

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 a dozen 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 or hearings. Chapter 9 contains overviews of 16 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. Chapter 10 contains five additional trials, based on historic events that can also be used for these purposes. The trial files, like the Chapter 7 problem files, are in the resources section of this book on CasebookConnect. 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 the first six chapters of this book, in contrast, 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.

Many 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 drafting 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 2023, the date of “6/15/[-1]” is June 15, 2022; “August 1, [-2]” is August 1, 2021. 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 get 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 Tenth Edition

Materials in Trial Advocacy has been used for over four decades. 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.

There are three major additions to the previous edition, all of them new trial files. The first two are files that have been added to Chapter IX. Trial 9.15 involves a dispute between a landowner and an oil and gas developer. Those from law schools or other trial training programs in or near jurisdictions with substantial oil and gas exploration and production will want to consider using this trial file. This trial demonstrates that a seemingly simple dispute over damages can involve factually complex—and even emotional—underlying matters.

The second addition to Chapter IX, Trial 9.16, is a wrongful death action arising out of a motorcycle accident. It is different than the other Chapter IX trial files because

it is designed as a semester-long (or, at least, several week) exercise that takes students from an initial conference with a potential client through the pleading, discovery, and pretrial process, all the way to a jury verdict. It is likely to be of interest to those in advanced trial practice classes or classes that teach both pretrial and trial advocacy.

In the Ninth Edition, we added a then new Chapter X entitled “Historic Trials.” Chapter X files are based on actual historical events, which adds elements of realism that are sometimes missing in purely fictional trials. You can use the Chapter X trial files like the Chapter IX files for semester-ending jury trials. But you can also use them to stage community events for your law school or bar organization. Chapter X includes an essay about how to effectively stage historic trials. In this Tenth Edition, we have added a new case, Trial 10.5, which provides a second civil trial option for those who like the historic trial concept.

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