

→ 教程影印系列(Coursebook Series) ←

审判技巧

Trial Techniques

[美] 托马斯·A·马沃特 (Thomas A. Mauet) / 著

第六版



中信出版社
CITIC PUBLISHING HOUSE

→ 教程影印系列(Coursebook Series) ←

审判技巧

Trial Techniques

[美] 托马斯·A·马沃特 (Thomas A. Mauet) / 著

第六版



中 信 出 版 社
CITIC PUBLISHING HOUSE

图书在版编目 (CIP) 数据

审判技巧 (教程影印系列) / (美) 马沃特著. 一影印本. 一北京: 中信出版社, 2003.9

书名原文: Trial Techniques

ISBN 7-80073-923-6

I. 审… II. 马… III. 审判-诉讼程序-研究-美国-英文 IV. D971.25

中国版本图书馆CIP数据核字 (2003) 第074719号

Copyright © 2002 by THOMAS A. MAUET

This volume of Trial Techniques, by Thomas A. Mauet, is an English Reprint Edition meant solely for publication in the country of China, published and sold by CITIC PUBLISHING HOUSE, by permission of ASPEN PUBLISHERS, INC., New York, New York, U.S.A., the owner of all rights to publish and sell same.

本书由中信出版社与Aspen Publishers, Inc.合作出版, 未经出版者书面许可, 本书的任何部分不得以任何方式复制或抄袭。

审判技巧

SHENPAN JIQIAO

著 者: [美] 托马斯·A·马沃特

责任编辑: 张 芳

出版发行: 中信出版社 (北京市朝阳区东外大街亮马河南路14号塔园外交办公大楼 邮编 100600)

经 销 者: 中信联合发行有限公司

承 印 者: 霸州市长虹印刷厂

开 本: 787mm × 1092mm 1/16 印 张: 39.25 字 数: 785千字

版 次: 2003年9月第1版 印 次: 2003年9月第1次印刷

京权图字: 01-2003-5489

书 号: ISBN 7-80073-923-6/D · 125

定 价: 96.00元

版权所有·侵权必究

凡购本社图书, 如有缺页、倒页、脱页, 由发行公司负责退换。服务热线: 010-85322521

E-mail: sales@citicpub.com

010-85322522

总 序

吴志攀

加入世界贸易组织表明我国经济发展进入了一个新的发展时代——一个国际化商业时代。商业与法律的人才流动将全球化，评介人才标准将国际化，教育必须与世界发展同步。商业社会早已被马克思描绘成为一架复杂与精巧的机器，维持这架机器运行的是法律。法律不仅仅是关于道德与公理的原则，也不单单是说理论道的公平教义，还是具有可操作性的精细的具体专业技术。像医学专业一样，这些专业知识与经验是从无数的案例实践积累而成的。这些经验与知识体现在法学院的教材里。中信出版社出版的这套美国法学院教材为读者展现了这一点。

教育部早在2001年1月2日下发的《关于加强高等学校本科教学工作提高教学质量的若干意见》中指出：“为适应经济全球化和科技革命的挑战，本科教育要创造条件使用英语等外语进行公共课和专业课教学。对高新技术领域的生物技术、信息技术等专业，以及为适应我国加入WTO后需要的金融、法律等专业，更要先行一步，力争三年内，外语教学课程达到所开课程的5%–10%。暂不具备直接用外语讲授条件的学校、专业，可以对部分课程先实行外语教材、中文授课，分步到位。”

引进优质教育资源，快速传播新课程，学习和借鉴发达国家的成功教学经验，大胆改革现有的教科书模式成为当务之急。

按照我国法学教育发展的要求，中信出版社与外国出版公司合作，瞄准国际法律的高水平，从高端入手，大规模引进畅销外国法学院的外版法律教材，以使法学院学生尽快了解各国的法律制度，尤其是欧美等经济发达国家的法律体系及法律制度，熟悉国际公约与惯例，培养处理国际事务的能力。

此次中信出版社引进的是美国ASPEN出版公司出版的供美国法学院使用的主流法学教材及其配套教学参考书，作者均为富有经验的知名教授，其中不乏国际学术权威或著名诉讼专家，历经数十年课堂教学的锤炼，颇受法学院学生的欢迎，并得到律师实务界的认可。它们包括诉讼法、合同法、公司法、侵权法、宪法、财产法、证券法等诸多法律部门，以系列图书的形式全面介绍了美国法律的基本概况。

这次大规模引进的美国法律教材包括：

伊曼纽尔法律精要 (Emanuel Law Outlines) 美国哈佛、耶鲁等著名大学法学院广泛采用的主流课程教学用书，是快捷了解美国法律的最佳读本。作者均为美国名牌大学权威教授。其特点是：内容精炼，语言深入浅出，独具特色。在前言中作者以其丰富的教学经验制定了切实可行的学习步骤和方法。概要部分提纲挈领，浓缩精华。每章精心设计了简答题供自我检测。对与该法有关的众多考题综合分析，归纳考试要点和难点。

案例与解析 (Examples and Explanations) 由美国最权威、最富有经验的教授所著，这套丛书历

经不断的修改、增订，吸收了最新的资料，经受了美国成熟市场的考验，读者日众。这次推出的是最新版本，在前几版的基础上精益求精，补充了最新的联邦规则，案例也是选用当今人们所密切关注的问题，有很强的时代感。该丛书强调法律在具体案件中的运用，避免了我国教育只灌输法律的理念与规定，而忽视实际解决问题的能力培养。该丛书以简洁生动的语言阐述了美国的基本法律制度，可准确快捷地了解美国法律的精髓。精心选取的案例，详尽到位的解析，使读者读后对同一问题均有清晰的思路，透彻的理解，能举一反三，灵活运用。该丛书匠心独具之处在于文字与图表、图例穿插，有助于理解与记忆。

案例教程系列 (Casebook Series) 覆盖了美国法学院校的主流课程，是学习美国法律的代表性图书，美国著名的哈佛、耶鲁等大学的法学院普遍采用这套教材，在法学专家和学生中拥有极高的声誉。本丛书中所选的均为重要案例，其中很多案例有重要历史意义。书中摘录案例的重点部分，包括事实、法官的推理、作出判决的依据。不仅使读者快速掌握案例要点，而且省去繁琐的检索和查阅原案例的时间。书中还收录有成文法和相关资料，对国内不具备查阅美国原始资料条件的读者来说，本套书更是不可或缺的学习参考书。这套丛书充分体现了美国法学教育以案例教学为主的特点，以法院判例作为教学内容，采用苏格拉底式的问答方法，在课堂上学生充分参与讨论。这就要求学生不仅要了解专题法律知识，而且要理解法律判决书。本套丛书结合案例设计的大量思考题，对提高学生理解概念、提高分析和解决问题的能力，非常有益。本书及时补充出版最新的案例和法规汇编，保持四年修订一次的惯例，增补最新案例和最新学术研究成果，保证教材与时代发展同步。本丛书还有配套的教师手册，方便教师备课。

案例举要 (Casenote Legal Briefs) 美国最近三十年最畅销的法律教材的配套辅导读物。其中的每本书都是相关教材中的案例摘要和精辟讲解。该丛书内容简明扼要，条理清晰，结构科学，便于学生课前预习、课堂讨论、课后复习和准备考试。

除此之外，中信出版社还将推出教程系列、法律文书写作系列等美国法学教材的影印本。

美国法律以判例法为其主要的法律渊源，法律规范机动灵活，随着时代的变迁而对不合时宜的法律规则进行及时改进，以反映最新的时代特征；美国的法律教育同样贯穿了美国法律灵活的特性，采用大量的案例教学，启发学生的逻辑思维，提高其应用法律原则的能力。

从历史上看，我国的法律体系更多地受大陆法系的影响，法律渊源主要是成文法。在法学教育上，与国外法学教科书注重现实问题研究，注重培养学生分析和解决问题的能力相比，我国基本上采用理论教学为主，而用案例教学来解析法理则显得薄弱，在培养学生的创新精神和实践能力方面也做得不够。将美国的主流法学教材和权威的法律专业用书影印出版，就是试图让法律工作者通过原汁原味的外版书的学习，开阔眼界，取长补短，提升自己的专业水平，培养学生操作法律实际动手能力，特别是使我们的学生培养起对法律的精细化、具体化和操作化能力。

需要指出的是，影印出版美国的法学教材，并不是要不加取舍地全盘接收，我们只是希望呈现给读者一部完整的著作，让读者去评判。“取其精华去其糟粕”是我们民族对待外来文化的原则，我们相信读者的分辨能力。

是为序。

TRIAL TECHNIQUES



ASPEN PUBLISHERS, INC.
Legal Education Division

EDITORIAL ADVISORS

Erwin Chemerinsky

Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and
Political Science
University of Southern California

Richard A. Epstein

James Parker Hall Distinguished Service Professor of Law
University of Chicago

Ronald J. Gilson

Charles J. Meyers Professor of Law and Business
Stanford University
Marc and Eva Stern Professor of Law and Business
Columbia University

James E. Krier

Earl Warren DeLano Professor of Law
University of Michigan

Richard K. Neumann, Jr.

Professor of Law
Hofstra University

Kent D. Syverud

Dean and Garner Anthony Professor
Vanderbilt University Law School

Elizabeth Warren

Leo Gottlieb Professor of Law
Harvard University

EMERITUS EDITORIAL ADVISORS

E. Allan Farnsworth

Alfred McCormack Professor of Law
Columbia University

Geoffrey C. Hazard, Jr.

Trustee Professor of Law
University of Pennsylvania

Bernard Wolfman

Fessenden Professor of Law
Harvard University

About Aspen Law & Business Legal Education Division

With a dedication to preserving and strengthening the long-standing tradition of publishing excellence in legal education, Aspen Law & Business continues to provide the highest quality teaching and learning resources for today's law school community. Careful development, meticulous editing, and an unmatched responsiveness to the evolving needs of today's discerning educators combine in the creation of our outstanding casebooks, coursebooks, textbooks, and study aids.

ASPEN LAW & BUSINESS
A Division of Aspen Publishers, Inc.
A Wolters Kluwer Company
www.aspenpublishers.com

PREFACE

My experiences as a trial lawyer and trial advocacy teacher have made me realize that effective trial lawyers always seem to have two complementary abilities. First, they have developed an effective method for analyzing and preparing each case for trial. Second, they have the technical skills necessary to present their side of a case persuasively during trial. It is the combination of both qualities — preparation and execution — that produces effective trial advocacy.

This text approaches trial advocacy the same way. It presents a method of trial preparation and reviews the thought processes a trial lawyer uses before and during each phase of a trial. In addition, it discusses and gives examples of the basic technical courtroom skills that must be developed to present evidence and arguments persuasively to the jury. This is done in the firm belief that effective trial advocacy is both an art and a skill, and that while a few trial lawyers may be born, most are made. Artistry becomes possible only after basic skills have become mastered.

In trial work, as in many other fields, there is no one “right way” to proceed. There are just effective, time-tested methods that are as varied as lawyers are numerous. Consequently, while the text presents standard methods of examining witnesses, introducing exhibits, and making arguments, there are different approaches to all the tasks involved in trial work. Thus, the examples in the text are not the only way of effectively accomplishing the particular task involved. The text uses these examples because inexperienced trial lawyers need specific examples of effective techniques they can learn and use in court. Other effective ways of doing things are necessarily a product of experience, and only through experience will you learn what works best for you.

The emphasis of this text is on jury trials, since a lawyer who can persuasively try cases to a jury should also be competent during a bench trial. The examples are principally from personal injury and criminal cases, since they involve easily isolated examples of trial techniques, and they constitute the substantial majority of cases tried to juries. If the method and techniques applicable to uncomplicated, recurring situations presented here are mastered, more complex cases can be handled competently as well.

What's New in the Sixth Edition

I have made several additions and changes to this sixth edition. First, the most apparent change is that the text adds a new chapter on bench trials.

Chapter XII addresses a commonly asked question: how much of what we know about the psychology of persuasion in jury trials applies to bench trials? This chapter is based on "Bench Trials" published in *Litigation* (Summer 2002).

Second, the experts chapter has been revised to reflect the Supreme Court's decisions since *Daubert* and the amendments to Rules 701, 702, and 703 of the Federal Rules of Evidence effective in December 2000. In particular, Rule 703 may have a significant effect on the direct examinations of experts, and the chapter discusses how the new rule may change what lawyers are permitted to bring out during direct examinations.

Third, other chapters have been revised to reflect the other 2000 amendments to the Federal Rules of Evidence, Rules 103, 404(a), 803(6), and 902. These affect preserving error for appeal, presenting character trait evidence, and the foundation for business records. In particular, self-authentication, now permitted by Rule 803(6) as an alternative foundation for business records, will become a common way to admit business records at trial.

Finally, as with the previous editions, I have added numerous ideas throughout the text that I have picked up over the years, mostly because trial lawyers have been kind enough to pass them on to me. Particularly helpful have been Dominic J. Gianna, the most creative trial lawyer I know, and the Hon. Warren D. Wolfson, the best trial judge I know. They have been friends, partners, and colleagues for many years and represent the best of the bar and bench. Particularly supportive has been my wife, Gloria Torres Mauet, also a trial lawyer, who never seems to tire from listening to my latest ideas. I hope you will be pleased with the result.

Thomas A. Mauet

Tucson, Arizona
April 2002

TRIAL TECHNIQUES

SUMMARY OF CONTENTS

<i>Preface</i>	xxiii
I. THE TRIAL PROCESS	1
II. THE PSYCHOLOGY OF PERSUASION	13
III. JURY SELECTION	31
IV. OPENING STATEMENTS	61
V. DIRECT EXAMINATION	95
VI. EXHIBITS	167
VII. CROSS-EXAMINATION	247
VIII. EXPERTS	309
IX. CLOSING ARGUMENTS	401
X. OBJECTIONS	463
XI. TRIAL PREPARATION AND STRATEGY	499
XII. BENCH TRIALS	541
FEDERAL RULES OF EVIDENCE (as amended through December 1, 2000)	561
<i>Index</i>	593

CONTENTS

Preface

xxiii

I. THE TRIAL PROCESS

§1.1.	Introduction	1
§1.2.	Local practices and procedures	2
§1.3.	Trial date assignment	2
§1.4.	Jury selection	3
§1.5.	Preliminary instructions of law	4
§1.6.	Opening statements	4
§1.7.	Plaintiff's case-in-chief	5
§1.8.	Motions after plaintiff rests	6
§1.9.	Defendant's case-in-chief	7
§1.10.	Motions after defendant rests	7
§1.11.	Plaintiff's rebuttal and defendant's surrebuttal cases	8
§1.12.	Motions at the close of all evidence	8
§1.13.	Instructions conference	8
§1.14.	Closing arguments	8
§1.15.	Jury instructions	9
§1.16.	Jury deliberations and verdict	9
§1.17.	Post-trial motions and appeal	10
§1.18.	Conclusion	11

II. THE PSYCHOLOGY OF PERSUASION

§2.1.	Introduction	13
§2.2.	Behavioral science and jury research	13
	1. Affective reasoning	14
	2. Beliefs and attitudes	15
	3. Decision making	16
	4. What influences the jury	18
	a. Sender credibility	18
	b. Receiver capacities	19
	c. Effective messages	20
§2.3.	What research means for trial lawyers	23
	1. Prepare from the jury's point of view	23
	2. Develop a theory of the case	24

3.	Select themes and labels	25
4.	Emphasize the people	26
5.	Use storytelling techniques	26
6.	Focus on the key disputed facts and issues	27
7.	Understand your role as an advocate	27
§2.4.	Conclusion	28

III. JURY SELECTION

§3.1.	Introduction	31
§3.2.	Do you want a jury?	31
1.	Who is the judge?	31
2.	Does your case have jury appeal?	32
§3.3.	Jury examination and selection methods	32
1.	How many jurors and alternates will be selected?	33
2.	What jury questioning system will be used?	33
a.	Lawyer examination	34
b.	Judge examination	34
c.	Hybrid system	34
d.	Questionnaires	34
e.	Individual and group questioning	35
3.	What kinds of questions will be permitted?	35
a.	Open approach	35
b.	Restrictive approach	35
4.	What jury selection system will be used?	36
a.	Strike system	36
b.	Panel system	37
5.	How many challenges does each side have, and how will they be exercised?	37
a.	Cause challenges	37
b.	Peremptory challenges	38
c.	How many peremptory challenges does each side have?	39
d.	How will challenges be exercised in court?	39
§3.4.	Psychology of prospective jurors	41
1.	What are prospective jurors feeling and thinking?	41
2.	What are you trying to accomplish during jury selection?	42
3.	Approaches to questioning prospective jurors	42
a.	Beliefs and attitudes	43
b.	Likability	45
c.	Body language	45
d.	Persuaders, participants, and nonparticipants	46
4.	Juror profile chart	47
§3.5.	How to question jurors	48
1.	Topics checklist	48
2.	Questioning techniques	50
a.	Getting information from jurors	50

b.	Conveying concepts to jurors	54
c.	Introductory and concluding comments	55
d.	Group questions	56
3.	Example of voir dire	57
§3.6.	Summary checklist	59

IV. OPENING STATEMENTS

§4.1.	Introduction	61
§4.2.	Opening statements from the jury's perspective	61
1.	Explain your theory of the case	62
2.	Themes, labels, and the first minute	62
3.	Storytelling and people	64
4.	Request a verdict	66
§4.3.	Strategic and evidentiary considerations	67
1.	Be efficient	67
2.	Do not argue or state personal opinions	68
3.	Do not overstate the evidence	69
4.	Consider using exhibits and visual aids	69
5.	Anticipate weaknesses	70
6.	Waiving or reserving opening statements	71
7.	Lawyer's position and delivery	72
§4.4.	Content of effective opening statements	73
1.	Introduction	74
2.	Parties	75
3.	Scene	76
4.	Instrumentality	77
5.	Date, time, weather, and lighting	78
6.	Issue	78
7.	What happened	79
8.	Basis of liability/nonliability or guilt/nonguilt	80
9.	Anticipating and refuting other side	81
10.	Damages (civil cases only)	82
11.	Conclusion	84
§4.5.	Examples of opening statements	84
1.	Criminal case (murder): <i>People v. Sylvester Strong</i>	84
Opening statement — prosecution		85
Opening statement — defense		88
2.	Civil case (products liability):	
<i>Hi-Temp., Inc. v. Lindberg Furnace Company</i>		90
Opening statement — plaintiff		90
Opening statement — defendant		92

V. DIRECT EXAMINATION

§5.1.	Introduction	95
§5.2.	Elements	96

1.	Keep it simple	96
2.	Organize logically	97
3.	Use introductory and transition questions	97
4.	Introduce witness and develop background	98
5.	Set the scene	101
6.	Recreate the action	104
a.	Point of view	104
b.	Pace	104
c.	Sensory language	106
d.	Present tense	108
7.	Use nonleading questions	109
8.	Have the witness explain	111
9.	Volunteer weaknesses	111
10.	Use exhibits to highlight and summarize facts	112
11.	Listen to the answers	112
12.	Lawyer's position	113
13.	Prepare the witness	114
§5.3.	Occurrence witnesses	116
1.	Example — direct examinations in a civil case	117
2.	Example — direct examinations in a criminal case	127
3.	Example — direct examinations with a different organization	134
§5.4.	Conversations and statements	139
§5.5.	Telephone conversations	141
1.	Witness knows other person	141
2.	Witness does not know other person, but later learns identity through subsequent conversations	142
3.	Witness does not know the person, but later learns identity through some transaction	143
4.	Witness does not know the person, but has dialed a listed business telephone number and spoken with the person there	145
§5.6.	Refreshing a witness' recollection	145
§5.7.	Opinions of lay witnesses	147
§5.8.	The records witness	148
§5.9.	Character witnesses	153
1.	Law	153
2.	Foundation	154
3.	Tactics	155
§5.10.	Adverse witnesses	157
§5.11.	Hostile witnesses	158
§5.12.	Using deposition transcripts and videotapes	159
§5.13.	Judicial notice and stipulations	161
1.	Judicial notice	161
2.	Stipulations	161
§5.14.	Redirect examination	162

VI. EXHIBITS

§6.1.	Introduction	167
§6.2.	How to get exhibits in evidence	168
	Step 1. Have the exhibit marked	169
	Step 2. Show the exhibit to opposing counsel	169
	Step 3. Ask the court's permission to approach the witness	170
	Step 4. Show the exhibit to the witness	170
	Step 5. Lay the foundation for the exhibit	171
	Step 6. Offer the exhibit in evidence	171
	Step 7. Have the exhibit marked in evidence	172
	Step 8. Have the witness use or mark the exhibit, if appropriate	172
	Step 9. Obtain permission to show or read the exhibit to the jury	172
	Step 10. "Publish" the exhibit	173
§6.3.	Foundations for exhibits	176
	1. Tangible objects	178
	2. Tangible objects — chain of custody	179
	3. Photographs, motion pictures, and videotapes	183
	4. Diagrams, models, and maps	185
	5. Drawings by witnesses	187
	6. Demonstrations by witnesses	188
	7. X-ray films	189
	8. Sound and video recordings	191
	9. Computer-generated graphics and animations	194
	10. Signed instruments	195
	11. Checks	198
	12. Letters	200
	a. Letter sent to your party by another party	201
	b. Letter sent by your party to another party	202
	13. Business records	204
	14. Computer records	209
	15. Recorded recollection	210
	16. Copies	212
	17. Certified records	213
	18. Summaries	214
	19. Stipulations	215
	20. Pleadings and discovery	216
§6.4.	Planning, preparing, and using visual aids and exhibits	217
	1. Develop a visual strategy	217
	2. Prepare courtroom visual aids and exhibits	220
	a. Objects	221
	b. Photographs and videotapes	222
	c. Diagrams, models, and charts	225
	d. Records and documents	232
	e. Summaries	234