

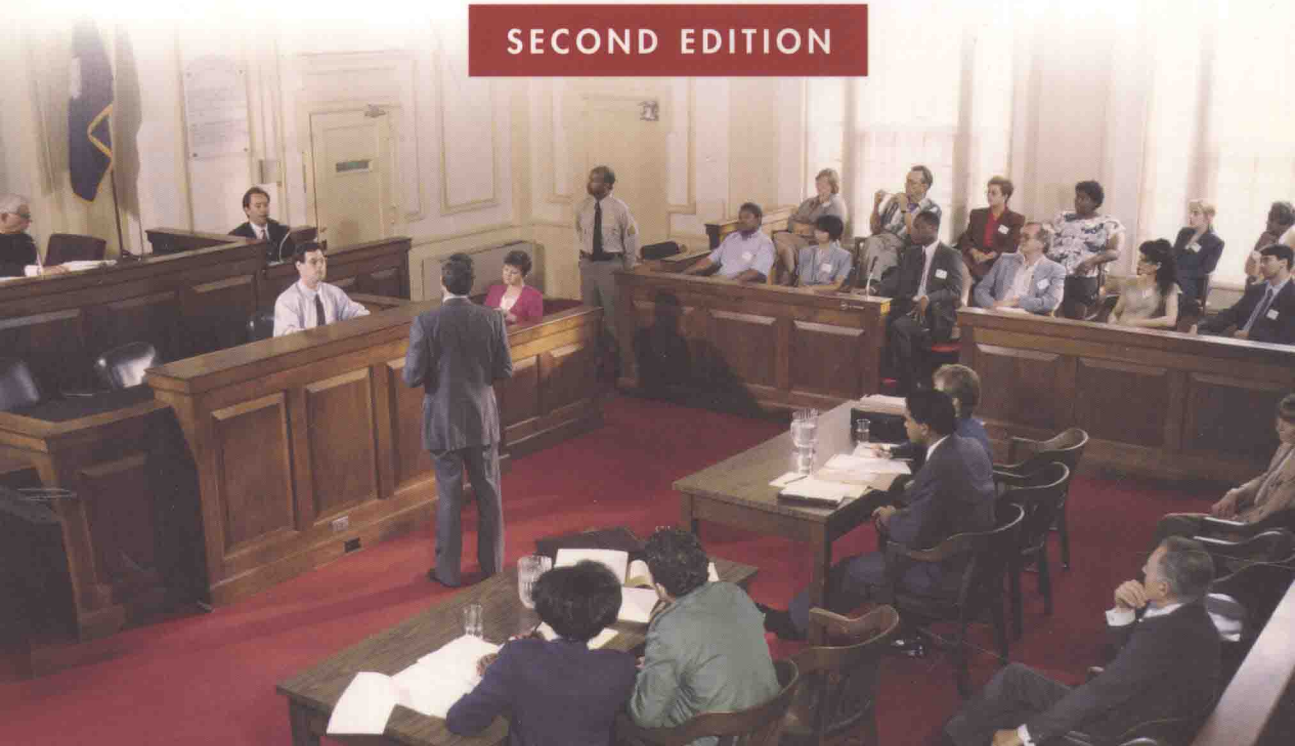
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Thomas A. Mauet TRIALS

STRATEGY, SKILLS,
AND THE NEW POWERS OF PERSUASION

SECOND EDITION



Wolters Kluwer

Law & Business

ASPEN PUBLISHERS

TRIALS

Strategy, Skills, and the New Powers of Persuasion

SECOND EDITION

Thomas A. Mauet

Milton O. Riepe Professor of Law
and Director of Trial Advocacy
University of Arizona



Wolters Kluwer

Law & Business

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PREFACE

It has been 25 years since I wrote the first edition of *Fundamentals of Trial Techniques*, and during that time much has changed in the world of trials. This new book focuses on the significant changes in trial theory and practice, because trial lawyers must respond to those changes to be effective advocates in the 21st century.

The changes begin with the jurors. Media reporting of legal issues, live television coverage of sensational trials, and courtroom dramas on television and in the movies have changed jurors' attitudes about the law in general and our court system in particular. Older jurors—seniors and baby boomers—are being replaced by the younger generations—Generation X and Generation Y—and with that change come different attitudes, attention spans, and learning preferences. As the jurors change, jury research has significantly increased our understanding of how those jurors prefer to learn, how they think, and how they make decisions. These changes have significant effects on how trials today must be conducted.

Every stage of the trial now must be visual, because most jurors have been raised in the era of visual learning based largely on television and computers. Opening statements are now understood as a critical stage in which juror impressions are first made and largely retained. Courtroom exhibits and visual aids are now seen as key elements in teaching jurors about the issues and the evidence. Expert witnesses now appear in almost every trial and are subject to heightened judicial scrutiny. Jury consultants and litigation support firms now stand ready to help lawyers develop persuasive trial themes, create effective exhibits and visual aids, select jurors, and train witnesses and lawyers to be better communicators. And while all these changes have been occurring, the number of bench trials and other nonjury proceedings has been increasing.

Despite these changes in trial theory and practice, successful trial lawyers today understand that some things have not changed. Presenting a compelling and successful case still requires three essential characteristics: understanding the psychology of persuasion, undertaking pretrial preparation, and developing effective trial skills. First, successful trial lawyers know that to be effective in the courtroom, they need to consider everything from the listeners' point of view. They know how jurors prefer to receive information and how jurors make individual and group decisions. They know that before jurors will accept their version of "what really happened" and return a favorable verdict, they need to reach the jurors' hearts as well as their minds. Second, successful trial lawyers understand that trials involve a

great deal of work well before the trial starts. They know that planning and preparation are essential to developing and executing a successful trial strategy, and they develop an effective method for preparing each case for trial. Third, successful trial lawyers understand that they need effective trial skills to translate a realistic trial strategy into persuasive trial tactics. It is the combination of the three — understanding persuasion, preparing for trial, and acquiring trial skills — that produces effective trial advocacy. In short, lawyers today need to understand strategy, skills, and the new power of persuasion.

This text approaches trials the same way. It reviews what we know today about the psychology of persuasion and how this knowledge can be applied to trials. It presents a methodology for developing an effective trial strategy and preparing for trial. It explains and demonstrates the skills that must be developed and used during a trial. The text is organized around the stages of a jury trial so that the important information will be quickly accessible, whether the text is used by experienced practitioners preparing for a trial, young lawyers attending a trial advocacy program, or law students taking a trial advocacy course.

To accommodate the age of visual learning, the text is accompanied by a DVD inside the back cover. The DVD contains all the shell forms and completed forms for the trial notebook discussed in Chapter 2, as well as all the exhibits and visual aids discussed in Chapter 7. The DVD also contains additional examples of opening statements, expert direct examinations, and closing arguments.

This book is dedicated to the proposition that effective advocacy in each stage of the trial affects the outcome of many cases, particularly the close cases that get tried. Persuasive advocacy makes a difference, and persuasive advocates get better verdicts.

I am indebted to the hundreds of trial lawyers and judges I have worked and taught with over the past 25 years. In the trial world, imitation is the sincerest form of flattery. Trial lawyers learn effective courtroom techniques in large part by watching other effective trial lawyers perform during trials and adopting those techniques for future use. Like them, I have borrowed, saved, and used the techniques of many others as examples throughout this book. Please do the same during your trial career.

What's New in the Second Edition

The most significant addition to the second edition is the DVD, which includes a video of a personal injury jury trial. Students and young lawyers frequently have a poor understanding of the atmosphere of a jury trial. They don't understand the formality of the courtroom setting and how to conduct themselves before the judge and jury. They rarely go to a courthouse and watch a jury trial. This video fills that gap, by showing all the stages of a jury trial, so that students and young lawyers can see the trial process and how lawyers conduct themselves during each of its stages. The trial can be viewed in its entirety (approximately 80 minutes), or particular segments can be viewed individually.



ACKNOWLEDGMENTS

Several people have been particularly helpful in the preparation of this text. Dominic J. Gianna, a trial lawyer in New Orleans, and Warren D. Wolfson, a judge in Chicago, have been friends, co-authors, and teaching partners in countless CLE programs over the years. Their ideas and feedback appear throughout the text.

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Jordan Ray, Senior Trial Consultant at inData Corporation, Gilbert, Arizona, prepared the exhibits, visual aids, and animations that appear in Chapter 7 as well as on the DVD. His contribution made that chapter immeasurably better.

Melissa English and Mark Hummels, former students at the University of Arizona College of Law, read the manuscript and gave me valuable feedback through the eyes of young trial lawyers.

Finally, the University of Arizona College of Law, my home for the past 25 years, has made this and other books on litigation and trial advocacy possible by generously and continuously supporting my efforts with research grants.

I owe much to all of you.

*Thomas A. Mauet
Tucson, Arizona
January 1, 2009*

SUMMARY OF CONTENTS

<i>Contents</i>	<i>ix</i>
<i>Preface</i>	<i>xxv</i>
<i>Acknowledgments</i>	<i>xxvii</i>
CHAPTER 1	
PERSUASION	1
CHAPTER 2	
STRATEGY, PREPARATION, AND ORGANIZATION	15
CHAPTER 3	
JURY SELECTION	39
CHAPTER 4	
OPENING STATEMENTS	83
CHAPTER 5	
DIRECT EXAMINATIONS	119
CHAPTER 6	
CROSS-EXAMINATIONS	209
CHAPTER 7	
EXHIBITS AND VISUAL AIDS	283
CHAPTER 8	
EXPERTS	387
CHAPTER 9	
CLOSING ARGUMENTS	455
CHAPTER 10	
EVIDENTIARY OBJECTIONS	517

CHAPTER 11	
BENCH TRIALS AND OTHER CONTESTED HEARINGS	563
APPENDIX	
FEDERAL RULES OF EVIDENCE	575
<i>Index</i>	<i>605</i>

CONTENTS

Preface

xxv

Acknowledgments

xxvii

CHAPTER 1

PERSUASION 1

- 1.1 Introduction 1
- 1.2 How Jurors Process Information 2
 - 1. The Sender 3
 - 2. The Message 3
 - 3. The Receiver 4
- 1.3 How Jurors Make Individual Decisions 5
- 1.4 How Jurors Make Group Decisions 7
- 1.5 Principles of Jury Persuasion 8
 - 1. Think Like a Juror 8
 - 2. Select a Theory of the Case 8
 - 3. Select Your Trial Vocabulary: Themes and Labels 9
 - 4. Focus on the People, Not the Problem 9
 - 5. Use Storytelling Principles 10
 - 6. Focus on the Key Disputed Issues 10
 - 7. Be an Advocate 11
- 1.6 Conclusion 12
- 1.7 Suggested Reading List 12

CHAPTER 2

STRATEGY, PREPARATION, AND ORGANIZATION 15

- 2.1 Introduction 15
- 2.2 Learn How Your Judge Will Conduct Your Trial 15
 - a. Scheduling Matters 16
 - b. Time Limitations 16

	c. Juror Note-Taking and Witness Questioning	16
	d. Exhibits Handling	16
	e. Beyond the Scope	17
	f. Rebuttal Evidence	17
	g. Instructing the Jury	17
2.3	Develop an Approach to Trial Strategy	17
	1. List Elements of Claims and Defenses	17
	2. Select a Theory of the Case	18
	3. Select Your Trial Vocabulary	18
	4. Prepare the Closing Argument and Opening Statement	19
	5. Prepare for Jury Selection	19
	6. Select and Prepare Exhibits and Visual Aids	20
	7. Select and Prepare Witnesses	21
	8. Determine Your Order of Proof	23
	9. Prepare Your Cross-Examinations	25
2.4	Example of Strategy and Trial Preparation	26
	1. The Case	26
	2. Plaintiff's Strategy	27
	a. Theory of the Case	27
	b. Themes and Labels	27
	c. Closing Argument and Opening Statement	28
	d. Jury Selection	28
	e. Exhibits and Visual Aids	28
	f. Select and Prepare Witnesses	28
	g. Order of Proof	29
	h. Cross-Examinations	29
	3. Defendant's Strategy	29
	a. Theory of the Case	29
	b. Themes and Labels	30
	c. Closing Argument and Opening Statement	30
	d. Jury Selection	30
	e. Exhibits and Visual Aids	31
	f. Select and Prepare Witnesses	31
	g. Order of Proof	31
	h. Cross-Examinations	31
2.5	Create a Trial Preparation Checklist	32
	a. 4–12 Weeks before Trial (Review Litigation File)	32
	b. 3–4 Weeks before Trial (Prepare Trial Notebook)	32
	c. 2–3 Weeks before Trial (Trial Preparation)	32
	d. 1–2 Weeks before Trial (Trial Preparation)	33
	e. Week before Trial (Final Trial Preparation)	33

2.6	Create a Trial Notebook	33
	a. Exhibits Folder	36
	b. Witnesses Folder	36
	c. Transcripts Folder	36
	d. Jury Instructions Folder	36
2.7	Common Problems	37
	1. Boring	37
	2. Weak Themes and Labels	37
	3. No Visual Strategy	37
	4. Not Focusing on Key Disputed Issues	37
	5. Not Telling a Compelling People Story	37
	6. Be Likeable	38
	7. Starting Too Late	38
	8. Not Using a Trial Notebook System	38

CHAPTER 3

JURY SELECTION		39
3.1	Introduction	39
3.2	The Law	40
	1. Number of Jurors and Alternate Jurors	40
	2. Strike and Panel Systems for Questioning Jurors	41
	3. Juror Questioning Methods	41
	4. Judge, Lawyer, and Hybrid Questioning Methods	42
	5. Scope of Questioning	43
	6. Cause Challenges	43
	7. Peremptory Challenges	44
	8. <i>Batson</i> Limitations on Peremptory Challenges	44
3.3	The Jury's Perspective	45
3.4	Create a Comfortable Environment for Self-Disclosure	45
	1. The Judge	45
	2. The Lawyers	46
3.5	Learn Juror Attitudes	48
3.6	Learn Strength of Juror Attitudes	51
3.7	Identify the Persuaders, Participants, and Nonparticipants	51
3.8	Identify the Punitive, Authoritarian, and Holdout Jurors	52
3.9	Questioning Techniques	53
	1. Create a Comfortable Environment for Self-Disclosure	53
	2. Identify Juror Attitudes on Matters Important in Case	55
	3. Learn the Strength of Juror Attitudes	58
	4. Learn if Jurors Are Persuaders, Participants, or Nonparticipants	60

5.	Learn if Jurors Are Punitive, Authoritarian, or Holdouts	61
3.10	Exercising Cause and Peremptory Challenges	63
1.	Challenges for Cause	64
a.	Strike System	64
b.	Panel System	65
2.	Peremptory Challenges	67
a.	Strike System	67
b.	Panel System	67
3.11	Example of Voir Dire	69
3.12	Trial Notebook	78
3.13	Common Problems	81
1.	Interrogation Environment	81
2.	Too Much Lawyer Talking	81
3.	Useless and Intrusive Questions	81
4.	Too Much General Background, Too Little Life Experiences	82
5.	Too Much “What,” Too Little “Why” and “How”	82
6.	Not Using All Peremptory Challenges to Preserve Error	82

CHAPTER 4

OPENING STATEMENTS	83
4.1 Introduction	83
4.2 The Law	84
1. Procedure	84
2. Content	84
3. Improper Opening Statements	85
a. Mentioning Inadmissible Evidence	85
b. Mentioning Unprovable Evidence	85
c. Arguing	85
d. Stating Personal Opinions	86
e. Discussing the Law	86
f. Mentioning the Opponent's Case	86
g. Appeals to Sympathy or Prejudice	86
4.3 The Jury's Perspective	87
4.4 Content of Effective Opening Statements	87
1. Impact Beginning	88
a. Present Short Re-creation of Case	88
b. Present Your Themes	89
c. Present Building Tension	91
2. Storytelling	93

3.	Ending	100
4.	Additional Considerations	101
a.	Focus on Liability, Not Damages	102
b.	Deal Candidly with Weaknesses and Avoid Overstating the Evidence	102
c.	Use Exhibits and Visual Aids	103
d.	Establish a Prima Facie Case	104
e.	Length of Opening Statements	104
5.	The Defense Opening	104
4.5	Delivery of Effective Opening Statements	107
4.6	Examples of Opening Statements	108
	<i>Gable v. Cannon</i> (Personal Injury)	108
	<i>Thompson v. Thermorad</i> (Criminal Case)	on DVD
	<i>State v. Rausch</i> (Commercial Case)	on DVD
4.7	Trial Notebook	115
4.8	Common Problems	116
1.	Weak First Minute	116
2.	Weak Themes, Not Repeated Enough	116
3.	Weak Labels	116
4.	No People Stories	116
5.	Weak Delivery	116
6.	Not Dealing with Weaknesses Candidly	117
7.	Forgetting That Jurors Know Nothing about Case	117
8.	Not Using Visual Aids	117
9.	Evidentiary Violations	117

CHAPTER 5

DIRECT EXAMINATIONS	119
5.1 Introduction	119
5.2 The Law	120
1. Witness Competency	120
2. Lawyer's Questions	121
3. Witness Testimony	121
5.3 The Jury's Perspective	122
5.4 Structure of Direct Examinations	123
1. Chronological	123
a. Introduction	124
b. Background	125
c. Scene	128
d. Action	132
Witness's Point of View	133
Present Tense	133

	Pace	134
	Sensory Language	136
	Witness Demonstration	137
	Selective Repetition	138
	Challenging One's Own Witness	139
	e. Exhibits	139
	f. Aftermath	140
	g. Ending	141
	h. Incorporate Weaknesses and Anticipate Cross-Examination	142
	2. Impact	144
5.5	Language of Direct Examination	145
	1. Lawyer's Questions	145
	2. Witness's Answers	147
5.6	Preparing the Witness and Yourself	148
	1. Prepare Yourself	148
	2. Prepare the Witness	149
5.7	Occurrence Witnesses	152
	1. Example (Plaintiff in Personal Injury Case)	152
	2. Example (Defendant in Personal Injury Case)	159
	3. Example (Eyewitness in Personal Injury Case)	162
	4. Example (Victim in Criminal Case)	164
	5. Example (Defendant in Criminal Case)	167
	6. Example (Police Officer in Criminal Case)	170
5.8	Transaction Witness	172
	1. Example (Plaintiff in Contract Case)	172
	2. Example (Records Witness in Contract Case)	176
5.9	Character Trait Witnesses	179
	1. Character Traits Relevant to Claims, Charges, and Defenses	179
	a. Character Trait as Essential Element	179
	b. Character Trait as Circumstantial Evidence	181
	2. Character for Truthfulness to Impeach Credibility of Testifying Witness	183
5.10	Adverse Parties, Hostile Witnesses, and Problem Witnesses	184
	1. Adverse Parties	184
	2. Hostile Witnesses	186
	3. Problem Witnesses	187
5.11	Lay Witness Opinions	187
5.12	Conversations, Telephone Calls, and Other Communications	189
	1. Conversations	189