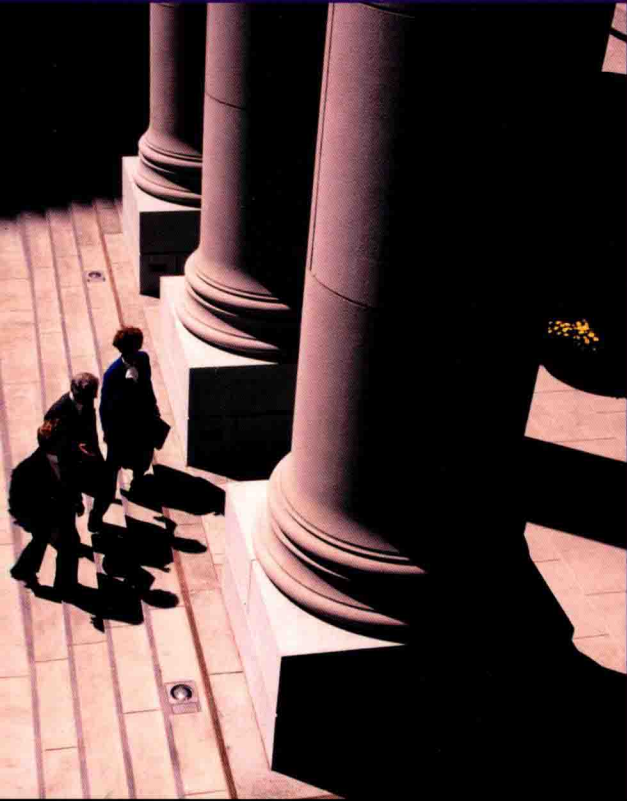


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Marilyn J. Berger
John B. Mitchell
Ronald H. Clark

Pretrial Advocacy

Planning, Analysis, and Strategy

Third Edition



Wolters Kluwer
Law & Business

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Marilyn J. Berger

Professor of Law

Seattle University School of Law

John B. Mitchell

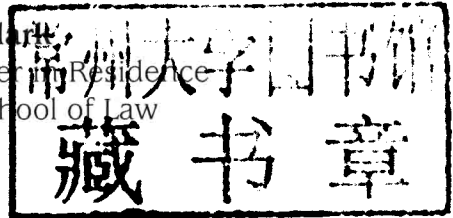
Professor of Law

Seattle University School of Law

Ronald H. Clark

Distinguished Practitioner in Residence

Seattle University School of Law



Wolters Kluwer

Law & Business

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EDITORIAL ADVISORS

Vicki Been

Elihu Root Professor of Law
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Harvard Law School

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Writing the first edition of this book was like clearing several acres of land and then landscaping it all with our bare hands.

The second edition was written 20 years later. The land was already cleared, and we had modern tools to work with, like computer graphics and DVDs, but we still had to pull out most of the landscaping and replace it.

Now we come to the third edition. We like how the land looks—a little weeding, some pruning, a few new plants, and watering was all that was required. And that's good; because our families have already sacrificed enough for us to write this book. From now on they can run through the sprinklers laughing when from time to time we publish a new edition.

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

To Eva, David, Sarah, J.P., and Tyler—my family.
John B. Mitchell

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

And to Laurie Sleeper Wells, our administrative assistant, without whom there might never have been any book at all.

Preface to Third Edition

This book reflects the technical, technological, and strategic knowledge base required of a litigator in the early twenty-first century, where changes such as the significant role of technology in practice, the extensive use of experts, the increasing importance of dispute resolution, as well as significant changes in doctrine that are now standard procedure are all part of the landscape.

The second edition was a total revision of the book, reflecting the evolution of pretrial practice over the past two decades. The second edition also incorporated the pedagogical lessons we learned from using the book in classes over those years. The third edition continues in this direction, trying to stay on the edge of both pedagogy and legal practice, while anticipating the likely trajectory of the future.

THE CONTINUED EMERGENCE OF ALTERNATIVE DISPUTE RESOLUTION

Alternative dispute resolution (ADR) advocacy skills are required for today's litigators. Few cases go to trial; rather, most litigation is referred to arbitrations and mediations, which are commonplace. Consequently, Chapter 13 has been expanded to cover advocacy skills and strategies for effective ADR advocacy. Revisions include getting to know the mediator, selecting the right mediator, advocating to and through the mediator, and advocating during both the case theory and the money phases of mediation. Also, a variety of ethical considerations specific to ADR are discussed: the scope of representation, allocation of authority, communication with the client, aggregate settlement, and client counseling. Finally, a *mediation video* was added to the DVD that accompanies the book. This addition to the DVD vividly illustrates the use of visuals in mediation.

REVISIONS AND ADDITIONS IN RESPONSE TO THE RAPID PACE OF TECHNOLOGY IN LAW

Pleading and filing documents electronically is now commonplace in federal court. Many state court documents can also be electronically filed. These electronic inroads are included in Chapter 7, Strategic Pleading.

E-discovery is perhaps the most important subject in pretrial litigation today. The law on e-discovery is rapidly evolving and involves malpractice traps for the unwary lawyer who bungles. Chapter 8, Creating a Coordinated Discovery Plan, thus was expanded to cover the essentials of what every practicing lawyer should know about e-discovery, including the duties to identify and preserve electronically stored information (ESI); when and how to place a litigation hold on ESI; sanctions for loss or failure to preserve ESI; techniques for reducing the risk of turning over privileged information; best practices and strategies for both the requesting and responding party; and e-discovery ethical issues—such as disclosure of privileged information in metadata and whether to mine for metadata.

In further recognition of evolving technology and legal practice, we also explore how *Internet searches* can be used to locate free or inexpensive and yet reliable information during case development. As such, Chapter 3, Case Development, was revised to cover how the Internet can be employed to locate witnesses, investigate backgrounds, identify experts, and do public cyber-sleuthing. Also, websites for legal research are provided.

RULE CHANGES

Rule changes, such as those made to the Federal Rules of Civil Procedure in 2007 and the Federal Rules of Evidence in 2008 have been incorporated into this third edition.

THE WEBSITE

Our website, <http://www.aspenadvocacybooks.com>, was created as a companion to the second edition of this book. Since we developed the website, we have added many new features and materials for the benefit of faculty and students of pretrial and trial advocacy. For pretrial advocacy alone, the site contains such resources as articles, like “Fielding Difficult Questions from the Bench” by Paul H. Anderson, Justice, Minnesota Supreme Court, St. Paul, Minnesota; sample pleadings (including complaints, answer, motion to com-

pel, motion for summary judgment, interrogatories, requests for production, requests for admissions); a virtual tour of a courtroom with state-of-the-art technology; links to pretrial and trial visuals websites; links to legal research websites; a link to the *U.S. v. Bernard Madoff* court documents and plea statement; and links to fact investigation websites for locating people, doing background checks, and other public cyber-sleuthing.

THE FIVE PEDAGOGICAL PILLARS

Notwithstanding all these changes in the second and third editions, the fundamentals of effective litigation advocacy remain constant. Cicero would still be a great lawyer should he miraculously appear today (once he learned about e-mail and e-discovery). The essential approach and foundational knowledge from our original book have not changed: We have written this edition strictly adhering to the five pedagogical pillars upon which our original text was constructed.

1. First, we present the various skills (negotiation, interviewing, discovery, and so forth) as part of an interrelated strategic endeavor, not as a series of fragmented performances.
2. Second, we present this endeavor guided by the conception of case theory (Chapter 2).
3. Third, learning takes place through experiential hands-on exercises that consist of both planning questions and detailed attorney and witness performance instructions. In this edition, we have grouped the performance and discussion Assignments at the end of the book, with a full table of contents for easy access to them.
4. Fourth, all exercises are founded upon extensive criminal and civil case files, both of which evolve from the same incident.
5. Fifth, the exercises are filled with realistic ethical issues.

We invite your enthusiastic response to advocacy in our technologically exciting world. Please write us with your comments and suggestions at mjb@seattleu.edu.



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

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, Seattle University School of Law graduate, 2002.

Authors of *The Appellate Prosecutor*.

Mimy Bailey, Seattle University, class of 2007.

William S. (Bill) Bailey, Attorney and Adjunct Professor of Law, Seattle University School of Law.

Mike Bitando, General Manager of The Garage billiards hall and bowling.

Jason Casebolt. Seattle University School of Law, class of 2010.

Nancy Clark, Artist and Editor.

Fred Dekay, Professor at Seattle University School of Law.

Tyler Fox, Instructional Technology Manager at Center for Educational Leadership, University of Washington.

Steve Fury, Attorney.

Captain Tag Gleason, Seattle Police Department, Violent Crimes Section.

Chris Hazemann, President and CEO, Prolumina Trial Technologies.

Sarah Johnson, Attorney.

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*.

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The Honorable Judge Terrance Lukens, JAMS, Adjunct Professor of Law, Seattle University School of Law.

Dr. Norman Mar, Ph.D.

Hannalore Merritt, Seattle University School of Law, class of 2009.

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 District Court and Adjunct Professor of Law, Seattle University School of Law.

Kyle C. Olive, Attorney.

Rex Prout, Assistant Chief, Enforcement & Education, Washington State Liquor Control Board.

Michael Riggio, Attorney and Adjunct Professor of Law, Seattle University School of Law.

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 Tish, Attorney.

Kirk Van Scoyoc, Actor.

Justin Walsh, Seattle University School of Law student and law clerk, class of 2008.

Laurie Sleeper Wells, Administrative Assistant, Seattle University School of Law.

Matt Williams, Attorney and Adjunct Professor of Law at Seattle University School of Law.

Katherine Wimble, Graphics Artist.

Ric Wyant, Forensic Scientist, Firearm/Toolmark Section, Crime Laboratory Division, Washington State Patrol Firearms Examiner for the Washington State Patrol Crime Laboratory.

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Introduction

This book, accompanying DVD with videos (demonstration videos of how to take a deposition and use it in court, a crime scene tour, and several ADR and trial videos), and the companion website at <http://aspenadvocacybooks.com> (with numerous pretrial and trial resources) are intended to provide you with the experience of being a practicing attorney engaged in pretrial activities. 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. STRUCTURE

This book is divided into 13 chapters followed by Chapter 14, which is an overview of the experiential learning envisioned for this course and the assignments for the class. Each chapter covers 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 checklists that you may consult when you plan to employ the pretrial skills that are the subject of that chapter.

Each performance assignment simulates a different adversarial practice situation—plaintiff’s interview with a neutral witness, defendant’s interview with an expert witness, defendant making a motion to compel discovery, plaintiff responding to a motion to compel discovery. Most of the problems are based on a single, but complex, fact pattern that manifests itself in two fictitious cases—a criminal case, *State v. Hard*, and a 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 CD included with this book. 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 CD 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.

DVD Videos: On the DVD included in the pocket on the back cover are valuable videos including the following:

- Demonstration video showing how to take a deposition;
- Demonstration video of how to use a deposition at trial;
- Animations that may be used during alternative dispute resolution and trial;
- A documentary developed for settlement negotiation and ADR; and
- A video of a tour of the crime scene where the shooting that led to the criminal *State v. Hard* and civil *Summers v. Hard* cases took place.

Website: A companion website to the book is available at <http://www.aspenadvocacybooks.com>. This site 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;
- Sample pleadings;
- A virtual tour of a courtroom with state-of-the-art technology;
- 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.

B. 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 that are on the DVD 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 DVD 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 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 fellow class members as well. Furthermore, even as a nonperforming class 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.

C. ICONS AND BOXES

Throughout the chapters, boxes appear containing information and covering topics that include checklists, substantive law, facts of a hypothetical, illustrations, and practical tips. The topical material within each box is designated by the following:

Checklists



Facts of a Hypothetical

