

Aspen Coursebook Series



Marilyn J. Berger

John B. Mitchell

Ronald H. Clark

Pretrial Advocacy

Planning, Analysis, and Strategy

Fifth Edition



Wolters Kluwer

PRETRIAL ADVOCACY

Planning, Analysis, and Strategy

Fifth Edition

MARILYN J. BERGER

*Emeritus Professor of Law
Seattle University School of Law*

JOHN B. MITCHELL

*Emeritus Professor of Law
Seattle University School of Law*

RONALD H. CLARK

*Distinguished Practitioner in Residence
Seattle University School of Law*



Wolters Kluwer

Copyright © 2017 Marilyn J. Berger, John B. Mitchell, and Ronald H. Clark.

Published by Wolters Kluwer in New York.

Wolters Kluwer Legal & Regulatory US serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.WKLegaledu.com)

No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or utilized by any information storage or retrieval system, without written permission from the publisher. For information about permissions or to request permissions online, visit us at www.WKLegaledu.com, or a written request may be faxed to our permissions department at 212-771-0803.

To contact Customer Service, e-mail customer.service@wolterskluwer.com, call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Wolters Kluwer
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-4548-7000-5

Library of Congress Cataloging-in-Publication Data

Names: Berger, Marilyn J., author. | Mitchell, John B. (John Barry), 1944- author. | Clark, Ronald H., author.

Title: Pretrial advocacy : planning, analysis, and strategy / Marilyn J. Berger, emeritus professor of law, Seattle University School of Law; John B. Mitchell, emeritus professor of law, Seattle University School of Law; Ronald H. Clark, distinguished practitioner in residence, Seattle University School of Law.

Description: Fifth Edition. | New York : Wolters Kluwer, [2017] | Includes index.

Identifiers: LCCN 2016030562 | ISBN 9781454870005

Subjects: LCSH: Pre-trial procedure--United States.

Classification: LCC KF8900 .B4 2017 | DDC 347.73/72--dc23

LC record available at <https://lcn.loc.gov/2016030562>



PRETRIAL ADVOCACY

EDITORIAL ADVISORS

Rachel E. Barkow

*Segal Family Professor of Regulatory Law and Policy
Faculty Director, Center on the Administration of Criminal Law
New York University School of Law*

Erwin Chemerinsky

*Dean and Distinguished Professor of Law
Raymond Pryke Professor of First Amendment Law
University of California, Irvine School of Law*

Richard A. Epstein

*Laurence A. Tisch Professor of Law
New York University School of Law
Peter and Kirsten Bedford Senior Fellow
The Hoover Institution
Senior Lecturer in Law
The 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 Law School*

James E. Krier

*Earl Warren DeLano Professor of Law
The University of Michigan Law School*

Tracey L. Meares

*Walton Hale Hamilton Professor of Law
Director, The Justice Collaboratory
Yale Law School*

Richard K. Neumann, Jr.

*Professor of Law
Maurice A. Deane School of Law at Hofstra University*

Robert H. Sitkoff

*John L. Gray Professor of Law
Harvard Law School*

David Alan Sklansky

*Stanley Morrison Professor of Law, Stanford Law School
Faculty Co-Director, Stanford Criminal Justice Center*

ABOUT WOLTERS KLUWER LEGAL & REGULATORY US

Wolters Kluwer Legal & Regulatory US delivers expert content and solutions in the areas of law, corporate compliance, health compliance, reimbursement, and legal education. Its practical solutions help customers successfully navigate the demands of a changing environment to drive their daily activities, enhance decision quality and inspire confident outcomes.

Serving customers worldwide, its legal and regulatory portfolio includes products under the Aspen Publishers, CCH Incorporated, Kluwer Law International, ftwilliam.com and MediRegs names. They are regarded as exceptional and trusted resources for general legal and practice-specific knowledge, compliance and risk management, dynamic workflow solutions, and expert commentary.



John B. Mitchell, Marilyn J. Berger, and Ronald H. Clark—The Seattle Space Needle in the background skyline

This book is and we are dedicated to our families.

To Albert J. and Dorian S.
Marilyn J. Berger

To Eva, David, Sarah, and Tyler
John B. Mitchell

To Nancy, Brady, Soojin, Malachi, Riley, Clancy, Kara,
Beatrice, Samuel, Colby, and Darren
Ronald H. Clark

And to Laurie Sleeper Wells, our administrative assistant and a member
of our extended family.

Acknowledgments

The cover of this book indicates that it is the work of three authors. Yet there were truly so many other individuals, in so many capacities, who were essential to this book. Their combined contributions are visible to us on every page. We do more than thank them; we share credit with them for this work.

Kwame Amoeteng, attorney at law.

Jonathan Barnard, Seattle University School of Law student and law clerk.

Mimy Bailey, attorney at law.

William S. (Bill) Bailey, attorney at law.

Albert J. Berger, Emeritus Professor, University of Washington.

Dorian S. Berger, attorney at law.

Nicolas Carlson, Seattle University School of Law, attorney at law.

Jason Casebolt, attorney at law.

Nancy Clark, artist and editor.

Randy Cox, attorney at law.

Fred Dekay, professor at Seattle University.

The Honorable John Erlick, Judge, King County Superior Court and adjunct professor of law at Seattle University School of Law.

Tyler Fox, movie editor.

Barbara Frost, adjunct professor of law, at Seattle University School of Law.

Steve Fury, attorney at law.

Captain Tag Gleason, Seattle Police Department, Office of Professional Accountability.

Monica Hartsock, attorney at law.

P. A. Hendrichsen, attorney at law.

Sarah Johnson, attorney at law.

The Honorable Judge Richard A. Jones, U.S. District Court, Western District of Washington.

Dean Paul Kirgis, Director the Honorable Judge Karen Townsend, and the faculty of the University of Montana Law School's Advanced Trial Advocacy Program.

- Alan Kirtley, associate professor of the University of Washington School of Law.
- Law Students at Seattle University School of Law.
- Monique M. C. Leahy, principal, Wordsworth Publishing, Reston, Virginia, and Contributing Editor to *Pretrial Advocacy*.
- Gretchen Ludwig, director of *The Garage* and *Taking and Using Deposition* movies.
- The Honorable Judge Terrance Lukens, JAMS (Judicial Arbitration Mediation Services).
- The Honorable Judge Dean Lum, King County Superior Court; adjunct professor of law, at Seattle University School of Law.
- Dr. Norman Mar, Ph.D.
- Hannalore Merritt, attorney at law.
- Rebecca Miller, Officer, Seattle Police Department, East Precinct.
- Theodore Myhre, legal writing professor of law, Seattle University School of Law.
- The Honorable Judge Jack Nevin, Pierce County Superior Court and adjunct professor of Law, Seattle University School of Law.
- Kyle C. Olive, attorney at law.
- The Honorable Judge Marsha J. Pechman, U.S. District Court, Western District of Washington.
- Rex Prout, Assistant Chief, Enforcement & Education, Washington State Liquor Control Board (ret.).
- Gavin Radkey, Seattle University School of Law student and law clerk, class of 2014.
- Professor Laurie Shanks, Albany Law School.
- Richard Sherwin, professor and director New York Law School's Visual Persuasion Project.
- John Jay Syverson (Jay), photographer, OnPoint Productions, Seattle.
- Tim Tesh, attorney at law.
- Chris Tiedemann, technology principal, Prolumina Trial Technologies.
- Kyle Trethewey, Seattle University School of Law student and law clerk, class of 2012.
- Kirk Van Scoyoc, actor.
- Justin Walsh, attorney at law.
- John D. Weiner, attorney at law.
- Laurie Sleeper Wells, administrative assistant, Seattle University School of Law.
- The Honorable Judge Matt Williams, King County District Court and adjunct professor of law at Seattle University School of Law.
- Katherine Wimble, graphics artist.
- Rick Wyant, M.S., Supervising Forensic Scientist, Firearm and Toolmark Examiner, Washington State Patrol, Crime Laboratory Division.

The Honorable Judge Mary Yu, King County Superior Court.
Robin L. Zaragoza, Seattle University School of Law, class of 2017, law clerk.
Grace Zavidow, Seattle University School of Law student and law clerk.

A special thank you for the assistance we were provided at Seattle University School of Law: Dean Annette Clark, Associate Dean for Academic Affairs John Eason, Associate Dean for Finance and Administration Richard Bird, Stephanie Wilson Reference Librarian, and J. Barratt Godfrey, multimedia specialist.

And finally, thanks to our friends and professional colleagues at Aspen Publishers: Dana Wilson, our Developmental Editor; John Devins, our former Development Editor.

Introduction: The Toolbox

This book along with the accompanying website *aspenadvocacy books.com* with videos (demonstration videos of how to take and defend a deposition and how to use it in court, a crime scene tour, and several ADR and trial videos), exemplars of commonly used pretrial documents, and numerous pretrial, trial, and evidence resources are all intended to provide you with a toolbox filled with tools for engaging in the wide array of pretrial activities. Additionally, through a series of criminal and civil problems, as well as supportive commentary and case files, the book presents an approach to thinking about, planning, and performing detailed and realistic problems that simulate a wide range of pretrial practice situations and foster the kinds of analytic processes needed to solve these problems.

A discussion of our theory and approach to lawyering in an adversary system is reserved for Chapter 1; the object of this introduction is to provide you with a basic understanding of how the book is structured and its intended use.

A. PRETRIAL ADVOCACY BOOK

This book is divided into 15 chapters, with Chapters 1 through 14 each covering a separate pretrial subject area—for example, witness interviews, discovery, and negotiation. The substance of each chapter elaborates a theoretical approach to the particular pretrial skill that is the subject of that chapter, provides demonstrations of that approach as applied to hypothetical situations, and offers a series of practical and strategic pointers in the subject area. The examples that we provide in the text are intended to be just that, examples. They are not meant to be exhaustive, but are merely intended to illustrate the point in question. Where possible, the text also includes references to sources that may be of help to

you. In each chapter, the text concludes with a checklist that you may consult when you plan to employ the pretrial skills that are the subject of that chapter.

Chapter 15 provides the experiential learning experiences which put into hands-on practice the lessons in Chapters 1-14. Combined with the book and the companion website, the exercises and supporting casefiles support a rich and realistic pretrial advocacy class for students in training for the profession, as well as challenging and useful CLE professional development workshops for practicing lawyers or the law students' class.

New to this fifth edition is an enriched, password-protected companion website: *aspenadvocacybooks.com*. This updated website contains: learning-by-doing performance assignments (also placed in the back of the text to afford maximum user flexibility and convenience); Case Files and an Actors' Guide that provide the information needed to bring the reality of practicing law to the wide range of experiences offered by the materials; videos, such as a taking-a-deposition demonstration and a crime scene tour; document samples; and an abundance of supplemental materials. Students, please contact your professor for the password to access the materials on the website.

B. WEBSITE ASSIGNMENTS, CASE FILES, AND ACTORS' GUIDE

Assignments: The 79 role-playing assignments located in Chapter 15 and in the Assignments folder on the website *aspenadvocacybooks.com* offer realistic in-practice experiences paralleling the wide range of skills and applied knowledge demanded in order to achieve a high level of practice in pretrial litigation. The performance assignments include not only writing, such as drafting a complaint, but also common practice activities, such as client and witness interviewing and taking and defending a deposition. Each performance assignment simulates a different practice situation based on a single, but complex, fact pattern that manifests itself in two fictitious cases—a homicide criminal case, *State v. Hard*, and a wrongful death civil case, *Summers v. Hard*.

The role or perspective you assume may shift from one problem assignment to another. Thus in the civil case, your entire approach to a particular problem may vary depending on whether you are a

defendant's privately retained attorney or an attorney representing a defendant's insurance company. Your instructor will clarify each of these roles—and your connection to them—as they appear. Each problem contains a preparation section that refers to the background reading you must do to work through the problem. Usually, this reading will include the text from one or more chapters and materials from the case file on the book's website. There are also references to rules of evidence, civil procedure, and criminal procedure.

Case Files: The criminal and civil case files for *State v. Hard* and *Summers v. Hard* on the website provide the factual and legal details for the problems. The files include diagrams, documents, expert reports, jury instructions, pleadings, research memoranda, statutes, and witness statements. The research memoranda are a special feature. The memoranda are composed of fictional cases from our fictional jurisdiction, the State of Major. The memos provide all the research you need to deal with the multitude of legal issues in the problems. Of course, your instructor may prefer that you instead research and use appropriate real cases from your jurisdiction.

Actors' Guide: The simulated pretrial skills performances generally involve role-play. Someone in the class must play the client who is being counseled or the expert economist who is interviewed or the custodian of records whose deposition is being taken. To make these simulations as realistic as possible, your instructor has been provided with a witness guide that contains for distribution all the information each actor requires to make his or her performance realistic—memorable background materials detailing the particular witness's personal history, information about the witness's knowledge of the case, and instructions for how the witness is to behave and respond during the particular assignment.

Additionally, the witness guide contains confidential instructions that at times will be given to the students who are playing the attorneys, for example, during negotiation exercises.

C. WEBSITE DEPOSITION DEMONSTRATION, CRIME SCENE TOUR AND SETTLEMENT NEGOTIATION MOVIES

Three helpful videos are located on the companion website and can be readily streamed. First, there is a how-to demonstration

video showing how to take a deposition and introduce and use the deposition at trial. Second, a video shows a guided tour of the crime scene where the shooting that led to the criminal *State v. Hard* and civil *Summers v. Hard* cases took place. Third, on the website you will find a documentary developed for settlement negotiation and alternative dispute resolution (“ADR”). Additionally, the website contains animations that were used during alternative dispute resolution and trial as well as a slide show used in ADR.

D. WEBSITE DOCUMENT SAMPLES AND SUPPLEMENTARY MATERIALS

Document Samples: Also on the companion website are exemplars of a variety of legal documents commonly used in pretrial practice including the following:

- Intake form;
- Engagement letter;
- Declination letter;
- Fee agreements—contingency, other;
- Settlement brochure;
- Deposition;
- Discovery plan;
- Settlement brochure; and
- Mediation brief.

Supplementary Materials: The website accompanying this book provides a wealth of supplemental material and special features for both pretrial and trial advocacy. Specifically for pretrial advocacy, the website contains resources such as:

- Articles for pretrial, such as “Fielding Questions from the Bench” and “Summary Judgment Tips from the Top”;
- Sample pleadings, such as complaints, answers, interrogatories, and motions;
- Links to pretrial and trial visuals websites;
- Links to legal research websites;
- Link to court documents of current cases; and
- Links to fact investigation websites for locating people, doing background checks, and other public cyber-sleuthing.

E. METHODOLOGY

The book offers a choice of one (or more) of six learning methodologies from which your instructor will choose:

Reading: The text provides a wealth of information about each skills performance ranging from theory to practice, including illustrations of any given approach so you can understand how the ideas are applied in practice. All of this information will assist you in working through the corresponding problems. The occasional references to other authors' work in the field give you the opportunity for further reading that can broaden your appreciation and understanding of the area.

Discussing: As just described, many of the assignments provide opportunities for you to discuss substantive issues and pretrial strategies.

Watching: The videos and other visuals on the website that accompanies this text allow you to watch veteran, skilled trial lawyers take a deposition and use a deposition in court. You can see visuals that are developed for pretrial and trial advocacy including a documentary, animations, and a PowerPoint storytelling show. The website also provides a guided video tour of a crime scene.

Performing: The assignments provide the opportunity to learn through simulated performances (interviewing, counseling, arguing motions). The experience of role-playing a witness, or just observing the role-play of fellow lawyers or law students, will also give valuable insights into the factors that constitute competent attorney performance.

Writing: Assignments also offer a variety of writing opportunities, from planning memos and discovery motions to pleadings and declarations for Constitution-based pretrial motions. As such, many of these involve developing the type of legal analysis you have perfected in law school, translating that analysis into an adversary perspective, and then communicating your position by persuasive writing to the appropriate audience.

Critiquing: Following your performances, you will gain a great deal from the critique of your work by your instructor and perhaps from peers as well. Furthermore, even as a nonperforming class or

workshop member, learning by example how to critique and what to critique will greatly enhance your ability to evaluate, and thereby improve, your own subsequent planning and performances.

F. FINAL THOUGHTS

Learn well. Your clients will totally rely on you. They will entrust their families, businesses, freedom, and even their very lives to your care and competence. Learn well . . . and have fun.

PRETRIAL ADVOCACY