

# CONTENTS

<i>Preface to the Eleventh Edition</i>	<i>xxvii</i>
<i>Preface to the Tenth Edition</i>	<i>xxxix</i>
<i>Website Information</i>	<i>xxxix</i>

## CHAPTER 1

### THE TRIAL PROCESS

	1
<b>1.1</b> Introduction	1
<b>1.2</b> Local Practices and Procedures	2
<b>1.3</b> Trial Date Assignment	3
<b>1.4</b> Jury Selection	3
<b>1.5</b> Preliminary Instructions of Law	4
<b>1.6</b> Opening Statements	5
<b>1.7</b> Plaintiff's Case-in-Chief	5
<b>1.8</b> Motions After Plaintiff Rests	7
<b>1.9</b> Defendant's Case-in-Chief	7
<b>1.10</b> Motions After Defendant Rests	8
<b>1.11</b> Plaintiff's Rebuttal and Defendant's Surrebuttal Cases	8
<b>1.12</b> Motions at the Close of All Evidence	8
<b>1.13</b> Instructions Conference	8
<b>1.14</b> Closing Arguments	9
<b>1.15</b> Jury Instructions	9
<b>1.16</b> Jury Deliberations and Verdict	10
<b>1.17</b> Post-Trial Motions and Appeal	11
<b>1.18</b> Conclusion	11
Video of Jury Trial ( <i>Gable v. Cannon</i> )	<i>See Website</i>

## CHAPTER 2

### THE PSYCHOLOGY OF PERSUASION

	13
<b>2.1</b> Introduction	13
<b>2.2</b> Behavioral Science and Jury Research	14
1. Affective Reasoning	14

2.	Beliefs and Attitudes	15
3.	Decision Making	16
4.	What Influences the Jury	18
	a. Sender Credibility	18
	b. Receiver Capacities	19
	c. Components of Persuasive Messages	20
2.3	What Research Means for Trial Lawyers	22
	1. Prepare from the Jury's Point of View	22
	2. Develop a Theory of the Case	23
	3. Select Themes and Labels	24
	4. Emphasize the People	25
	5. Use Storytelling Techniques	25
	6. Focus on the Key Facts and Issues	26
	7. Understand Your Role as an Advocate	26
2.4	Conclusion	27
2.5	Selected Reading List on Psychology of Persuasion	28

## CHAPTER 3

<b>JURY SELECTION</b>	31	
3.1	Introduction	31
3.2	The Law	32
	1. Number of Jurors and Alternate Jurors	32
	2. Strike and Panel Systems for Questioning Jurors	33
	3. Juror Questioning Methods	34
	4. Judge, Lawyer, and Hybrid Questioning Methods	34
	5. Scope of Questioning	35
	6. Cause Challenges	36
	7. Peremptory Challenges	36
	8. <i>Batson</i> Limitations on Peremptory Challenges	37
3.3	The Jury's Perspective	37
3.4	Create a Comfortable Environment for Self-Disclosure	38
	1. The Judge	38
	2. The Lawyers	38
3.5	Learn Juror Attitudes	39
3.6	Learn Strength of Juror Attitudes	42
3.7	Identify the Persuaders, Participants, and Nonparticipants	43
3.8	Identify the Punitive, Authoritarian, and Holdout Jurors	44
3.9	Questioning Techniques	45
	1. Create a Comfortable Environment for Self-Disclosure	45
	2. Identify Juror Attitudes on Matters Important in the Case	46
	3. Learn the Strength of Juror Attitudes	49

4.	Learn if Jurors Are Persuaders, Participants, or Nonparticipants	51
5.	Learn if Jurors Are Punitive, Authoritarian, or Holdouts	52
<b>3.10</b>	Exercising Cause and Peremptory Challenges	54
1.	Challenges for Cause	54
a.	Strike System	54
b.	Panel System	55
2.	Peremptory Challenges	57
a.	Strike System	57
b.	Panel System	57
<b>3.11</b>	Example of Voir Dire	59
<b>3.12</b>	Trial Notebook	68
<b>3.13</b>	Common Problems	70
1.	Interrogation Environment	71
2.	Too Much Lawyer Talking	71
3.	Useless and Intrusive Questions	71
4.	Too Much General Background, Too Little Life Experiences	71
5.	Too Much “What,” Too Little “Why” and “How”	71
6.	Not Using All Peremptory Challenges to Preserve Error	71

## CHAPTER 4

<b>OPENING STATEMENTS</b>	73	
<b>4.1</b>	Introduction	73
<b>4.2</b>	The Law	74
1.	Procedure	74
2.	Content	74
3.	Improper Opening Statements	75
a.	Mentioning Inadmissible Evidence	75
b.	Mentioning Unprovable Evidence	75
c.	Arguing	75
d.	Stating Personal Opinions	76
e.	Discussing the Law	76
f.	Mentioning the Opponent’s Case	76
g.	Appeals to Sympathy or Prejudice	76
<b>4.3</b>	The Jury’s Perspective	77
<b>4.4</b>	Content of Effective Opening Statements	77
1.	Impact Beginning	78
a.	Present a Short Re-creation of the Case	78
b.	Present Your Themes	79
c.	Present Building Tension	81
2.	Storytelling	82

3.	Ending	90
4.	Additional Considerations	91
	a. Focus on Liability, Not Damages	92
	b. Deal Candidly with Weaknesses and Avoid Overstating the Evidence	92
	c. Use Exhibits and Visual Aids	93
	d. Establish a Prima Facie Case	94
	e. Keep Opening Statement Short	94
5.	The Defense Opening	94
4.5	Delivery of Effective Opening Statements	96
4.6	Examples of Opening Statements	98
	<i>Gable v. Cannon</i> (Personal Injury)	98
4.7	Trial Notebook	105
4.8	Common Problems	106
	1. Weak First Minute	106
	2. Weak Themes, Not Repeated Enough	106
	3. Weak Labels	106
	4. No People Stories	106
	5. Weak Delivery	106
	6. Not Dealing with Weaknesses Candidly	107
	7. Forgetting That Jurors Know Nothing About the Case	107
	8. Not Using Visual Aids	107
	9. Evidentiary Violations	107
CHAPTER 5		
	<b>DIRECT EXAMINATIONS</b>	109
5.1	Introduction	109
5.2	The Law	110
	1. Witness Competency	110
	2. Lawyer's Questions	111
	3. Witness Testimony	111
5.3	The Jury's Perspective	112
5.4	Structure of Direct Examination	113
	1. Chronological	113
	a. Introduction	114
	b. Background	115
	c. Scene	118
	d. Action	121
	Witness's Point of View	122
	Present Tense	122
	Pace	123
	Sensory Language	125
	Witness Demonstration	126

	Selective Repetition	127
	Challenging One's Own Witness	128
	e. Exhibits	128
	f. Aftermath	129
	g. Ending	130
	h. Incorporating Weaknesses and Anticipating Cross-Examination	131
	2. Impact	133
<b>5.5</b>	Language of Direct Examination	134
	1. Lawyer's Questions	134
	2. Witness's Answers	136
<b>5.6</b>	Preparing the Witness and Yourself	137
	1. Prepare Yourself	137
	2. Prepare the Witness	138
<b>5.7</b>	Occurrence Witnesses	141
	1. Example (Plaintiff in Personal Injury Case)	141
	2. Example (Defendant in Personal Injury Case)	148
	3. Example (Eyewitness in Personal Injury Case)	151
	4. Example (Victim in Criminal Case)	153
	5. Example (Defendant in Criminal Case)	156
	6. Example (Police Officer in Criminal Case)	160
<b>5.8</b>	Transaction Witnesses	161
	1. Example (Plaintiff in Contract Case)	162
	2. Example (Records Witness in Contract Case)	166
<b>5.9</b>	Character Trait Witnesses	168
	1. Character Traits Relevant to Claims, Charges, and Defenses	168
	a. Character Trait as an Essential Element	168
	b. Character Trait as Circumstantial Evidence	170
	2. Character for Truthfulness to Impeach Credibility of Testifying Witnesses	172
<b>5.10</b>	Adverse Parties, Hostile Witnesses, and Problem Witnesses	173
	1. Adverse Parties	173
	2. Hostile Witnesses	175
	3. Problem Witnesses	176
<b>5.11</b>	Lay Witness Opinions	176
<b>5.12</b>	Conversations, Telephone Calls, and Other Communications	178
	1. Conversations	178
	2. Telephone Calls	179
	a. Call Made to or from a Known Person	180
	b. Call Made to an Unknown Person	180
	c. Call Made by an Unknown Person	181
	3. Computer-Based Conversations	183
<b>5.13</b>	Refreshing Memory	183

5.14	Anticipating Cross-Examination and Judge's and Jurors' Questions	185
5.15	Stipulations	189
5.16	Redirect Examination	191
5.17	Trial Notebook	193
5.18	Common Problems	196
	1. Weak Introduction	196
	2. Too Long, Too Detailed	196
	3. No Word Pictures	197
	4. Not Enough Exhibits and Visual Aids	197
	5. Not Enough Focus on Key Disputed Facts	197
	6. Weak Ending	197
	7. Not Anticipating Cross-Examination	197
	8. Inadequate Witness Preparation	197
CHAPTER 6		
	CROSS-EXAMINATIONS	199
6.1	Introduction	199
6.2	The Law	200
	1. Cross-Examination	200
	2. Impeachment	201
	a. Impeachment Procedures	201
	b. Impeachment Methods	202
	Bias, Interest, and Motive	202
	Prior Inconsistent Statements	202
	Contradictory Facts	203
	Prior Convictions	203
	Prior Dishonest Acts	203
	c. Proving Up Unadmitted Important Impeachment	203
6.3	The Jury's Perspective	204
6.4	Purpose, Order, and Structure of Cross-Examination	205
6.5	Language of Cross-Examination	206
	1. Lead	207
	2. Factual	207
	3. Simple	208
	4. Bit by Bit	209
	5. Stop	210
6.6	Cross-Examination Topics	211
	1. Favorable Facts from Direct	211
	2. Favorable Facts Not Yet Mentioned	212
	3. What Witness Must Admit	213
	4. What Witness Should Admit	214
	5. Attacks on the Witness's Perception	214

6.	Attacks on the Witness's Memory	218
7.	Attacks on the Witness's Ability to Communicate	220
8.	Attacks on the Witness's Conduct	221
9.	The "No Ammunition" Cross	222
<b>6.7</b>	<b>Impeachment</b>	<b>223</b>
1.	Bias, Interest, and Motive	223
2.	Prior Inconsistent Statements	227
a.	Oral Statements	232
b.	Written Statements	234
c.	Sworn Transcripts	237
d.	Impeachment by Omission	240
3.	Contradictory Facts	243
4.	Prior Convictions	245
5.	Prior Dishonest Acts	247
6.	Character for Untruthfulness	247
7.	Treatises	248
8.	Impeaching Out-of-Court Declarants	248
<b>6.8</b>	<b>Planning and Preparing a Cross-Examination</b>	<b>249</b>
1.	What Is My Theory of the Case?	251
2.	What Are My Themes and Labels?	251
3.	What Are My Closing Argument Points About This Witness?	251
4.	What Facts Exist to Support Those Points?	252
5.	In What Order Should I Bring Out Those Facts on Cross?	252
6.	What Tone and Attitude Should I Use on Cross?	252
7.	What Questioning Style Should I Use on Cross?	253
<b>6.9</b>	<b>Preparing Your Witnesses for Cross-Examination</b>	<b>253</b>
<b>6.10</b>	<b>Problem Witnesses</b>	<b>255</b>
<b>6.11</b>	<b>Recross-Examination</b>	<b>259</b>
<b>6.12</b>	<b>Proving Up Unadmitted Impeachment</b>	<b>259</b>
1.	Bias, Interest, and Motive	260
2.	Prior Inconsistent Statements	261
a.	Oral Statements	261
b.	Written or Signed Statements	262
c.	Transcripts of Sworn Testimony	263
d.	Omissions	264
3.	Contradictory Facts	264
4.	Prior Convictions	265
5.	Failure to Prove Up When Required	266
<b>6.13</b>	<b>Trial Notebook</b>	<b>266</b>
<b>6.14</b>	<b>Common Problems</b>	<b>268</b>
1.	Weak Beginning	268
2.	Weak Selection of Points	269
3.	Losing Control	269

4. Ineffective Impeachment Technique	269
5. No Attitude Projection	269
6. Weak Ending	269

## CHAPTER 7

<b>EXHIBITS AND VISUAL AIDS</b>	<b>271</b>
<b>7.1</b> Introduction	<b>271</b>
<b>7.2</b> The Law	<b>272</b>
1. Foundation Procedure for Exhibits	<b>272</b>
<b>Step 1.</b> Have the exhibit marked, if not already marked	<b>273</b>
<b>Step 2.</b> Show the exhibit to the opposing lawyer	<b>274</b>
<b>Step 3.</b> Ask permission to show the exhibit to the witness	<b>275</b>
<b>Step 4.</b> Give the exhibit to the witness	<b>275</b>
<b>Step 5.</b> Establish proper foundation for the exhibit	<b>275</b>
<b>Step 6.</b> Offer the exhibit in evidence	<b>275</b>
<b>Step 7.</b> Have the exhibit marked in evidence	<b>277</b>
<b>Step 8.</b> Have the witness use or mark the exhibit, if appropriate	<b>277</b>
<b>Step 9.</b> Ask permission to show or read the exhibit to the jurors	<b>278</b>
<b>Step 10.</b> Show or read the exhibit to the jurors	<b>278</b>
2. Foundation Requirements for Exhibits	<b>281</b>
3. Visual Aids	<b>282</b>
<b>7.3</b> The Jury's Perspective	<b>283</b>
<b>7.4</b> Exhibit Foundations	<b>284</b>
1. Objects	<b>285</b>
a. Identifiable Through Sense Identification	<b>286</b>
b. Chain of Custody	<b>289</b>
Continuous and Exclusive Possession	<b>289</b>
Protective Packaging	<b>292</b>
c. Illustrative Objects	<b>298</b>
d. Site Visits	<b>300</b>
2. Demonstrative Evidence	<b>300</b>
a. Photographs, Movies, Videotapes, Sound Recordings, and X-rays	<b>301</b>
b. Diagrams, Models, Maps, and Drawings	<b>309</b>
c. Animations and Simulations	<b>312</b>
3. Writings/Instruments	<b>314</b>
a. Legal Instruments	<b>315</b>
b. Letters and Other Written Communications	<b>319</b>
Letters Sent to a Person	<b>320</b>
Letters Received from a Person	<b>322</b>
E-mails and Other Electronic Communications	<b>324</b>



4.	Business Records	324
5.	Public Records	334
6.	Summaries	336
7.	Recorded Recollections	337
8.	Transcripts of Testimony	339
<b>7.5</b>	Visual Aids	<b>340</b>
1.	Opening Statements	340
2.	Direct Examinations of Experts	344
3.	Cross-Examinations of Lay and Expert Witnesses	347
4.	Closing Arguments	349
<b>7.6</b>	Making, Using, and Marking Exhibits and Visual Aids	<b>352</b>
1.	Making Exhibits and Visual Aids Before Trial	352
a.	Objects	352
b.	Photographs, Videotapes, and Movies	353
c.	Diagrams, Models, and Maps	356
d.	Animations and Simulations	356
e.	Documents, Records, and Summaries	356
f.	Charts	360
1.	Board	366
2.	Lettering	366
3.	Color	366
4.	Movement	366
5.	Symbols	366
6.	Composition	366
g.	Transcripts and Videotapes	367
2.	Using Exhibits and Visual Aids During Trial	368
3.	Marking Exhibits and Visual Aids During Trial	369
<b>7.7</b>	Trial Notebook	<b>376</b>
<b>7.8</b>	Common Problems	<b>377</b>
1.	No Overall Visual Strategy	377
2.	Exhibits and Visual Aids Fail the “Billboard Test”	377
3.	Too Many Exhibits	377
4.	Not Providing Smooth Judge and Jury Foundations	377
5.	Not Anticipating Objections and Raising Issues Early	378
	All Exhibits in Full Color That Are Contained in Chapter 7	<i>See Website</i>

## CHAPTER 8

<b>EXPERTS</b>	<b>379</b>
<b>8.1</b>	Introduction <b>379</b>
<b>8.2</b>	The Law <b>380</b>
1.	Direct Examination <b>380</b>
a.	Is the Subject Appropriate for Expert Testimony? <b>380</b>

	b. Is the Expert Properly Qualified?	380
	c. Is the Expert's Testimony Relevant and Reliable?	380
	d. Were Underlying Tests Properly Done?	381
	e. Are the Sources of Facts and Data Relied on Proper?	381
	f. When Must the Sources Be Disclosed?	382
	g. Are the Sources Themselves Admissible?	382
	h. Are the Forms of the Expert's Testimony Proper?	382
	i. Can the Expert Testify About Ultimate Issues?	383
	2. Cross-Examination	383
<b>8.3</b>	The Jury's Perspective	384
<b>8.4</b>	Finding and Preparing Experts	384
	1. Good Experts	384
	2. Finding Good Experts	385
	3. Preparing the Expert	385
<b>8.5</b>	General Structure of Expert Direct Examinations	386
	1. Introduction	387
	a. Nonverbal Beginning	387
	b. Verbal Beginning	387
	2. Professional Education, Training, and Experience	388
	a. Education and Training	389
	b. Experience	392
	c. Voir Dire, Tendering Witness as Expert, and Stipulations	393
	3. What the Expert Did and Why	395
	a. What the Expert Did	396
	b. Expert Compensation	398
	4. The Expert's Conclusions	400
	5. The Expert's Bases and Explanations	401
	a. Rule 703	402
	b. Expert as Teacher	403
	c. Treatises	405
	d. Take Issue with the Other Expert	406
	e. End Big	406
	6. Other Organization	407
	a. Opinion Quickly	407
	b. Hypothetical Question	408
<b>8.6</b>	Example of Direct Examination	408
<b>8.7</b>	Cross-Examination	415
	1. Preparation	415
	2. Specific Topics	416
	a. Expert's Qualifications	416
	b. Bias and Interest	418
	c. Data Relied on	420

	d. Assumptions	421
	e. What Expert Did Not Do	422
	f. Prior Inconsistent Statements	424
	g. Treatises	425
	h. Using Opposing Expert to Build Up Your Expert	427
	i. Experts Disagree	428
	j. Order of Cross-Examination Points	428
<b>8.8</b>	Example of Cross-Examination	429
<b>8.9</b>	Redirect and Recross-Examinations	431
<b>8.10</b>	Trial Notebook	432
<b>8.11</b>	Common Problems	432
	1. Too Much, Too Long	432
	2. Not Enough Visual Aids	432
	3. Weak Beginning	433
	4. Weak Ending	433
	5. Not Enough Witness Preparation	433
	6. Showing Off	433

## CHAPTER 9

	<b>CLOSING ARGUMENTS</b>	435
<b>9.1</b>	Introduction	435
<b>9.2</b>	The Law	436
	1. Procedure	436
	2. Content	436
	3. Improper Closing Arguments	437
	a. Mentioning Unadmitted Evidence	437
	b. Misstating or Mischaracterizing Evidence	438
	c. Improperly Commenting on Missing Evidence	438
	d. Stating Personal Opinions	438
	e. Appealing to Sympathy or Prejudice	438
	f. Improperly Arguing the Law	439
	g. Improperly Arguing Damages	439
	h. Arguing the Consequences of a Verdict	439
	i. Improperly Arguing on Rebuttal	439
<b>9.3</b>	The Jury's Perspective	440
<b>9.4.</b>	Jury Instructions and Instructions Conference	441
	1. When to Draft Jury Instructions and Submit Them to the Judge	441
	2. How to Draft Jury Instructions and Verdict Forms	442
	3. How to Argue and Preserve the Record at the Instructions Conference	443
<b>9.5</b>	Content of Effective Closing Arguments	444
	1. Impact Beginning	445

	a. Start with Your Themes	445
	b. Re-create the Event	446
	c. Show Dramatic Evidence	447
	d. Empower the Jury	447
	e. Tell a Story	448
	2. Arguing	448
	a. What to Argue	449
	b. How to Argue	449
	Testimony of Witnesses	450
	Admitted Exhibits	450
	Jury Instructions	451
	Common Sense and Life Experiences	451
	Stories and Analogies	452
	Rhetorical Questions	452
	Visual Aids	453
	Two-Sided Arguments	454
	Turn the Facts and Arguments Around	454
	Comment on Unkept Promises	455
	3. Ending	455
9.6	Delivery	457
9.7	Common Issues in Closing Arguments	458
	1. General Issues	459
	a. Length of Closing Arguments	459
	b. Allocation of Time Between Liability and Damages	459
	c. Allocation of Time Between Plaintiff's	
	Closing and Rebuttal	459
	d. Arguing Liability Only, or Liability and Damages	459
	e. Anticipating Defense Argument, or Waiting for Rebuttal	461
	f. Anticipating Plaintiff's Rebuttal	461
	g. Multiple Parties and Claims	462
	h. Eyewitness Credibility and Conflicts	463
	i. Expert Credibility and Conflicts	465
	j. Exhibit Management	466
	2. Civil Issues	466
	a. Negligence	466
	b. Causation	467
	c. Comparative Fault	467
	d. Compensatory Damages	469
	e. Punitive Damages	473
	f. Burdens of Proof	474
	3. Criminal Issues	474
	a. Circumstantial Evidence	474
	b. Lesser Included Offenses	475

	c. Mental States	477
	d. Defenses	478
	e. Burden of Proof	479
9.8	Plaintiff's Rebuttal	480
9.9	Example of Closing Argument	482
	<i>Gable v. Cannon</i> (Personal Injury)	482
9.10	Trial Notebook	490
9.11	Common Problems	493
	1. Boring	493
	2. Weak First Minute	493
	3. Not Using Opening Statement's Themes and Labels	493
	4. Not Arguing	493
	5. Not Using Exhibit and Visual Aids	494
	6. Too Much Law	494
	7. Not Dealing with Weaknesses Candidly	494
	8. Weak Ending	494
	9. Inadequate Preparation	494
	10. Too Many Notes	495
	11. No Passion	495

## CHAPTER 10

	<b>EVIDENTIARY OBJECTIONS</b>	497
10.1	Introduction	497
10.2	The Law	498
	1. Procedure	498
	a. Right Time	498
	b. Right Rule	499
	c. Right Reason	499
	d. Record for Appeal	499
	e. Ethics	499
	2. The 3Rs Approach to Evidence Advocacy	500
	a. Is the Evidence Relevant for the Offered Purpose?	500
	b. Is the Evidence Reliable for the Offered Purpose?	500
	c. Is It Right to Admit the Evidence for the Offered Purpose?	501
10.3	The Jury's Perspective	501
10.4	Objections Strategy	502
	1. Help the Judge Get It Right	502
	2. Raise It Early	502
	3. Raise as Proponent and Opponent	503
	4. Multiple or Focused Reasons	503
	5. Is It Important, and Should I Win It?	503
	6. How Do I Get Around a Sustained Objection?	504

7. If I Cannot Get Around It, How Do I Make a Record for Appeal?	504
8. Watch the Judge	506
<b>10.5</b> Objections Procedure	506
1. How to Make and Argue Evidentiary Objections	506
a. Before Trial	506
b. During Breaks in the Trial	507
c. During Trial in Presence of Jury	508
2. What Evidentiary Issues Can Be Raised Before Trial?	510
<b>10.6</b> Evidentiary Objections to Witness Testimony	511
1. Irrelevant (FRE 401, 402)	511
2. Violates Character Trait Rules (FRE 404, 405)	512
a. Essential Element Rule	512
b. Circumstantial Evidence Rule	513
3. Violates Other Acts Rules (FRE 404(b), 608(b))	515
4. Violates Habit Rule (FRE 406)	517
5. Violates Policy Exclusion Rules (FRE 407–411)	518
6. Violates Sexual Assault Rules (FRE 412–415)	519
7. Violates Privileges Rules (FRE 501, 502)	519
8. Unfairly Prejudicial/Waste of Time (FRE 403)	521
9. Hearsay (FRE 801–807)	522
10. Violates Original Documents Rule (FRE 1001–1004)	525
11. Violates Court’s Pretrial Order	525
12. Witness Incompetent (FRE 601)	526
13. No Firsthand Knowledge (FRE 602)	526
14. Improper Lay Witness Opinion (FRE 701)	527
15. Misstates or Mischaracterizes Evidence	528
16. Assumes Facts Not in Evidence	528
17. Leading (FRE 611(c))	529
18. Calls for a Narrative	530
19. Asked and Answered/Repetitive/Cumulative (FRE 403)	530
20. Speculative	531
21. Confusing/Misleading/Vague/Ambiguous	532
22. Compound	532
23. Argumentative	532
24. Embarrassing/Harassing (FRE 611(a)(3))	532
25. Unresponsive Answer	533
26. No Question Pending	533
27. Improperly Refreshing Recollection (FRE 612)	533
28. Improper Impeachment	535
29. Beyond the Scope (FRE 611(b))	537
30. Improper Rehabilitation	537
31. Improper Rebuttal	538
32. Miscellaneous Fairness Objections (FRE 102, 611(a))	539

<b>10.7</b>	Evidentiary Objections to Exhibits	<b>539</b>
	1. Improper Foundation Witness	<b>539</b>
	2. Improper Foundation Procedure	<b>539</b>
	3. No Foundation	<b>539</b>
	4. Record Not Trustworthy	<b>540</b>
	5. Record Contains Double Hearsay/Hearsay Within Hearsay	<b>540</b>
	6. Record Contains Inadmissible Expert Opinions and Conclusions	<b>541</b>
	7. Violates Original Documents Rule	<b>541</b>
	8. Reading from/Showing Exhibit Not in Evidence	<b>541</b>
	9. Improper Marking of Exhibit	<b>542</b>
<b>10.8</b>	Trial Notebook	<b>542</b>
<b>10.9</b>	Common Problems	<b>542</b>
	1. Not Making an “Objection”	<b>543</b>
	2. Not Stating Reason for Objections	<b>543</b>
	3. Making “Speaking” Objections	<b>543</b>
	4. Not Raising Objections Earlier	<b>543</b>
	5. Not Making Timely Objections	<b>543</b>
	6. Not Getting a Ruling	<b>544</b>
	7. Not Making an Offer of Proof	<b>544</b>
	8. Not Establishing Yourself as the Evidence Expert	<b>544</b>

## CHAPTER 11

<b>TRIAL PREPARATION AND STRATEGY</b>	<b>545</b>	
<b>11.1</b>	Introduction	<b>545</b>
<b>11.2</b>	Trial Preparation Timetable	<b>546</b>
<b>11.3</b>	Organization of Litigation Files and Trial Notebook	<b>547</b>
	1. Litigation Files	<b>548</b>
	2. Trial Notebook	<b>548</b>
	a. Exhibits	<b>551</b>
	b. Witness Folders	<b>551</b>
	c. Transcripts	<b>551</b>
	d. Jury Instructions	<b>551</b>
	e. Notepads	<b>551</b>
<b>11.4</b>	Elements of Claims and Defenses	<b>552</b>
<b>11.5</b>	Psychological Principles of Jury Persuasion	<b>553</b>
<b>11.6</b>	Theory of the Case	<b>554</b>
<b>11.7</b>	Themes and Labels	<b>555</b>
<b>11.8</b>	Dramatize, Humanize, and Visualize Using People Stories	<b>556</b>
<b>11.9</b>	Focus on the Key Disputed Facts and Issues	<b>557</b>
<b>11.10</b>	Opening Statement and Closing Argument Preparation	<b>558</b>
<b>11.11</b>	Jury Selection Preparation	<b>559</b>

<b>11.12</b>	Witness Selection and Preparation	<b>561</b>
	1. Witness Selection	<b>561</b>
	2. Witness Preparation	<b>563</b>
	3. Direct Examination Outline	<b>565</b>
	4. Witness List	<b>567</b>
<b>11.13</b>	Developing a Visual Strategy	<b>567</b>
<b>11.14</b>	Order of Proof	<b>570</b>
<b>11.15</b>	Cross-Examination Preparation	<b>572</b>
<b>11.16</b>	Examples of Trial Strategy	<b>575</b>
	1. The Case — <i>Robert Johnson v. Mary Smith</i>	<b>575</b>
	2. Plaintiff's Strategy	<b>576</b>
	a. Theory of the Case	<b>577</b>
	b. Themes and Labels	<b>577</b>
	c. Dramatize, Humanize, Visualize	<b>578</b>
	d. Opening Statement and Closing Argument	<b>578</b>
	e. Jury Selection	<b>579</b>
	f. Witnesses	<b>580</b>
	g. Exhibits	<b>580</b>
	h. Order of Proof	<b>581</b>
	i. Cross-Examinations	<b>581</b>
	3. Defendant's Strategy	<b>582</b>
	a. Theory of the Case	<b>582</b>
	b. Themes and Labels	<b>582</b>
	c. Dramatize, Humanize, Visualize	<b>583</b>
	d. Opening Statement and Closing Argument	<b>583</b>
	e. Jury Selection	<b>583</b>
	f. Witnesses	<b>584</b>
	g. Exhibits	<b>584</b>
	h. Order of Proof	<b>585</b>
	i. Cross-Examinations	<b>585</b>
<b>11.17</b>	Trial Lawyer's Self-Evaluation Guide	<b>586</b>
	1. Strategy	<b>586</b>
	2. Execution	<b>586</b>
	a. Opening	<b>586</b>
	b. Witnesses	<b>586</b>
	c. Exhibits	<b>587</b>
	d. Closing	<b>587</b>
	3. Delivery	<b>587</b>
	a. Verbal	<b>587</b>
	b. Nonverbal	<b>587</b>
	Example of a Trial Notebook and Forms	<i>See Website</i>



**CHAPTER 12**

<b>BENCH TRIALS AND OTHER CONTESTED HEARINGS</b>	<b>589</b>
<b>12.1</b> Introduction	<b>589</b>
<b>12.2</b> The Law of Bench Trials	<b>590</b>
<b>12.3</b> Know Your Judge	<b>591</b>
<b>12.4</b> Bench Trials Versus Jury Trials	<b>593</b>
<b>12.5</b> Stages of a Bench Trial	<b>595</b>
<b>1.</b> Opening Statements	<b>595</b>
<b>2.</b> Direct Examinations	<b>597</b>
<b>3.</b> Cross-Examinations	<b>599</b>
<b>4.</b> Exhibits	<b>600</b>
<b>5.</b> Experts	<b>602</b>
<b>6.</b> Closing Arguments	<b>603</b>
<b>7.</b> Findings of Fact and Conclusions of Law	<b>605</b>
<b>12.6</b> Other Contested Hearings	<b>606</b>
<b>12.7</b> Conclusion	<b>606</b>
 <i>Index</i>	 <i>607</i>