Preface to the Twelfth Edition

As the practice of trying cases and the law controlling those trials continue to evolve, though admittedly slowly rather than dramatically, the Twelfth Edition reflects these changes.

Chapters 6, 7, 8, and 10 discuss or note the 2022 amendment to Federal Rule of Evidence (FRE) 106, often referred to as the rule of completeness. That amendment expanded the coverage of the rule to all statements, including oral statements that are recorded only in witness's memories, and effectively nullified hearsay objections to evidence of covered statements, to further incentivize attorneys offering prior statements to avoid mischaracterizing them by omitting related statements.

Chapter 11 contains a discussion of FRE 615. This rule (or "The Rule," as it is sometimes referred to) allows a party to demand that witnesses, other than parties and other specified exempt persons, be excluded from court so they cannot listen to the testimony of other witnesses. 2022 amendments clarified that the standard FRE 615 court order only excludes witnesses from the courtroom, but also explicitly authorized courts to enter further orders preventing disclosure of trial testimony to excluded witnesses.

Chapter 8, which covers expert testimony, dissects FRE 702. Consistent with the 2022 amendments to FRE 702, this discussion notes that the proponent of expert testimony must establish that the foundational elements of FRE 702 have been met, including that the expert's opinion results from reliable application of specialized knowledge to the facts at issue in the case.

Chapter 11 discusses the Standing Committee on Ethics and Professional Responsibility's 2023 Formal Opinion 508. In this formal opinion, the ABA committee attempted to distinguish ethically permissible (or even required) witness preparation from illegal witness coaching.

We have made one change in our discussions from the Eleventh to the Twelfth Edition. In the Eleventh Edition, where the co-authors differed in their approaches to an issue being discussed, junior co-author Easton's view was noted in a footnote. In the Twelfth Edition, we have moved these discussions into the body of the text, with introductory comments like, "On the other hand, some trial attorneys believe . . . ."

Trial lawyers should make it their practice to watch for developments like those noted above and to stay up to speed, as much as reasonably possible, with

technical and other advancements that can make them more (or, if ignored, less) effective courtroom advocates. Nonetheless, the basics of effective courtroom advocacy have remained relatively constant over the decades. We are grateful and honored that you have turned to us for an overview of these important principles.

Thomas A. Mauet
Tucson, Arizona

Stephen D. Easton
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July, 2024

Preface to the Eleventh Edition

For the Eleventh Edition of this industry-leading text, legendary Professor Thomas A. Mauet has decided to add a co-author. He has bestowed the considerable honor of co-authorship on yours truly. As the newcomer to this project (but not to the book, as I have assigned it as required reading to my Trial Practice students for over two decades at two different law schools), I have a perspective that differs from Professor Mauet's vantage point. Permit me to make a few observations about this book that reflect that perspective.

First, it is difficult for me to imagine the teaching of trial advocacy without this book. Newcomers to the simultaneously terrifying and exhilarating world of the courtroom need a guide to the many situations they will face as student lawyers and real-world practitioners. For decades, they have turned to Professor Mauet's guidance about how to conduct a direct examination, how to get an exhibit introduced, how (and when) to object, and on and on. This book gives them that crucial starting point.

Indeed, in a sense there really was no teaching of trial advocacy before this book. A few law schools offered trial advocacy courses in the 1960s and 1970s, but only a few. Professor Mauet's first edition of *Fundamentals of Trial Techniques* appeared in 1980. This book made it possible for law schools to add trial advocacy training for their students.

The movement toward trial advocacy courses had picked up steam by the time the ABA formed the Task Force on Law Schools and the Profession in the late 1980s. The Task Force's 1992 work product, widely referred to as the MacCrate Report, criticized American law schools for their dearth of practical training. This report pumped considerable energy into the movement to teach trial advocacy, prompting many law schools to add courses in this discipline. This book was the backbone of most of those courses. It has also been used widely outside the United States.

Though Professor Mauet has now added a co-author, not much has changed. The book is still at least 98 percent Professor Mauet's work. My rather modest contributions consist largely of revising the relatively few sections that needed updating to reflect new law, making the occasional minor editorial change, and adding a few (but only a few) short discussions of previously uncovered matters—usually about aspects of trial that seem to confound newcomers (based upon my trial advocacy teaching experience). Law students and new trial lawyers will continue to turn to the guidance and samples that Professor Mauet has provided.

This gets us squarely to the point of this book and how it should be used. Any new trial attorney, in or beyond law school, would be well served by first reviewing this book in total. (Indeed, I now require my trial advocacy students to read the entire book before the first class for my concentrated Trial Practice class.) This review will provide new trial attorneys with an impressively comprehensive overview of situations they will soon face in the courtroom.

When you face one of these situations, like the aforementioned attempt to get an exhibit introduced, go back to the relevant section of the book. First, review Professor Mauet's advice about how to best accomplish your goal. (Please do not make the mistake of turning directly to the second step.) After you have done this, but only after, turn to the specific examples in the book that most resemble the situation you face. When you do so, though, remember that these are examples, not straightjackets.

This is not a cookbook. It is, instead, a book chock full of valuable advice about how to "cook" in court, with examples that will help you get a feel for your upcoming task. Your actual time in court will almost never track the example. That, of course, is the great fun, but also the great challenge, of trial advocacy: Things happen differently than you expect. Come with a plan, to be sure, but be prepared to adjust.

That reality leads to another fundamental principle of trial advocacy that must be kept in mind when reviewing this book and its timeless advice. I call this the "default" principle. As a newcomer to trial work, you need to learn the default way to conduct a direct examination, introduce an exhibit, skewer a witness on cross, etc. In your first trials, you should endeavor to follow the default. You need to retrain your brain by jamming the default methods into it via repetition.

Defaults, though, are not "universals." For every principle of trial advocacy, even the timeworn advice that you should use leading questions on cross-examination (*see* section 6.5(1)), there are exceptions or, at least, possible exceptions. It is a major mistake to focus on or even think about the exceptions when you are in those first trials. Instead, during those first trials, you should be zealously following the defaults until they are indeed jammed into your brain. Until they become second nature, you need to force them in. Thus, for your first trials, you should only use leading questions during cross.

Once the principle has indeed become second nature, you can sometimes open yourself up to the possibility of not following the default methods. If you are a newcomer to trial advocacy, as even the most experienced of us once were, you should ignore the possibility of not following the defaults. If you think there might be an exception to the default before that default is second nature, you won't really learn the default.

Though there are a few exceptions, this book is mostly about the default tactics you need to learn well to become an effective trial attorney. Frankly, there isn't enough space in the book (or enough time in an introductory Trial Practice course) to deal with the exceptions to the default. But even more fundamentally, newcomers should be focusing exclusively on the defaults, not the exceptions.

Sometimes there is room for reasonable disagreement about the default tactics. Different trial lawyers have different experiences that lead them to different views, even about the default tactics. Even though I have tremendous respect and admiration for Professor Mauet, on a few—but only a few—occasions, I have disagreements, often minor, about the best default approaches. When I believe

my views contrary to Professor Mauet's views are worthy of your consideration, I have noted them in the footnotes.

Please note, though, that there are not very many footnotes of this nature. On a huge percentage of trial tactics issues, I agree with Professor Mauet. His advice is, indeed, timely and comprehensive.

One more quick suggestion before I end this preface: Keep this book. If there is any chance you will be entering the courtroom after you graduate from law school, you will want to have this book in your office during your trial preparation and then in the briefcase you take to court. When something comes up that you have not previously experienced, you will find yourself turning to this book, as I have done many times with previous editions. In this way, Professor Mauet has sat in co-counsel's chair in thousands, if not tens of thousands, of trials. You will be glad to have him in that role in your trials.

Indeed, this book likely will be even more valuable to you than to those of us who are collecting grey hair toward the end of our trial careers. We had the good fortune of starting our practices when there were more trials. The growth of the alternative dispute resolution movement and budgetary pressures on state and federal courts have resulted in substantially fewer trials in recent decades. Thus, it probably will take you a bit longer to drill the defaults into your head, as your first trials might be spread over several years. Keep this book with you. It will help you through those first trials and then comfort and help you in later ones.

There are relatively few gems in legal writing. You are currently reading one. Congratulations on your purchase of the book and on your decision to pursue trial work!

Stephen D. Easton
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November, 2020

Preface to the Tenth Edition

Why this new text? And why now? Because both jurors and trials have changed, so trial lawyers must change as well to be successful in the new millennium.

In 1980, when *Fundamentals of Trial Techniques* was first published, psychological research on the jury trial process was in its infancy, and teaching trial skills through the learn-by-doing method was in its early stages. At that time, young lawyers learned trial skills by observing, then emulating, experienced, successful trial lawyers. *Trial Techniques* reflected this reality, by showing how experienced lawyers performed the various tasks involved in jury trials, and that became the blueprint for young lawyers.

By 2005, when *Trials—Strategy, Skills, and the New Powers of Persuasion* was first published, much had changed. Jury research showed how juror attitudes about lawsuits, courts, and lawyers have all changed. Jury research also extensively studied how juror clusters—seniors, Baby Boomers, Gen X, Gen Y—have different preferences in how they learn, how they think, and how they make decisions. *Trials* focused on the psychology of juror learning and decision making, and how these preferences have changed the way trial lawyers now perform the various tasks involved in jury trials.

In this new text I have combined *Trial Techniques* and *Trials* by taking the best from each book. From *Trial Techniques* I have kept the overall structure of the book and the chapters that discuss the trial process, the psychology of persuasion, trial preparation and strategy, and bench trials. From *Trials* I have incorporated the chapters that discuss jury selection, opening statements and closing arguments, and direct and cross-examinations. The remaining chapters take significantly from both books. The examples throughout the text now reflect the three principal kinds of trials—tort, criminal, and commercial—so that readers can either read all the examples or can focus immediately on the plaintiff's and defendant's side of a particular kind of case. The text's format has also been modernized, and the difference between text and examples has been made clearer.

In addition, the website that accompanies the text contains an edited video of a trial so that students and lawyers can see a complete jury trial in 80 minutes. The website also contains the structure and contents of a completed trial notebook that students and lawyers can use as a blueprint to customize their own trial notebooks and forms as well as all the exhibits in full color and motion from the exhibits chapter. And the website contains additional examples of opening statements, direct examinations, and closing arguments.

For the Tenth Edition, I have added dozens of video lectures and demonstrations covering key components of trial. Professor Steve Easton and I are featured in several of these lectures, as is the late Professor Irving Younger. Other lectures are presented by the skilled trial attorneys, judges, and court reporters who served as the volunteer guest faculty for the 2013 University of Wyoming Summer Trial Institute at the University of Wyoming College of Law. Thanks to Steve Easton for his skillful integration of the videos with the text.

Finally, the teacher's manual, available to instructors, contains my suggestions on how to organize a law school trial advocacy program and how to teach trial advocacy skills effectively.

Our understanding of jury trials has changed since 1980 in several significant ways. First, we now know that juror beliefs and attitudes heavily influence whether jurors will be receptive to particular themes, messages, and evidence. Second, we know that trials must be visual, because most jurors today have been raised largely on television and computers and expect evidence during trials to be presented the same way. Third, we know that opening statements are a critical stage of the trial process where trial themes and people stories are first presented and juror impressions are first formed. Finally, trials today must be conducted efficiently, as juror attention spans have shortened. These changes have fundamentally altered how successful trial lawyers conduct themselves in all stages of a jury trial and are discussed and illustrated throughout the text.

Some things have not changed. Successful trial lawyers know that organization and preparation before trial remain essential. They know that they need effective trial skills to implement a realistic trial strategy. And they know that to get favorable verdicts they need to reach the jurors' hearts and minds. These concepts are also emphasized throughout the text.

It is the combination of understanding jury psychology, pretrial preparation, and executing a realistic trial strategy with persuasive courtroom skills that produces effective trial advocacy. *Trial Techniques and Trials* is the result of over 40 years I have spent as a trial lawyer and trial advocacy teacher. I hope you are pleased with the result.

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January 2017