

MATERIALS IN TRIAL ADVOCACY

PROBLEMS AND CASES

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ASPEN COURSEBOOK SERIES

**MATERIALS IN
TRIAL ADVOCACY**

PROBLEMS AND CASES

Ninth Edition

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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 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 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. New Chapter 10 contains four additional trials, based on historic events, that can be used for these purposes. The trial files, like the Chapter 7 problem files, are in the Website 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.

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 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 2019, the date of “6/15/[-1]” is June 15, 2018; “August 1, [-2]” is August 1, 2017. 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 Ninth Edition

Materials in Trial Advocacy has been used for over 35 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.

There are two substantial changes in the Ninth Edition. First, as we did previously for Chapter IX, we have now moved the files for the problems in Chapter VII to the companion website. As in Chapter IX, the book itself now contains only brief introductions to the Chapter VII problems. This change reduced the length and, therefore, the cost of the book.

We have also added an entirely new Chapter X entitled “Historic Trials.” This chapter parallels Chapter IX in providing four new files that can be used for mock jury trials. And we have followed the Chapter IX pattern of placing the trial files on the companion website, with only brief introductions to the trial files in the book itself. But the 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.

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January 2019

MATERIALS IN TRIAL ADVOCACY

PROBLEMS AND CASES

I

JURY SELECTION

Introduction

- 1.1 Civil: Automobile Negligence
- 1.2 Civil: Products Liability
- 1.3 Civil: Medical Malpractice
- 1.4 Civil: Wrongful Death
- 1.5 Criminal: Armed Robbery and Aggravated Battery
- 1.6 Criminal: Sexual Assault
- 1.7 Criminal: Tax Evasion
- 1.8 Criminal: Murder

INTRODUCTION

The problems in this chapter represent common types of civil and criminal cases that are routinely tried to juries. They present recurring issues about which a trial lawyer must reach decisions before and during the jury selection process. In addition, the two-witness cases in Chapter 7 may be used.

For each problem assigned, you should be prepared to make all necessary preliminary decisions and resolve any procedural uncertainties before the jury selection process actually begins. You must be thoroughly familiar with the applicable substantive law, your jurisdiction's procedural rules, and your judge's particular practices during jury selection.

Your instructor may modify the assignments and make specific additional assignments for these exercises.

The suggested background reading is Mauet, *Trial Techniques and Trials*, Chapter 3.

1.1 CIVIL: AUTOMOBILE NEGLIGENCE

This is a negligence action brought by Sharon Howard against James Walton arising out of a vehicle collision that occurred two years ago during the evening of May 2.

At the time, Howard was driving southbound in the inside lane of Main Street, a four-lane street with two lanes of traffic in each direction. Suddenly, another car, driven northbound in the inside lane by Walton, turned left without signaling and cut in front of Howard. Howard slammed on her brakes but couldn't avoid hitting Walton's car.

Walton maintains that he was driving northbound on Main Street, that he decided to turn left, and that the oncoming car driven by Howard was speeding and crashed into him before he could complete the turn. Walton says he was stopped in the inside southbound lane of Main waiting for a break in the outside lane traffic, so he could finish the turn, when the other car struck him.

The police at the scene gave Walton a Breathalyzer test because they smelled liquor on his breath. The test showed some alcohol but in an amount below the legal presumption-of-intoxication level. The police gave Walton a citation for failing to signal a left turn. The charge was dropped at a later date.

Both drivers were taken to a nearby hospital. Walton was examined and released. Howard was admitted with a broken nose, concussion, and facial cuts. Today she still has visible scarring on her nose and cheeks and complains of periodic headaches. She is 22 years old and single.

Plaintiff's occurrence witnesses are two girls, ages 11 and 12, who were sitting on their front lawn across from where the collision occurred. They will support plaintiff's version of the event, including Howard's claim that she was not speeding.

1. Prepare a juror profile of favorable and unfavorable jurors.
2. Conduct a voir dire examination of prospective jurors and make appropriate cause and peremptory challenges for the plaintiff or defendant.
3. Submit a written list of supplemental questions you wish the court to ask the prospective jurors if the court will conduct the entire voir dire.

1.2 CIVIL: PRODUCTS LIABILITY

This is a products liability case brought by Susan James against the ABC Manufacturing Company.

Three years ago, at a local supermarket, James purchased a standard metal can opener manufactured by the defendant. When purchased, the can opener was in a plastic and cardboard package. The back of the package contained the following words: “WARNING: Use only for opening bottles and cans.” James did not read the back of the package at any time.

On May 2, two years ago, James used the can opener to pry open a sticky kitchen drawer. The tip of the can opener broke off and flew into her left eye, resulting in a total loss of vision in that eye.

At the time of the accident, James was 53 years old, married, and had three adult children no longer living with her. She is not formally employed outside of her house, though she is a potter who sells her work at art and craft fairs.

The ABC Manufacturing Company, a Japanese corporation located in Tokyo, defends on the basis of product misuse and the adequacy of the written warning contained on the package. ABC manufactures numerous kitchen utensils and appliances, principally for importation to the United States. It has been in business since 1948. There are several products liability cases pending against ABC based on alleged defects in the can opener, but none has yet been settled or tried.

1. Prepare a juror profile of favorable and unfavorable jurors.
2. Conduct a voir dire examination of prospective jurors and make appropriate cause and peremptory challenges for the plaintiff or defendant.
3. Submit a written list of supplemental questions you wish the court to ask the prospective jurors if the court will conduct the entire voir dire.

1.3 CIVIL: MEDICAL MALPRACTICE

This is a medical malpractice case brought by Juan Gonzalez against Mercy Hospital.

On May 2, two years ago, Gonzalez fell down the stairs of his apartment and fractured his ankle. He was taken to the Mercy Hospital emergency room, where he was examined and treated by the emergency room personnel.

An intern employed by the hospital set the fracture and placed the lower leg in a cast. The next day Gonzalez began to complain of swelling and numbness in the leg, was examined periodically by the hospital staff, and was assured repeatedly by the hospital staff that his complaints were not unusual in injuries of that type.

Five days after the accident the cast was removed, and the leg was found to have significantly impaired circulation. Gangrene had set in. Despite remedial measures, the condition worsened, and the leg eventually had to be amputated just below the knee.

Gonzalez at the time of the accident was 35 years old, married, and the father of two small children. He was employed as a carpenter by a local construction company, but he has not worked at that job or any other since the accident. His employer's health and disability insurance has covered his medical and lost income expenses to date.

Gonzalez, a Mexican national, was a lawful resident alien when the accident happened.

Mercy Hospital, a not-for-profit charitable institution, has been owned and operated for many years by the Jesuits, a Catholic order.

1. Prepare a juror profile of favorable and unfavorable jurors.
2. Conduct a voir dire examination of prospective jurors and make appropriate cause and peremptory challenges for the plaintiff or defendant.
3. Submit a written list of supplemental questions you wish the court to ask the prospective jurors if the court will conduct the entire voir dire.

1.4 CIVIL: WRONGFUL DEATH

This is a wrongful death and survival action brought by William Smith, administrator of the estate of Jennifer Smith, deceased, against the defendants, Frank Jones and the ABC Construction Company.

On May 2, two years ago, Jennifer Smith, age 6, was playing with several other children in the schoolyard of her grade school shortly after school had let out for the day. At the same time, Frank Jones, a 62-year-old carpenter, was driving down the street by the schoolyard in a truck owned by his employer, ABC Construction Company, on his way to a job site.

The school zone is marked with signs. Jones was driving within the posted speed limit. The schoolyard is separated from the street by a fence, which has periodic openings in it.

Jennifer then spotted an ice cream truck parked across the street from the schoolyard. Its lights and music were on. Jennifer suddenly ran through an opening in the fence and across the street toward the truck.

Jones saw the ice cream truck and then saw Jennifer running across the street. He slammed on his brakes and turned his steering wheel but was unable to stop in time. The truck knocked Jennifer down on the pavement.

Jennifer was taken to a nearby hospital where she died five days later without ever regaining consciousness.

1. Prepare a juror profile of favorable and unfavorable jurors.
2. Conduct a voir dire examination of prospective jurors and make appropriate cause and peremptory challenges for the plaintiff or defendants.
3. Submit a list of supplemental questions you wish the court to ask the prospective jurors if the court will conduct the entire voir dire.

1.5 CRIMINAL: ARMED ROBBERY AND AGGRAVATED BATTERY

This is an armed bank robbery and aggravated battery case brought against the defendant, William Hill.

On May 2 of last year, two persons, one of whom was armed with a handgun, robbed the Second Federal Savings and Loan Association. Two tellers and the branch manager were in the bank at the time. Approximately \$16,000 was taken.

During the robbery, one of the tellers, Helen Lee, age 37, married, with two teenage children, was shot in the foot. She was taken to a nearby hospital and treated. Today her left leg is slightly smaller in the calf area than the right leg, and she has a noticeable limp.

The police, who obtained the license plate number of the getaway car from a passerby, arrested the defendant one hour later. The defendant, a 20-year-old high school dropout who had been unemployed six months when arrested, had been previously arrested twice for robbery and burglary. The robbery charge was dismissed; the burglary charge is still pending.

Following his arrest, the defendant was placed in a lineup with several other persons. One of the tellers positively identified the defendant as the robber. Helen Lee and the branch manager were unable to make any identification.

The money and handgun were never found. The second offender was never arrested or charged.

1. Prepare a juror profile of favorable and unfavorable jurors.
2. Conduct a voir dire examination of prospective jurors and make appropriate cause and peremptory challenges for the prosecution or defense.
3. Submit a list of supplemental questions you wish the court to ask the prospective jurors if the court will conduct the entire voir dire.

1.6 CRIMINAL: SEXUAL ASSAULT

This is a criminal sexual assault prosecution brought against the defendant, William Jackson.

The victim, Mary Rice, age 22 and single, will testify that she worked as a bartender at Butch's, a local spot popular with college students and young working persons. On May 2 of last year, she left work at 2:00 A.M. and walked to her apartment building one block away. A man followed her onto the elevator and exited on her floor. As she opened her apartment door, the man grabbed her from behind, pushed her into the apartment, told her he had a knife, and sexually assaulted her.

Immediately after the man left, Rice called the police. When they arrived she told them that she had seen the man previously at Butch's. (Based on this and other information, the police arrested the defendant several days later.) The police took Rice to a hospital, where she was examined and released.

When arrested, the defendant told the police that he had accompanied Rice to her apartment, that she had invited him in, and that they had voluntarily engaged in sex.

The defendant, age 22, who is African American, has a prior conviction for burglary. The victim is white.

1. Prepare a juror profile of favorable and unfavorable jurors.
2. Conduct a voir dire examination of prospective jurors and make appropriate cause and peremptory challenges for the prosecution or defense.
3. Submit a list of supplemental questions you wish the court to ask the prospective jurors if the court will conduct the entire voir dire.

1.7 CRIMINAL: TAX EVASION

This is an income tax evasion case brought against the defendant, Joseph Church.

The indictment charges that for the tax year ending December 31, two years ago, the defendant, a physician specializing in orthopedic surgery, intentionally and knowingly understated his gross income. It charges that his unreported gross income for the year was \$293,000, resulting in an underpayment of tax in the amount of \$70,000.

Church admits that he underreported his gross income in the amounts alleged but denies that this was intentionally and knowingly done. His defense is that he delegated all the financial aspects of his practice to his bookkeeper (since fired), who, he later discovered, was sloppy and did inaccurate work. He claims that he personally had no idea what his gross income for the tax year was when he signed the return.

The bookkeeper will testify that the doctor was satisfied with her work until his tax difficulties began and that she merely did the billings and paid the office expenses. She contends she never did accounting or tax work for the doctor.

1. Prepare a juror profile of favorable and unfavorable jurors.
2. Conduct a voir dire examination of prospective jurors and make appropriate cause and peremptory challenges for the prosecution or defense.
3. Submit a list of supplemental questions you wish the court to ask the prospective jurors if the court will conduct the entire voir dire.

1.8 CRIMINAL: MURDER

This is a murder case brought against the defendant, William Barnes.

On May 2 of last year the victim, Fred Silver, was found in his apartment by police, who were called to the scene by a neighbor who complained of loud voices and noises coming from Silver's apartment. When police arrived, they found Silver already dead, with numerous stab wounds in the neck, chest, and back. At the time of his death, Silver was age 42, single, and worked for an advertising agency.

Following an anonymous tip, two homicide detectives went to the defendant's home. After a lengthy interrogation, the defendant finally admitted killing Silver, a social friend, after an argument.

The indicated defense is insanity. The defendant's proof will show that during the past five years, the defendant has been admitted two times on a voluntary basis to psychiatric institutions for paranoid schizophrenia. A defense psychiatrist who examined the defendant after his arrest concluded that the defendant was suffering from the same condition at the time of the stabbing. The prosecution has an expert with a contrary opinion.

1. Prepare a juror profile of favorable and unfavorable jurors.
2. Conduct a voir dire examination of prospective jurors and make appropriate cause and peremptory challenges for the prosecution or defense.
3. Submit a list of supplemental questions you wish the court to ask the prospective jurors if the court will conduct the entire voir dire.

II

OPENING STATEMENTS

INTRODUCTION

The trial files summarized in Chapter 9 and included in full on the Companion Website, prepared for use as full trials, may also be used here as representative civil and criminal cases on which to base separate opening statement assignments. In addition, the two-witness cases in Chapter 7 may be used for additional opening statement assignments.

For each problem assigned you should be prepared to present an opening statement that is logically organized and persuasively delivered to the jury. Your instructor may modify the assignments and make specific additional assignments for these exercises.

The suggested background reading is Mauet, *Trial Techniques and Trials*, Chapter 4.

III

DIRECT AND CROSS-EXAMINATION

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INTRODUCTION

The problems in this chapter represent the kinds of recurring problems routinely encountered during the direct and cross-examinations of common types of witnesses. Each problem focuses on a specific kind of skill, the mastery of which is essential to present the witness's testimony effectively in the courtroom. This chapter focuses on occurrence witnesses, the most common and important witnesses in personal injury and criminal cases. The advanced direct and cross-examination cases in Chapter 7 have a number of witnesses in commercial transactions settings.

You should prepare your specific assignment for each problem as though the case were actually on trial. Accordingly, you should determine whether any admissibility issues exist and anticipate the objections and arguments your opponent is likely to make. In addition, you should structure and execute your direct or cross-examination so that you will effectively present that witness's testimony to the jury.

Most of the witnesses do not have background information. Be prepared to develop realistic, credible backgrounds for them.

Your instructor may modify the assignments and make specific additional assignments for these exercises.

The suggested background reading is Mauet, *Trial Techniques and Trials*, Chapters 5 and 6.

3.1 CONVERSATIONS AND TELEPHONE CALLS

1. The charge is extortion. Jess Smith is the complaining witness. The defendant is Ed Crosby. Smith has worked with Crosby at Ajax Machine Works for the past five years. They spoke on several occasions, at the plant.

Smith will testify that on January 15 of last year, at 6 P.M., in the 14' by 20' Ajax Machine Works coffee room, Crosby said that unless Smith paid him \$1,000 by the end of the week, he would put sugar in the gas tank of Smith's new Cadillac. No one else was in the coffee room at the time. Ajax is located at 322 W. Vernon Street.

For the prosecution, call Smith as a witness and put the conversation in evidence.

2. Use the same facts as in No. 1 above, except that the conversation occurred when Crosby called Smith at Smith's home. Smith lives at 3110 S. Crawford Avenue.

For the prosecution, call Smith as a witness and put the telephone conversation in evidence, assuming:

(a) they had talked on the phone many times before January 15 of last year;

or

(b) they had never talked on the phone before January 15 of last year.

3. Assume that Crosby and Smith had never met or spoken before January 15 of last year. Smith will testify that Crosby telephoned him/her at home on January 15, at about 6:00 P.M., and made the threat contained in No. 1 above. Crosby did not give his name during the call. One week later Crosby walked up to Smith outside Smith's house, at 2:15 P.M., and said: "I'm the one who called you last week. Do you have the \$1,000?"

For the prosecution, call Smith as a witness and put both conversations in evidence, assuming:

(a) when they talked in front of Smith's house, Smith recognized Crosby's voice;

or

(b) when they talked in front of Smith's house, Smith did not recognize Crosby's voice.

4. For the defense, in each of the above situations, oppose the testimony and cross-examine Smith.

3.2 CONVERSATIONS AND TELEPHONE CALLS

A new client, Kennedy Smith, came to you one year ago today and told you the following story:

One month ago I decided to purchase a new car, so I checked the yellow pages of the telephone directory and called Ace Motors. A man answered, said he'd be happy to talk to me, and said I should come in so they could show me the various models and accessories.

The next day I went to Ace Motors and met a salesman, Tim Bonner. I looked at several cars and the accessories, got price quotes, and finally placed my order for a new sports car. I gave him a check for \$2,000 as a down payment. The full price of the car was \$36,000.

The next day I had second thoughts about the sports car. I decided that it was not the right car for me and that what I really needed was a minivan. I called Ace again and a woman answered. I told her I had ordered a car but wanted to switch my order to a minivan I had looked at the previous day with the same accessories I ordered for the sports car. She asked my name and put me on hold for a few minutes. When she came back she said everything was taken care of; they'd call when the minivan came in. She said the price would be \$28,000.

Two weeks later the phone rang. I picked it up and said, "Hello," and the voice said, "Hi, it's Tim Bonner at Ace—your sports car arrived and is ready for pickup." I told him I'd changed the order, and he said he didn't know anything about it. He said I'd better come in.

The next day I went again to Ace Motors and talked to Charles Locker, the owner and manager. He said he had no written record of any order change. In any event, he said, none of the women working for him were sales personnel, and only salespeople were authorized to either write purchase contracts or modify existing orders. Hence, he said, he could only deliver the sports car in accordance with the terms of the written contract.

The next day I called Ace Motors and talked to Mr. Locker again. I demanded that he obtain the minivan for me. He refused. I then demanded that he return my \$2,000 deposit. He refused, stating that he couldn't return my money since it was a deposit for a sports car, and they were ready to deliver a sports car.

You have brought suit to enforce the oral modification of the contract or, alternatively, for the return of the \$2,000. The case is now on trial.

1. For the plaintiff, conduct a direct examination of Smith.
2. For the defendant, cross-examine Smith.

3.3 REFRESHING RECOLLECTION AND RECORDED RECOLLECTION

On February 15, [-1], there was a burglary at the Ace Hardware Store, located at 1050 North Main Street.

At about 3:00 A.M. that day, Logan Stone was walking on the sidewalk in front of the store on the way home from the nearby plant where s/he worked the night shift, 5:30 P.M. to 2:30 A.M. Stone saw a man run out of the store and jump into a large black sedan. The car sped away.

Stone, from about ten feet away, saw the license plate number of the car, ZQB-437, as it pulled away from the curb. S/he ran to his/her locked car, which was parked a half-block away, found a pencil and piece of paper in the glove compartment, and wrote down the license plate number. Stone then used a cellular telephone to call the police and report what s/he had just seen. Later, s/he gave Officer Arthur Jones the scrap of paper containing the license plate number.

Now, Fred Miller, the registered owner of the black car, is on trial for the burglary. Stone is called by the prosecution to testify about the license plate number on the black car that left the scene.

1. On direct examination, Stone is unable to remember the license plate number. Use the piece of paper to refresh Stone's memory of the number.
2. On direct examination, Stone cannot remember the license plate number, even after being shown the piece of paper. Get the paper or its contents in evidence.
3. For the prosecution, be prepared to conduct the entire direct examination.
4. For the defense, cross-examine Stone.
5. Assume that Stone testifies that the car s/he saw was a large *white* car. The defendant owns a white Lincoln Continental. For the defense, cross-examine Stone using Jones's police report.

10B-437

POLICE REPORT

Re: Burglary at 1050 North Main Street

To: Commanding Officer

From: Patrolman Arthur Jones

Reporting officer arrived at scene of reported burglary at 3:20 A.M. (2/15/[-1]). Interviewed witness Logan Stone. Said witness told reporting officer s/he saw a man run out of the Ace Hardware Store, 1050 North Main, at about 3 A.M. Witness further said the man jumped into a large black car and said car then sped away. S/he did not see the face of the man, but did note the number on the car license plate. Stone said s/he then ran to his/her own parked car and wrote down the license plate number. S/he gave the reporting officer the piece of paper with the license plate number on it.

Arthur Jones

Star number 1424

2/15/[-1]

600 hours