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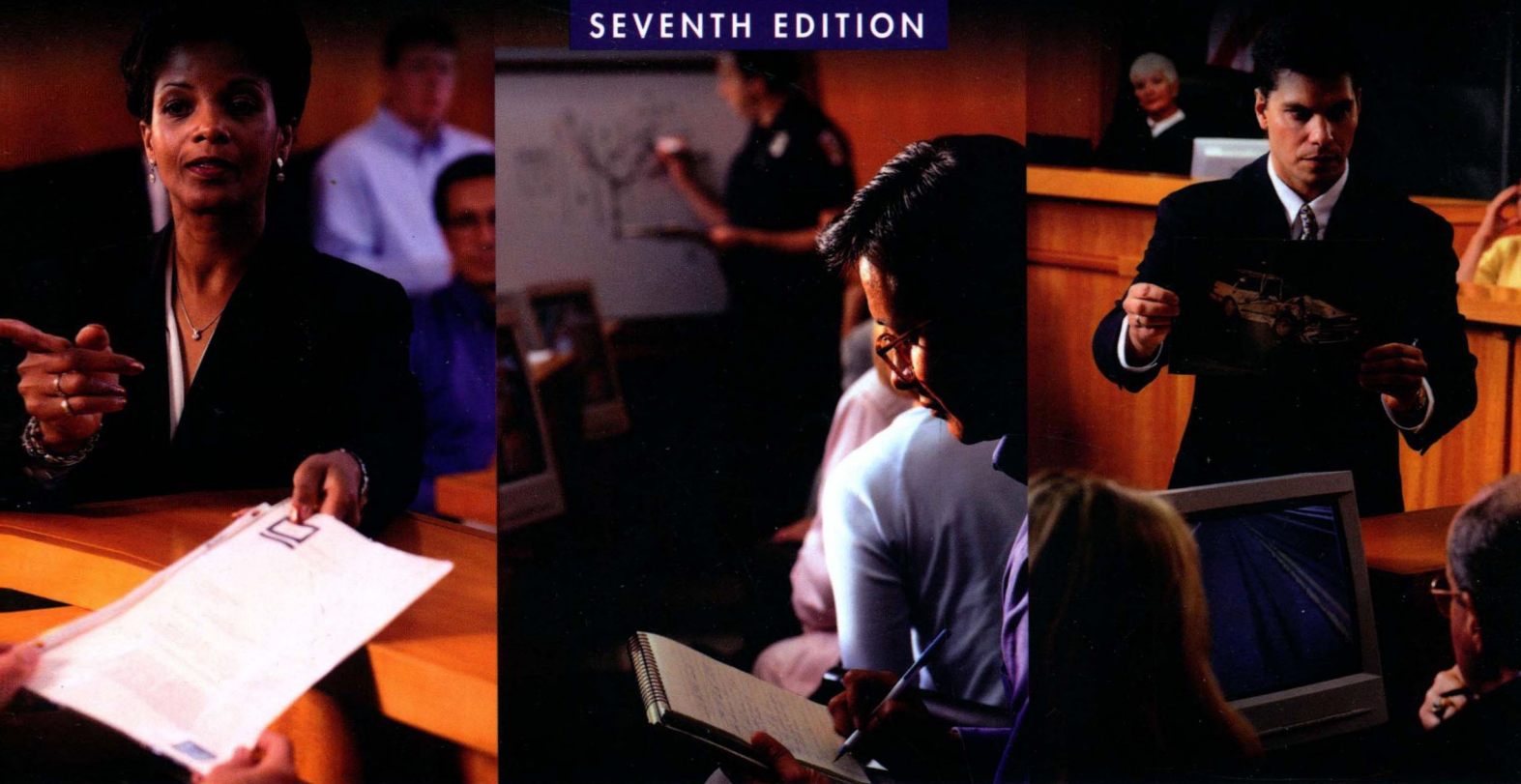
INCLUDES TRIAL FILE CD

Thomas A. Mauet • Warren D. Wolfson • Stephen D. Easton

MATERIALS IN TRIAL ADVOCACY

PROBLEMS AND CASES

SEVENTH EDITION



Wolters Kluwer

Law & Business

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PROBLEMS AND CASES

Seventh Edition

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MATERIALS IN TRIAL ADVOCACY

PROBLEMS AND CASES

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PREFACE

This book presents a progressive series of problems, cases, and trial files. They can be utilized for semester courses in trial advocacy as well as in post-graduate programs for trial lawyers. The problems are organized to parallel the various stages of a jury trial. Each chapter contains a mix of civil and criminal problems of increasing difficulty, allowing for substantial assignment selection. The problems present situations that commonly occur during civil and criminal trials. They are designed to develop basic trial skills. Chapter 7 contains 11 cases involving two opposing witnesses that can be used as advanced direct and cross-examination problems, as opening statement and closing argument exercises, and as short trials. The last chapter, Chapter 9, contains overviews of 14 trial files, each having two to four witnesses per side, that can be used during the semester or as a final trial at the end of the course. The trial files are in the compact disc that accompanies the book. Each trial file can be effectively tried to a jury in approximately three to four hours.

The organization and design of the problems are a result of our experiences as trial lawyers, judges, and trial advocacy teachers. In our view, some of the other available trial advocacy teaching materials are too lengthy and complex. Often these materials base problems on complete case files, requiring the reading of an entire case to prepare one problem. This results in assignments being an exercise in reading and memory, not in trial techniques. The problems in this book, on the other hand, have two principal characteristics. First, they are efficient and self-contained, often being only two or three pages long. Second, each problem emphasizes a specific trial skill that is essential to every competent trial lawyer.

Most of the problems, cases, and trial files are based on actual cases that we have tried during our years as trial lawyers or as judges or those that otherwise have come to our attention. In redrafting the materials for this book, we have converted the actual dates into a now commonly used system of stating dates based on their relationship to the present year. For example, “[-1]” means one year ago, “[-2]” means two years ago, and so on. For example, this year being 2011, the date of “6/15/[-1]” is June 15, 2010; “August 1, [-2]” is August 1, 2009. Through this device the dates can be kept realistic.

Finally, we must point out difficulties created by the mock trial setting. Obviously, testimony in that setting gets shaped and at times created by the students. There is perhaps a danger that students will confuse the mock world with the real world. In a mock trial, lawyers cannot know what the truth is because there is no truth: Everything is made up. In the real world, lawyers often know what the truth is and do the best they can to deal with it. Those attempts should lead to serious and important discussions about the nature of the adversary system and a lawyer's ethical obligations and sense of morality.

This book is designed to help teach trial techniques to people who want to learn them and who eventually might have to use them. We do not want to discourage discussion about the lawyer's role and duties in the real trial world; nor do we want our purpose diluted by a confusion of the mock with the real. We rely on the teachers to point out the differences.

What's New in the Seventh Edition

Materials in Trial Advocacy has been used for 30 years. Since 1981 we have received numerous suggestions for additions, deletions, and modifications. We always welcome these suggestions and have incorporated many of them over the years, so that the present edition is substantially different from the first. The principal changes in this seventh edition are listed here:

First, we have made numerous changes to the existing problems and cases, many of which update and more accurately reflect the dollar amounts of the bills, charges, and services involved in those problems and cases. When possible, we also added line numbers to deposition transcripts, typed statements, and the like, to get students used to making precise references to prior statements.

Second, we removed the trial files themselves from the book and placed them in the compact disc. Frankly, the book was becoming too large. Due to requests from those who use certain problems and trials to not remove any of them, it was not possible to keep the book within reasonable size by culling it. Thus, we decided to reduce bulk by putting the trial files in the compact disc and simply including a general

description of each trial file in the book. We also left the general jury instructions in the book, though we also included them in the compact disc.

Third, we added two new problems to Chapter 4, which concerns exhibits. Both problems feature alleged printouts of electronic communications. In each instance, the opponent of the evidence would be expected to contest the authenticity of the exhibit. We added these files to reflect the new reality that items allegedly generated by a computer are the new frontier of authentication issues.

Fourth, we have added two (or, depending on how one counts, four) new trials. The first is *State v. Smithton*, Trial 9.13, a Driving While Intoxicated (and Careless and Imprudent Driving) case. We would like to thank Professor Greg Scott of the University of Missouri School of Law for allowing us to use and modify this case file. For this file, we have included jury instructions, even though we generally do not do so for the reasons listed below. Driving While Intoxicated (or, in some states, Driving Under the Influence) statutes vary in their procedural form from jurisdiction to jurisdiction. In order to prevent undue confusion, we adopted the basic format of one state, Missouri, for this problem. Your instructor might decide to use the basic facts of this case, but to eschew the included jury instructions and ask you to use the relevant law of your jurisdiction.

The other new case file—or, rather, files—are contained in Trials 9.14(A), (B), and (C). All of these trials arise out of a relatively brief encounter between three individuals, two of whom collided with each other while walking and the third of whom was a police officer who responded to this physical encounter and arrested one of those involved. This encounter could spawn three different lawsuits, a criminal case against one of the two men involved in the initial physical encounter, a traditional intentional tort suit by the individual who was hurt, or a civil rights action against the police officer.

The 9.14 trial files give your instructor the option of adopting a new approach to creating witness testimony. If your instructor assigns you to a 9.14 trial, your witnesses will receive their memories in a new manner. Instead of reading what they “remembered,” your witnesses will review a videotape of the encounter from a web-

site. From that point forward, each will rely on his or her actual memory of the event, which will be based on viewing the videotape. To determine what the witnesses observed, you will have to interview them. As an attorney in the case, you are *not* allowed to review any videotape of the encounter before the trial. Of course, because you cannot review the videotape before the trial, you cannot use the videotape as a trial exhibit. Indeed, for the purposes of the trial, the videotape does not even exist. It is simply a way to insert a memory into the minds of the witnesses. [*After* your trial, but not before, you might want to review the videotape, to see how closely it resembles the “facts” as the witnesses reported them to you.]

We would like to thank Professor John Mollenkamp of Cornell Law School, who developed the 9.14 files with one of the co-authors at the University of Missouri School of Law. We would also like to thank Ms. Shannon Snow for her assistance in researching and drafting the medical records for Jennifer Smith v. Kelly Davis, M.D. (9.12), and Gilda Cardeñosa, M.D., and Lippincott, Williams & Wilkins for giving us permission to reproduce the two mammograms that appear in the case file. These two images are from page 259 of Cardeñosa, *Breast Imaging Companion*, Second Edition, Lippincott, Williams & Wilkins, 2000. Finally, we would like to thank Nora Wheeler, Christine Michel, and O. Shane Balloun for their technical assistance.

As in the past, we have chosen not to include case-specific jury instructions in most of the case files. We believe it is important to have students prepare instructions for the claims, damages, and defenses, as well as verdict forms, as part of their trial preparations. However, we have provided the key instructions in Joseph Minor Construction Company v. Mid-American Concrete Company (9.3), which cover the contribution claim and the nonparty at fault issue, because these instructions frequently are not included in a jurisdiction’s pattern or approved jury instructions. As noted above, we also included jury instructions for new case 9.13, the DWI trial. We have also kept the general jury instructions and suggested verdict forms at the beginning of Chapter 9. They can be used for all the trials.

We hope you will be pleased with the additions and changes in this seventh edition.

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March 2011

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