

CONTENTS



Introduction	xvii
Chapter 1	
The Judicial Role	1
<hr/>	
The Ideal Judge	2
The Realities	2
Relating to the Jury	3
Moving Toward Settlement	3
A Common Source of Contention	4
Cooperation Between Judge and Counsel	4
The Well-Organized Argument	5
Chapter 2	
What Judges Like	7
<hr/>	
Trading Places with the Court	7
Approaching the Court	8
Knowing the Judge	8
Personal Data	9
Professional Background	9
Prior Opinions	9
Work Habits	9
Finding the Information	10
Heeding Court Procedures	10

The Importance of Initial Impressions	11
Recognizing That Civility Counts	12
Remembering Common Courtesies	12
Effective Courtroom Methodology	13
Be Prepared	13
The Jury Is Always Watching	13
Avoid Distracting Mannerisms	14
Control Your Emotions	14
Show Respect for the Judge	14
Know When to Stop	14
Aiding Case Management	14
Avoiding Discovery Disputes	15
Promoting the Disposition of Motions	15
Furthering Settlement Discussions	16
Proper Behavior at Trial	16
Cross-Examination	17
Closing Arguments	17
A Court's Decree of Conduct	18
What Trial Judges Ultimately Want	18
Judges Want Informed Lawyers	18
Judges Want Respect	19
Judges Want the Law	19
Judges Want Valid Objections	20
Judges Want the Exhibits	20
Judges Want Trial Notebooks	20
Judges Want Well-Crafted Jury Instructions	21
Judges Want the Judgment	21
Judges Want to Be Affirmed on Appeal	21
What Appellate Judges Ultimately Want in a Brief	21
Judges Want Good Organization	21
Judges Want Brevity	22
Judges Want Precision and Clarity	22
What Appellate Judges Ultimately Want in Oral Argument	22
Judges Want a Dialogue	23
Judges Want Good Preparation	23
Judges Want Visual Aids	23

Chapter 3
What Judges Don't Like **25**

Lack of Courtroom Decorum	25
A Misunderstanding of the Process	26
Case Management	27
Discovery Issues	27
Arguing Motions	27
Settlement Conferences	28
Sure-Fire Ways to Alienate the Trial Judge	28
Ignore the Rules of Court	28
Fail to Prepare	29
Arrive Late	29
Repeat Themselves	29
Act Rudely	29
Make Frivolous Arguments	30
Mislead the Court	30
Argue with the Judge	30
Refuse to Talk Settlement	31
Request a Last-Minute Continuance	31
Sure-Fire Ways to Alienate an Appellate Judge	31
Cover Every Issue Imaginable	31
Slant the Facts	32
Misstate the Law	32
Use Complex or Obtuse Language	32
Are Verbose	33
Ignore the Court's Questions	33

Chapter 4
The Difficult Judge **35**

The Problem of Unfair Judges	35
Encountering Discovery Disputes	36
Dealing with Pre-Trial Motions	36
Issues Related to Settlement Conferences	37
A Judge Advocating Against You	37
Do Not Overreact	37
Do Not Argue	37

Be Prepared	38
Be Honest	38
Ask for a Continuance or Short Recess	38
Always Make a Record	38
Consider Substitute Counsel	38
Consider Filing a Motion for Recusal	39
A Judge Advocating for You	39

Chapter 5

Case Management **41**

Importance of Good Management	42
Moving the Case Along	43
Effective Judicial Oversight	43
Foreseeing Problems	44
Status Conferences	44
Legal Issues	45
Discovery	45
Settlement	45
Continued Discussions	45
Witness Lists	46
Discovery Issues	46
Motion Practice	47
Settlement Discussions	47
How Attorneys Can Help Judges Manage Cases	48
Agree on a Discovery Plan	48
Serve Discovery Promptly	48
Analyze the Case Early	48
Keep Discovery Simple	49
Consider Reasonable Settlement Options	49

Chapter 6

Discovery Disputes **51**

Trench Warfare	52
An Unreasonable Obsession	52
The Issue of Judicial Discretion	52
Judicial Oversight	53
Involvement of the Judge	53

Significant Discovery Issues	53
The Art of Advocacy	54
The Lawyer's Role	55
Protective Orders and Privilege	55
Issues of Contentiousness	55
Aiding the Judge	56
A Well-Oiled Machine	56
The Use of Sanctions	57

Chapter 7
Pre-Trial Motions **59**

First Impressions	60
Frivolous Motions	60
Dismissal	60
Summary Judgment	60
Discovery	61
Sanctions	61
Matters of Attorney Conduct	61
Unwillingness to Grant Extensions of Time	61
Resisting Service of Process	62
Impeding the Initial Conference	62
Unreasonable Discovery Disputes	62
Evading Page Limits	63
Lack of Courtroom Decorum	63
Common Problems	63
A Matter of Credibility	64
A Matter of Brevity	64
The Well-Written Motion	65
Verbal Excess	65
The Importance of Oral Argument	66
Tips for Oral Argument	67
Keep It Simple	68
Answering the Judge's Questions	68
The Importance of Civility	69
Dealing with the Court	70
Imagine Yourself in Their Place	71
Challenging Your Opponent	71

Chapter 8	
Settlement Negotiations	73
<hr/>	
The Judge's Role	74
Being Realistic	74
Arriving at the Right Figure	75
Necessary Flexibility	76
Other Factors	76
Psychological Aspects	77
Solid Advice About Settling	77
The Development of the Case	77
The Nature of Damages	78
The Economic Positions	78
The Point in Negotiations	78
Your Strengths and Weaknesses as a Negotiator	78
The Personalities Involved	79
Your Opponent's Need to Feel Victorious	79
The Settlement Conference	80
Risk Evaluation	81
Settlement Authority from the Client	81
Unreasonable Expectations of the Lawyer	82
Achieving Success in a Settlement Conference	82
Analyze Your Case Beforehand	82
Level with Your Client	82
Keep the Client Informed	82
Respect Your Opponent's Case	83
Discuss Settlement with Your Client Early On	83
Prepare a Settlement Statement	83
Be Flexible with Your Offers	83
Leave Room for Further Negotiations	83
Alternative Dispute Resolution	84
Realize That Settlement Discussions Were Not Time Wasted	84
Chapter 9	
Trial: General Considerations	85
<hr/>	
Importance of Discernment	85
The Value of Checklists	86
Bench or Jury Trial	86

The Key Differences	87
Bench Trials from the Judge’s Perspective	88
Settlement Talks in a Bench Trial	88
Resolution of Bench Trials	89
The Jury’s Level of Understanding	90
Preparing a Witness for Direct Examination	90
Refreshing Your Knowledge of Basic Hearsay Objections	91
Party Opponent	91
Emergency Room Statements	91
Business Records	92
Remembering to Memorialize Nonverbal Aspects	92
Making Your Point	93
Exhibits	93
Bias	93
Attorney Conferences	93
Suggestions for Effective Trial Advocacy	94
Organization Is the Key	94
Prepare Your Witnesses	94
Keep Your Opening Statements and Closing Arguments Concise	95
Speak Up	95
Do Not Talk Over Your Opponent or the Judge	95
Know Your Rules of Evidence	95
Maintain Your Professionalism	95
The Power of Non-Aggression	96
Preserving the Record for Appeal	98
Succeeding at Trial	98
Make a Meaningful Opening Statement	98
Be Careful with Promises in Opening Statements	98
Don’t Ask Leading Questions of Your Own Witness	99
Never Prove Your Case Through Adverse Witnesses	99
Carefully Devise Each Question on Cross-Examination	99
Listen Closely to a Witness’s Answers to Your Own Questions	100
Never Surprise the Court with New Issues	100
Respect All Stipulations	100
Cite Only Relevant Cases	100
Heed Opinions the Judge Has Written	100
Know When to Stop	101

Chapter 10**Trial: Relating to the Jury 103**

The Key to Communication	103
Showing Rather Than Telling	104
Helping the Jury to Understand	104
Organize Your Case Carefully	104
Don't Hide the Ball	105
Use Voir Dire to Learn	105
Consider Your Exhibits	105
Obtain Pre-Instructions When Feasible	106
Streamline Witness Presentation	106
Limit Deposition Testimony	107
Do Not Repeat Too Much	107
Beware of Courtroom Tests	107
Expedite the Trial	107
Other Aids to Jury Understanding	108
Try Your Case to the Jury	108
Avoid Technical Terms and Legalese	108
Keep the Evidence Flowing	108
Use Restraint	109
Avoid Sidebars	109
Object to Argument in the Guise of Objections	109
Help Jurors with Important Exhibits	109
Consider Sequential Summations	109
Write Jury Instructions in Plain English	110
The Relationship Between Judge and Jury	110
The Rural Trial	110
Fairness Issues	111
Pace	111
Jurors	111
Voir Dire	112
Settlement	112

Chapter 11**Trial: Voir Dire 113**

Employing Charisma	114
Using Voir Dire to Learn	114

Suggestions for Effective Voir Dire	114
Know Your Judge	114
Keep It Simple	115
Establish a Dialogue	115
Avoid Embarrassing the Jurors	116
Humanize Your Client	116
Divulge Your Weaknesses	116
Always Be Civil	117
Humanize Yourself	117
Avoid Focusing on Yourself	117
Choose Like-Minded Jurors	118

Chapter 12

Trial: Opening Statements **119**

Generating Enthusiasm	119
Planning Your Case	120
Making the Best Opening Statement	121
Prepare Carefully	121
Keep It Simple	121
Maintain Your Credibility	122
Do Not Be Argumentative	122
How <i>Not</i> to Make an Opening Statement	122

Chapter 13

Trial: Evidence **125**

Keeping It Basic	125
Planning the Order of Presentation	126
Keeping the Evidence Flowing	126
Presenting Orders of Proof	127
Questioning the Witness	127
Keeping Witnesses Straight	128
Presenting Deposition Evidence	128
Dramatic Interpretations	129
Considerations for Bench Trials	129
Visual Learning	129
Tactics for Physical Evidence	130
Considerations in Commercial Cases	130

Presenting Exhibits	131
Using Modern Presentation Technology	131
The Many Challenges of Exhibits	133
Identification	133
Revelation	133
Display	133
Helping Jurors with Important Exhibits	134
Using Video-Presentation Devices	134
Employing Narrative Videos	135
The Controversy	135
Applying Evidentiary Rules	136
Prejudicial Nature	137
Dealing with Distortion	137
Setting Ground Rules	138

Chapter 14

Trial: Closing Statements 141

The Power of Persuasion	141
Remember the Basics	142
Sticking to the Point	142
An Effective Closing Argument	143
Be Prepared	143
Tie the Evidence Together	143
Use Exhibits	143
Use Stories That Have a Point	143
Avoid Theatrics	144
Don't Wax Philosophical	144

Chapter 15

Trial: Jury Instructions 145

The Root of the Problem	146
Pattern Jury Instructions	146
The Art of Drafting Good Jury Instructions	147
Instructions in Plain English	147
Pre-Instructions	148
Conditional Instructions	148

Chapter 16
Appeals: General Considerations **151**

The Changing Scene	152
Inform and Persuade	152
Changing Places	152
Know Your Judge	153
The Importance of the Judge’s Legal Background	153
Experience Shapes Attitudes	154
Complying with Internal Procedures	154
Trial Lawyer Versus Appellate Specialist	155
The Matter of Error at Trial	156

Chapter 17
Appeals: Briefs **157**

Finding the Proper Approach	157
The Payoff of Your Efforts	158
Failing to Filter the Issues	159
Clear and Simple	159
Pointless Jargon	160
Telling the Whole Truth	160
Professional Courtesies	160
Working on the Reader’s Mind	161
Conveying a Sense of Justice	161
Choosing Your Words Wisely	162
The Art of Writing Effective Briefs	162
Use Simple and Clear Language	162
Be Blissfully Brief	163
Limit Your Issues on Appeal	163
Be Accurate in Summarizing Facts	163
Analyze Contrary Authorities	164
Avoid String Citations	164
Include Facts in Relevant Cases Cited	164
Avoid the Use of Footnotes	165
Avoid Long Quotations	165
Include Relevant Texts of Statutes, Rules, or Regulations	165
Set Forth the Standard of Review	165

Conclude Your Brief with a Summary and Desired Relief	166
Do Not Avoid Your Opponent’s Arguments	166
The Length of Briefs	166
Common Characteristics of Poor Writing	166
Wordiness	167
Lack of Precision and Clarity	167
Poor Organization	167
Clarity Above All Else	167

Chapter 18

Appeals: Oral Arguments 169

Trends Away from Oral Argument	169
The Importance of Oral Argument	170
Waiving Oral Argument	171
The Window to Deliberations	172
Knowing the Record Well	172
The Legal Argument Itself	173
Presentation Is Everything	174
Welcome Interruptions	175
The Effective Presentation	176
First Things First	177
Other Matters of Preparation	177
Tactics of Rebuttal	178
Sharing the Argument	178
The Opinion Below	179
Less Is Better	179
Answering Questions	179
Tips for Effective Appellate Argument	181
Consider Other Cases	181
Prepare to Be Interrogated	181
Arrive Early to Assess the Scene	181
Know the Record	182
Don’t Fight the Facts	182
Be Ready to Go	182
Use Rebuttal Time Wisely	182
What <i>Not</i> to Do in Oral Argument	183
Your View of Opposing Counsel	184
Ending Well	185

Epilogue	
The Art of Judicial Persuasion	187

Appendix A	
ABA Model Rules of Professional Conduct	191

Appendix B	
Code of Conduct for United States Judges	199

Appendix C	
Stellar Briefs	211

Index	279
About the Author	285