERVIEW OF CROSS-EXAMINATION

- § 8:1 Preparing for cross-examination, general

B. PURPOSES AND OBJECTIVES

- § 8:2 Safeguards against false evidence

- § 8:3 Pretrial investigation in preparation for cross-examination
- § 8:4 Decision to cross-examine
- § 8:5 Strategic considerations, generally
- § 8:6 Control of witness
- § 8:7 Scope of cross-examination

II. CONSTRUCTIVE AND DESTRUCTIVE CROSS-EXAMINATION

A. CONSTRUCTIVE CROSS-EXAMINATION

- § 8:8 In general
- § 8:9 Subject matter of direct examination
- § 8:10 New matters
- § 8:11 Mode of interrogation

B. DESTRUCTIVE CROSS-EXAMINATION

1. In General

- § 8:12 Introduction
- § 8:13 Matters affecting credibility

2. Preliminary Evidentiary Considerations

- § 8:14 Effective utilization of rules of evidence
- § 8:15 Special evidentiary consideration, cross-examination of complainant in case alleging sexual assault

3. Categories of Destructive Cross-Examination

a. Suggesting Witness is Mistaken

- § 8:16 Mistaken witness
- § 8:17 Attacking elements of competency

b. Suggesting Witness is Lying or Untruthful

(1) In General

- § 8:18 Lying witness
- § 8:19 Bias, interest, etc.
- § 8:20 Illustrations

(2) Prior Convictions

- § 8:21 In general

TABLE OF CONTENTS

- § 8:22 Crimes involving dishonesty
- § 8:23 Other felonies
- § 8:24 Illustration

(3) Prior Bad Acts

- § 8:25 In general
- § 8:26 Truthfulness or untruthfulness
- § 8:27 Extrinsic evidence
- § 8:28 Good faith basis for inquiry

c. Prior Inconsistent Statements

- § 8:29 In general
- § 8:30 What is an inconsistent statement?
- § 8:31 —Impeachment use of unconstitutionally obtained evidence
- § 8:32 —Impeachment use of accused's silence
- § 8:33 —Impeachment use of statements made during settlement discussions in a criminal case
- § 8:34 Impeachment versus substantive use of statement
- § 8:35 Foundational requirements
- § 8:36 —Traditional rule
- § 8:37 —Modern rule
- § 8:38 Extrinsic evidence
- § 8:39 Illustration

d. Permissible and Impermissible Uses of Extrinsic Evidence Relating to Credibility

- § 8:40 Introduction
- § 8:41 Collateral issues
- § 8:42 Bias or interest
- § 8:43 Character trait for veracity
- § 8:44 Expert testimony

e. Tactics and Mechanics

- § 8:45 Tactical considerations, generally
- § 8:46 Dual purpose cross-examination
- § 8:47 Impeaching police witnesses
- § 8:48 Impeaching informant witnesses
- § 8:49 Impeaching character witnesses
- § 8:50 Leading questions
- § 8:51 Conditioning the witness
- § 8:52 Knowing the answer

EXAMINATION OF WITNESSES

- § 8:53 Short questions
- § 8:54 —Maximizing the impact of one's point
- § 8:55 Avoiding questions containing argumentative conclusions
- § 8:56 Avoiding arguing with witness
- § 8:57 Avoiding giving witness opportunity to explain answer
- § 8:58 Gilding the lily
- § 8:59 Avoiding appearance of reading during cross-examination
- § 8:60 Maintaining sense of jury's concerns
- § 8:61 Counsel's clothing

CHAPTER 9. USE OF EXHIBITS

- § 9:1 Introduction
- § 9:2 Role of witness in identifying or authenticating exhibits
- § 9:3 Competency of sponsoring witnesses
- § 9:4 Real versus demonstrative evidence
- § 9:5 Authentication of exhibits, chain of custody and condition
- § 9:6 Examining sponsoring witness
- § 9:7 Laying foundation
- § 9:8 Offering exhibit in evidence
- § 9:9 Testimony relating to exhibit
- § 9:10 —What constitutes "testimony"
- § 9:11 Publishing exhibit to jury
- § 9:12 Alternatives to formal foundation: stipulation, judicial notice, admission and self-authentication
- § 9:13 Examination of witnesses on writings
- § 9:14 —Evidentiary considerations
- § 9:15 —Identification of handwriting
- § 9:16 —Examples
- § 9:17 Illustrating testimony with demonstrative evidence
- § 9:18 —Foundations for demonstrative evidence
- § 9:19 —Preserving record
- § 9:20 —Examples
- § 9:21 Identifying physical characteristics
- § 9:22 Video exhibits
- § 9:23 Summary exhibits
- § 9:24 Accuracy of exhibits

TABLE OF CONTENTS

CHAPTER 10. RE-DIRECT AND RE-CROSS EXAMINATION

I. IN GENERAL

- § 10:1 Purpose and scope
- § 10:2 Mode of interrogation
- § 10:3 Recross-examination

II. REHABILITATION

- § 10:4 In general
- § 10:5 Explaining answer
- § 10:6 Placing answer in proper context
- § 10:7 Eliciting full answer
- § 10:8 Correcting mistakes in testimony
- § 10:9 Bolstering elements of competency
- § 10:10 Rebutting inference of bias or interest
- § 10:11 Prior consistent statements

CHAPTER 11. OBJECTIONS AND RESPONSES TO OBJECTIONS

I. IN GENERAL

- § 11:1 Introduction
- § 11:2 Purposes of objections
- § 11:3 Timeliness of objections
- § 11:4 Object of objections; testimony, questions, exhibits
- § 11:5 Remedies for cause of source of objection
- § 11:6 Motions in limine

II. FORMAL OBJECTIONS

- § 11:7 In general
- § 11:8 Leading questions
- § 11:9 Assuming fact not in evidence
- § 11:10 Argumentative questions
- § 11:11 Questions calling for narrative answers
- § 11:12 Non-responsive answers
- § 11:13 Compound questions
- § 11:14 Repetitive questions

III. SUBSTANTIVE OBJECTIONS

- § 11:15 In general

EXAMINATION OF WITNESSES

- § 11:16 Relevancy
- § 11:17 Materiality
- § 11:18 Competency
- § 11:19 Hearsay
- § 11:20 Privilege
- § 11:21 —Applicability of attorney-client confidentiality
in response to claim of ineffective assistance of
counsel
- § 11:22 —Waiver of privilege
- § 11:23 —Overcoming assertion of work product
privilege
- § 11:24 Improper opinion
- § 11:25 Improper foundation
- § 11:26 Exhibit not in evidence; improper display
- § 11:27 Best evidence

IV. MAKING AND RESPONDING TO OBJECTIONS

- § 11:28 Probative versus prejudicial value of proposed
evidence
- § 11:29 Articulating objections
- § 11:30 Responding to objections
- § 11:31 —Offers of proof
- § 11:32 Obtaining ruling
- § 11:33 Responding to ruling
- § 11:34 Continuing objections
- § 11:35 Overcoming objections
- § 11:36 Voir dire of witness
- § 11:37 Special objections in conspiracy cases

CHAPTER 12. EXPERT WITNESSES

I. EXPERT WITNESSES IN GENERAL

A. OVERVIEW OF USE AND EXAMINATION OF EXPERT WITNESSES

- § 12:1 Introduction to examining expert witnesses
- § 12:2 Evidentiary considerations
- § 12:3 Proceedings in which rules of evidence
inapplicable

TABLE OF CONTENTS

B. DETERMINING WHETHER TO PRESENT EXPERT TESTIMONY; CHALLENGING THE ADMISSIBILITY OF PROPOSED EXPERT TESTIMONY

- § 12:4 Need for expert testimony
- § 12:5 —Circumstances requiring expert testimony
- § 12:6 —Circumstances allowing expert testimony
- § 12:7 —Pre-trial challenges to proposed expert
testimony
- § 12:8 Potential for abuse

II. ENGAGING EXPERT

A. FINDING THE RIGHT EXPERT WITNESS

- § 12:9 In general
- § 12:10 Expert already in case
- § 12:11 Engaging expert for litigation purposes
- § 12:12 Compensating expert
- § 12:13 Compelling testimony of expert
- § 12:14 Use of expert in preparation for trial

B. DISCOVERY

- § 12:15 Discovery of opponent's experts
- § 12:16 —Non-testifying experts

III. PREPARING EXPERT TO TESTIFY

A. OVERVIEW OF PREPARING AN EXPERT WITNESS' TESTIMONY

- § 12:17 In general
- § 12:18 Review testimony

B. EXHIBITS

- § 12:19 Review exhibits
- § 12:20 —Records, reports, etc.
- § 12:21 —Demonstrative exhibits
- § 12:22 Framing questions

IV. DIRECT EXAMINATION

A. IN GENERAL

§ 12:23 Introduction

B. QUALIFYING EXPERT

§ 12:24 Generally
§ 12:25 Education or formal training
§ 12:26 Experience
§ 12:27 Other qualifications
§ 12:28 Offers to stipulate to qualifications
§ 12:29 Tendering witness as expert

C. ESTABLISHING BASIS FOR OPINION

1. Techniques for Presenting the Basis of Expert's Opinion

§ 12:30 Generally
§ 12:31 Personal knowledge
§ 12:32 Hypothetical question
§ 12:33 Testimony of other witnesses
§ 12:34 Reliance on hearsay
§ 12:35 Reliance on records or reports
§ 12:36 Reliance on other expert opinion

2. Specific Applications in Criminal Cases

§ 12:37 In general
§ 12:38 Absence of incriminating physical evidence
§ 12:39 Bite mark evidence
§ 12:40 Bloodstain-pattern analysis
§ 12:41 Cell tower data analysis
§ 12:42 Common understanding of terms
§ 12:43 Compulsive gambling disorder
§ 12:44 Consequences of prior sexual abuse
§ 12:45 DNA non-exclusion
§ 12:46 Dog tracking evidence
§ 12:47 "Earwitness" identification
§ 12:48 Eyewitness identification
§ 12:49 False confessions
§ 12:50 Global Positioning System (GPS) evidence
§ 12:51 Handwriting analysis evidence
§ 12:52 Law enforcement officer testimony

TABLE OF CONTENTS

- § 12:53 Polygraph examinations
- § 12:54 Post-traumatic stress disorder
- § 12:55 Psychiatric status of a key witness
- § 12:56 Relevant (or purportedly relevant) psychological
and cultural characteristics of the accused
- § 12:57 Shaken baby syndrome
- § 12:58 Shoe print identification
- § 12:59 Suggestibility of prosecution investigation
- § 12:60 Voice identification

D. ELICITING OPINION

- § 12:61 Generally
- § 12:62 Framing question
- § 12:63 Ultimate issue

E. EXPLAINING OPINION

- § 12:64 Generally
- § 12:65 Expert's narrative
- § 12:66 Persuasive effect
- § 12:67 Explanation of technical terms

V. CROSS-EXAMINATION OF EXPERT WITNESS

A. IN GENERAL

- § 12:68 Introduction

B. PLANNING

- § 12:69 Generally
- § 12:70 Preparation
- § 12:71 —Illustrations
- § 12:72 —Illustration regarding exhibits
- § 12:73 Limitations on discovery
- § 12:74 Use of own expert

C. ATTACKING QUALIFICATIONS

- § 12:75 Generally
- § 12:76 Lack of formal training
- § 12:77 Lack of experience

D. ATTACKING OBJECTIVITY

- § 12:78 Generally

EXAMINATION OF WITNESSES

- § 12:79 Compensation
- § 12:80 Pattern of past testimony

E. ATTACKING BASIS FOR OPINION

- § 12:81 Generally
- § 12:82 Lack of personal knowledge of underlying facts
- § 12:83 Relevant facts unavailable
- § 12:84 Different facts would alter opinion

F. INTRODUCTION OF LEARNED TREATISE

- § 12:85 Generally
- § 12:86 Foundation

Table of Laws and Rules

Table of Cases

Index