

# PREFACE

## TAKE THIS QUIZ

So you want to succeed as a trial lawyer! It would so helpful for any aspiring trial lawyer to have a mentor on standby for practical advice whenever needed. This is that mentor. In your career, you will confront a host of issues. You need to be prepared to deal with them.

*Do you know what to do?*

- As you are drafting a complaint, you are in a quandary about what to allege, which causes of action to assert, which defendants to sue, where to bring the action, and what you need to discuss with your client. See Chapter 3(C).
- You have just received an antagonistic email from opposing counsel. See Chapter 3(B), section 2.
- You are about to communicate with your expert, and you must determine whether that communication will be within work product protection. See Chapter 2(D).
- You just realized that you inadvertently produced to opposing counsel ESI within the attorney/client privilege. See Chapter 4(G), section 7.
- Your client complains that compliance with opposing counsel's request for ESI would be prohibitively expensive. See Chapter 4(G), section 6.
- In negotiating a matter in which you represent more than one client, opposing counsel proposes a settlement that treats some of your clients disproportionately. See Chapter 5(A), section 6.
- At mediation, you have reached an impasse. See Chapter 5(B), section 5.
- Your client is in arrears in paying your bills. See Chapter 1(G).
- You need to prepare an opening statement and a closing argument in a jury trial. See Chapter 6(A), sections 3 and 4.
- At trial, opposing counsel seeks to put in rebuttal evidence. See Chapter 6(C), section 14.

- At trial, the judge has just sustained an objection to admissibility of a key document affecting a substantial right of your client. See Chapter 6(B), section 12.
- You just received an arbitration award that rules against your client. See Chapter 5(C), section 16.
- You want to solicit clients by promoting your expertise and publicizing your most recent courtroom victories. See Chapter 7(C), section 1.
- You need to draft an appellate court brief. See Chapter 3(J).
- You have trouble sleeping at night because of work pressure. See Chapter 7(D), section 1.

*Can you answer these questions with confidence?*

- What are a dozen common mistakes you should not make in drafting briefs? See Chapter 3(A).
- What strategies are most effective in taking advantage of the most recent amendments to the Federal Rules of Civil Procedure? See Chapter 4.
- What should you do if you have good reason to believe your client is lying to you or lying under oath? See Chapter 7(B), section 9.
- What are ten ways you can use a deposition transcript before and during trial? See Chapter 4(J), sections 17 and 18.
- Ethically, can you contact a former employee of an opposing party represented by counsel? See Chapter 7(B), section 12.
- What is your best way to get an answer if a witness testifies that he or she lacks memory or knowledge? See Chapter 4(J), section 9.
- How can you make the most effective *Daubert* challenge to an expert witness testifying? See Chapter 6(C), section 8.
- What are more than two dozen bases to object to trial testimony and more than a dozen bases to object to introduction of documents into evidence at trial? See Chapter 6(C), section 5.
- What should you do when you must deliver bad news to your client? See Chapter 1(H).
- What do you need to know about prospective mediators and arbitrators that you won't find in their résumés? See Chapter 5(B), section 2 and Chapter 5(C), section 5.
- In a negotiation, are you better off being the first to propose a settlement and, if so, how do you determine what to propose? See Chapter 5(A), section 3.

- During a negotiation or mediation, what are the ethical guidelines about truthfulness, especially about such matters as settlement authority? See Chapter 5(A), section 6.
- How do you avoid ethical violations in doing informal discovery on the Internet? See Chapter 4(I).
- How can you minimize tax consequences in the settlement of a commercial case? See Chapter 3(K).
- How can you enhance your powers of persuasion in negotiation, mediation, arbitration, and litigation by applying Socrates' theory of *ethos*, *logos*, and *pathos*? See Chapter 7(A).
- What does it mean to succeed as a trial lawyer? See Chapter 7(D), section 7.

In this updated, reorganized, and expanded second edition of *How to Succeed as a Trial Lawyer*, you will find the answers to these and many other vexing questions you will confront as a trial lawyer.

One reviewer described the first edition as “everything you need to know that you didn’t learn in law school.” So much of what successful lawyers need to know is gleaned from experience—experience you can benefit from vicariously by reading this book.

The law evolves and, as it does, any book providing practical advice to lawyers must be updated and revised. “A lawyer without books would be like a workman without tools,” wrote Thomas Jefferson. Just as a workman’s tools must be sharpened and improved over time, so it is with books for lawyers.

Why this second edition? Several reasons.

Since the publication of the first edition, the Federal Rules of Civil Procedure and the American Arbitration Association Rules for Commercial Disputes have been revised in significant ways.

To mentor you more comprehensively, new sections are added on propounding and responding to e-discovery, how to negotiate, how to persuade, and essentials for success. In addition, the text is amplified, providing tips to make the most of technological advances, insights from the most recent studies related to negotiation strategies, work efficiency, and lawyer stress, as well as gleanings from a variety of sources to guide you in your legal career. The list of suggested readings is updated.

You can benefit from this portable mentor to advance as a trial lawyer with confidence. This book will always be there for you, whenever you need practical advice, just like an esteemed mentor.

## WHY YOU MUST BECOME A GRYPHON

Whether you are a law student taking a clinical course, or a lawyer learning the ropes, you can read this book at least two different ways. You can read it straight through, or you can read sections as you need guidance on particular issues. The detailed table of contents, index, and citation tables will make it easy for you to pinpoint where in the text you'll find answers to your questions. The practice checklists provide you with a cogent summary of what you need to know.

To the extent my advice is based on procedural rules, I apply the Federal Rules of Civil Procedure and the Federal Rules of Evidence. I refer to each Federal Rule of Civil Procedure as "Rule" and each Federal Rule of Evidence as "FRE." For easy on-line reference to both, with helpful Notes of Advisory Committee as to their intent and purpose, see The Cornell Law School Information Institute website, [www.law.cornell.edu/rules](http://www.law.cornell.edu/rules). For an excellent and easy-to-navigate primer on the meaning of legal terms, with useful cross-references and case cites, go to [www.law.cornell.edu/wex](http://www.law.cornell.edu/wex). For a handy table of deadlines in the Federal Rules of Civil Procedure, see the West® version of those rules. For local procedures, you need to check the rules in your federal district and circuit courts, chambers practices of the judge before whom you are appearing, available on-line for federal judges, and state court rules.

Studies reveal that at least 10,000 hours of disciplined effort are required to master a skill. *See* K. Anders Ericsson, Ralf Th. Krampe & Clemens Tesch-Römer, "The Role of Deliberate Practice in the Acquisition of Expert Performance," 100 *PSYCHOL. REV.* 363–406 (1993). Think of tennis great Roger Federer, violinist Isaac Stern, chess grandmaster Garry Kasparov, or opera star Placido Domingo. But the practice of law is never mastered. There is always room for improvement. I have learned something about the skills we must master from each meeting with a client, each deposition I take, and each case I try.

The skills the successful trial lawyer must seek to master are disparate, a melding of qualities that, together, make up the complete package. Like the gryphon, the ancient Greek mythological beast combining the head of an eagle with the body of a lion (see the cover image), the successful trial lawyer is a hybrid, combining the best qualities of different animals: an eager beaver, busy as a bee, with an eagle eye for key documents during discovery, unearthed with dogged determination, squirreled away for later use, outfoxing opposing counsel, ferreting out the truth by taking effective depositions, while avoiding badgering the witness, preparing for trial with

the benefit of an elephantine memory, while not forgetting that sometimes it is vital to horse around to achieve some measure of balance in life.

Just as the gryphon combines the most potent attributes of an eagle and a lion, to formidable effect, the successful trial lawyer is a formidable hybrid, benefitting from the unique skill set this book encompasses. The successful trial lawyer must be adept in such diverse roles as advisor; advocate in negotiation, mediation, arbitration, and litigation; colleague; adversary; strategist; negotiator; officer of the court; writer; orator; ethicist; and marketer—not to mention all nonprofessional roles in life. This book includes all the essentials you need to know as a trial lawyer in all these professional roles, as well as guidance in balancing the personal and professional aspects of your life.

This is not just a formulaic recipe book for success. As you read on, you will encounter obnoxious opposing counsel, perjuring clients, curmudgeonly judges, Batman and Robin, web scammers, insane rabbits, BATNA, WATNA, a man who may have committed suicide, a smoking-gun exhibit, a multiverse of conveyor belts, a death-row inmate about to be executed because of a lawyer's blunder, Lance Armstrong, the Tarpeian Rock from which perjurers were hurled, the Csikszentmihalyi flow channel, the score of Beethoven's Fifth Symphony, a funnel distilling sap into the maple syrup of admissions, psychological concepts such as persistence of belief (also known as confirmation bias), serial position effect, primacy, and recency, a Japanese style of eating known as *hara bachi bu*, warm zeal, a Cherokee legend, and a sexually aggressive corporate executive.

You will also benefit from words of wisdom of Abraham Lincoln, Will Rogers, Ralph Waldo Emerson, Winston Churchill, Mark Twain, Rabindranath Tagore, Pliny the Younger, Irving Younger (no relation), Shakespeare, William Wordsworth, Socrates, Montaigne, Oscar Wilde, Pascal, neuroscientist Daniel J. Levitin, Cicero, Benjamin Franklin, Jerry Seinfeld, Confucius, Albert Einstein, Eleanor Roosevelt, Daniel Kahneman, winner of the Nobel Prize in Economic Sciences, and others. As a bonus, you'll learn strategy from the often-cited defamation action, *Montague v. Capulet*.

What will you *not* find in this book? I don't include what lawyers refer to as "war stories"—personal accounts of adventures as a trial lawyer. You want succinct practical advice, not long stories about my own experience—although my own experience informs everything you'll read in this book.

I don't include a discussion of such specialties as personal injury, divorce, or criminal law, although I do focus on commercial litigation. Even so, this book encompasses all the fundamental skills required of any successful trial lawyer.

Whether or not you are past the ten thousand hour mark, this book is worth reading. After all, we can all benefit from advice that gets us closer to the ever-elusive mastery of the skills required of a trial lawyer.

## BUT FOR

We all learned in law school a specialized use of language, including the meaning of “but for” in the tort causation analysis. “But for” applies here as well, to positive effect rather than the cause of harm, beginning with a Yale Law School student’s inquiry many years ago. He asked Steve Wizner, the Yale professor then in charge of clinical programs, if Yale offered an advanced course for students who completed Trial Practice. Yale did not, but Steve told him that if the student could find enough others interested in such a course, he would see what he could do.

The next day, that student delivered to Steve a petition signed by a dozen classmates: if Yale offered an advanced civil litigation course, they would take it. Steve had the confidence in Fred Gold and me (we had each taught Trial Practice at Yale for many years) to ask that we create that new course, Civil Litigation Practice. For many years thereafter, we taught that course, which included all the essentials from the first client meeting to the end of a jury trial.

Knowing how to do something and knowing how to teach it are distinct skills. By teaching at Yale Law School for twenty years, I learned—sometimes my students as guinea pigs—what works and what doesn’t. *But for* my students, who taught me so much by teaching them, I would not have the insights that made this book possible. As Oscar Hammerstein II put it: “If you become a teacher, by your students you’ll be taught.”

The *but for* class of people who made this book possible includes many others in addition to Steve Wizner, Fred Gold, and my YLS students. I am grateful to my assistant, Ellen Beckwith; research librarian Sandee Molden; arbitrator and mediator Beverly Hodgson; certified personal trainer George Bakes; registered dietician Merrill Adelman; a partner at Patterson Belknap, Gregory L. Diskant; a senior litigation partner at Jenner & Block, Richard F. Ziegler; and my colleagues at Cohen and Wolf, P.C., among others.

My thanks also to my editor, Jonathan Malysiak, Director of the Ankerwycke and Flagship imprints at ABA Publishing; copy editor and compositor Neha Bhargara; production manager Marisa L’Heureux; and cover designer Tony Nuccio.

*But for* all these folks, this book would not have become a reality.