Introduction to the Fourth Edition

It is still true. What we wrote in the introduction to the first edition in 1997 was that one of the hardest tasks of a trial lawyer is to ask the right question. Asking it well can sometimes be an even greater challenge. Whether focusing on direct examination or cross-examination, there are many ways to accomplish the goal of eliciting facts. We continue to hope that the material in this Fourth Edition of our book will enable the advocate to grasp the fundamental requirements in selected types of examinations of witnesses, and thereby freeing the advocate to focus on the refinement of courtroom style and strategic approaches to posing the questions.

The examinations consist of both model examinations—a series of questions utilized to solicit facts and opinions from the witnesses in situations that recur sometimes specifically and other times generally, and must be reasonably adhered to in order for counsel to obtain the needed evidence. Each model examination is preceded by contextual outline, followed by a comment annotated to the cases, statutes, the Federal Rules of Evidence, and valuable secondary sources.

This Fourth Edition includes new model questions and commentary on direct examination, its purpose, form and structure; the introduction of social media evidence, and numerous models for cross-examination. Commentary is updated as are case citations and secondary sources.

We issue a word of caution as we have in prior Editions: The model examinations cannot be simply lifted from the page and applied during the course of a trial. The models are only suggested organizational structures, which contain the basic questions designed to elicit an answer necessary to obtain a desired result. The trial and lawsuit is more art than science. Differing approaches can be used to the same end. The model examinations in this work are the threads from which the trial lawyer can weave his or her own cloth.

Although comments following the model examinations include tactics, and practice points on the conduct of examination, as well as a presenta-
tion of evidentiary discussions, we do not attempt to teach trial tactics. For example, consider the cross-examination of a witness utilizing a transcript to impeach. One approach consists of soliciting facts from the witness to contradict the deposition. Then counsel reminds the witness that she or he was deposed; elicits that the witness was deposed in the lawyer’s office; that the witness took an oath; that the witness’s recollection of events was fresher in her mind at the time of the deposition than at trial; and finally, a reminder that when counsel took the deposition the witness testified one way in the deposition and another way at trial.

Another approach to impeachment using a transcript is to only remind the witness that she just testified that the accident occurred at 10:00 p.m., but in the deposition at a certain page and line the witness swore that the accident occurred at 6:00 p.m. For consideration of trial tactics, see Anatomy of A Trial – A Handbook for Young Lawyers, Second Edition (Paul Mark Sandler, Esq. with contributions from members of the Bench, ABA Publishing 2014.)

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