FUNDAMENTALS OF TRIAL TECHNIQUES

THOMAS A. MAUET

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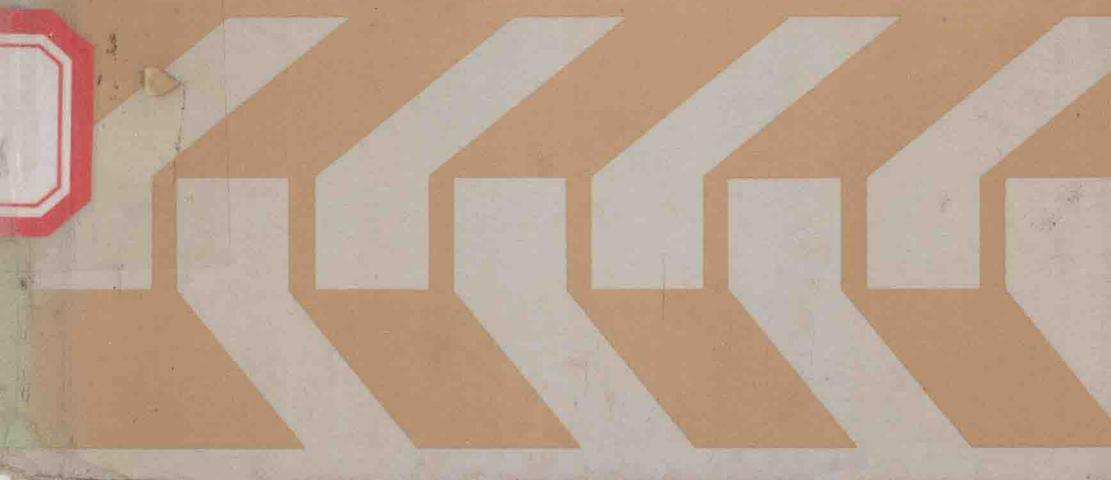

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PREFACE

My experiences as a trial lawyer and trial advocacy teacher have made me realize that the effective trial lawyers always seem to have two complementary abilities. First, they have developed a methodology that thoroughly analyzes and prepares each case for trial. Second, they have acquired the technical skills necessary to present their side of a case persuasively in court. It is the synthesis of both qualities — preparation and execution — that produces effective trial advocacy.

This text approaches trial advocacy the same way. It presents a methodology for trial preparation and reviews the thought processes a trial lawyer should utilize before and during each phase of a trial. In addition, it discusses and gives examples of the technical courtroom skills that must be developed to present evidence and arguments in a persuasive way to the trier of fact. 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 when basic skills have become mastered.

In trial work, as in many other fields, there is no "right way" to try cases, or "authority" on trial techniques. 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 of the tasks involved in trial work. Thus, the examples set forth in the text are not the only way of effectively accomplishing the particular task involved. The text makes use of these examples because inexperienced trial lawyers need concrete, specific examples of effective techniques they can learn and utilize in court. Other effective ways of doing things are necessarily a product of experience, and only through experience will you determine what works best for you.

The emphasis of this text is on jury trials, since a lawyer who can effectively 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 methodology and techniques applicable to the uncomplicated, recurring situations presented here are mastered, more complex cases can be handled competently as well.

Several persons were instrumental in the development of this text. I gratefully acknowledge the help of Thomas Geraghty, Professor of Law at Northwestern University, whose extensive analysis and review have influenced almost every page of this text; the Honorable Warren D. Wolfson, Judge of the Circuit Court of Cook County, Illinois, whose initial encouragement and continuous advice were largely responsible for my beginning and completing this text; and my wife, Susan Mauet, who patiently supported this undertaking from its inception. Many sources, of course, have contributed to the development of my ideas and approaches to trial work which are expressed in this text. These include many members of the bar and bench with, against, and before whom I have tried cases, as well as several teaching institutions in which I have been active, particularly the National Institute for Trial Advocacy.

I am also indebted to Fred Lane, Attorney at Law, of Chicago, who first taught me the fundamentals of trial techniques, the Honorable Marvin E. Aspen, Judge of the United States District Court for the Northern District of Illinois, the Honorable Benjamin S. Mackoff and the Honorable Robert J. Collins, both Judges of the Circuit Court of Cook County, Illinois, all of whom contributed significantly to my understanding of trial techniques. Finally, I am indebted to Mary Vezina, who tirelessly typed and edited the numerous drafts of the manuscript.

Thomas A. Mauet

Chicago, Illinois
March 1, 1980

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§1.1. *Introduction*

You have just been called into the office of a partner of the litigation firm that recently hired you. The partner tells you that he has a case which will be going to trial soon that seems "just right" for you. Witnesses have been interviewed. Discovery has been completed. Pretrial motions have been filed and ruled on. Settlement negotiations have just collapsed. The case now needs to be tried, and you're the person who will try it. With a smile, the partner hands you the file. Apprehensively, you walk out of his office, thinking: "My God. What do I do now?"

What you do, how you do it, and why you do it is what this book is all about, from beginning to end. This chapter will discuss the all-important first steps: how to organize files, prepare a trial notebook, develop a theory of the case, prepare witnesses for direct examinations, structure the order of proof, and prepare cross-examinations of your opponent's witnesses.

§1.2. *Organization of files*

Ours is an age of records, and the field of law is no exception. Everything is routinely recorded and routinely duplicated. Even a

simple case can, and invariably will, by the time it approaches trial, generate an extensive collection of paperwork. Consequently, all files must be organized, divided, and indexed to provide immediate and accurate access to the contents at any time during trial. The lawyer who is organized will appear prepared, confident, and professional to both the court and jury.

Files should usually include the following indexed folder categories:

1. *Court papers:*

These should normally be bound in the order filed or entered:

a. pleadings
b. discovery (interrogatories, depositions, etc.)
c. motions and responses
d. orders
e. subpoenas
f. jury instructions

2. *Evidence:*

Records should be placed in clear plastic document protectors and have evidence labels attached. While records will depend on the specific case, the following are commonly involved:

a. bills, statements, and receipts
b. correspondence between parties
c. photographs, maps, diagrams
d. business records

3. *Attorney's records:*

a. running case history (log of attorney's activities in the case)
b. retainer contract, bills, costs
c. correspondence
d. legal research
e. miscellaneous

There is no magic in organizing files. Most offices have developed their own systems for the types of cases they routinely handle. The important point to remember is that your system must be logical, clearly indexed, and bound whenever possible, so that records can be retrieved quickly and accurately.

§1.3. *Trial notebook*

Trial material should be organized in a way that is most efficiently useful at trial. This is different from organizing case files, discussed above. Each part of a trial — jury selection, opening statements, direct and cross-examinations, and closing arguments — requires separate organization and preparation. Accordingly, paperwork

necessarily generated during the preparation of each phase of the trial should be organized in a logical, easily retrievable way.

Two methods, the divider method and trial notebook method, are most commonly used. While ordinarily either of the two methods is used, they can also effectively be used in conjunction, especially in large cases. In such instances the notebook can be used as a working trial notebook which keys into a larger divider system. This is frequently done, particularly in large commercial litigation cases.

1. Divider method

Under this method each part of the trial (jury, openings, plaintiff witnesses, defense witnesses, closings, etc.) receives a separate, labeled file divider, which has in it all papers pertinent to that phase of the trial. By merely pulling out the appropriate section, the lawyer has immediately at his disposal all necessary materials.

The advantage of the divider method is that it is usually better suited to a long, complex case when the paperwork is so voluminous it cannot physically be organized and contained in a trial notebook.

The disadvantages are primarily logistical. A divider method is only as reliable as the lawyer maintaining it. If a file is misfiled or its contents misplaced, it cannot be readily located and its utility is eliminated. If more than one lawyer represents a party and shares the files, the possibilities of disruption are much greater. (The organization of the divider method is essentially identical to the trial notebook method, discussed below.)

2. Trial notebook

Under this method all necessary materials for each part of the trial are placed in a 3-ring notebook in appropriately tabbed sections. The advantages are that once placed in the notebook, the materials cannot be lost or misplaced, and are immediately located simply by turning to the appropriate section.

While it should be organized to meet individual lawyers' needs, the notebook system works best when it contains enough tabbed sections to make the contents easily located. The following sections are commonly incorporated in trial notebooks:

a. Facts

This section should contain all reports, witness statements, diagrams, charts, and other factual materials. It should also contain a

summary sheet which recites the parties, attorneys (address and telephone), the counts of the complaint or indictment, and the essential facts and chronology of events involved.

b. Pleadings

This section should contain the complaint or indictment, answer, and reply of each party to the suit. The pleadings should be in chronological order. It should include a pleading abstract when the pleadings are sufficiently complex. Where the charge or complaint is based on a specific statute, a copy of the statute should also be included. Keeping the elements instructions (see jury instructions below) in this section is also useful.

c. Discovery

Included should be the following discovery documents:

1. interrogatories and answers to interrogatories
2. deposition abstracts, cross-indexed to tabbed and marked depositions
3. other discovery (notices to admit and produce, etc.)

d. Motions

This section should contain all pretrial motions, responses, and orders which have already been made, as well as any that will be presented prior to or during the trial.

e. Jury selection

This section should contain:

1. *Jury chart.* A jury chart is necessary to record the basic background information about each juror obtained during the voir dire examination, so that you can review it before deciding which jurors you will peremptorily challenge. Most lawyers use a jury box diagram to record the jurors' names and backgrounds. When a challenge is exercised, simply put a large "P" (plaintiff), "D" (defendant) or "C" (cause) through the appropriate box to record which party exercised the peremptory challenge or if it was for cause.