Contents

Introduction ................................................................. xi

Chapter 1
Effective Advocacy ......................................................... 1
  A. The Legal Argument .................................................. 2
  What Are the Keys to Courtroom Success? ....................... 2
  What Are the Most Effective Tools of a Litigator? ............. 2
  What Constitutes a Good Legal Argument? ...................... 3
  How Critical Is the Litigator’s Preparation of the Argument? 3
  How Does a Litigator Lay the Foundation of the Argument? 4
  What Are the Principles for Developing a Well-Honed
  Legal Argument? ....................................................... 4
  Where Does Efficiency Enter into the Litigator’s Presentation? 5
  How Can a Litigator Predict Which Arguments Will Appeal
to the Decision Maker? ............................................... 6
  Is the Sequence of the Presentation Important? ................. 6
  B. Presentation to the Tribunal ........................................ 7
  What about the Intimidation of Presenting the Case? .......... 7
  Where Does the Litigator Find Useful Information
  about the Judge? ...................................................... 7
  What about the Court’s Internal Operating Procedures? .... 8
  How Important Are the Judge’s Initial Impressions? .......... 8
  What Is Meant by “Civility of Counsel”? ......................... 9
  What Is Considered the Most Effective Courtroom Methodology? 9

Chapter 2
Case Management ............................................................. 11
  Why Is Case Management So Important? ........................ 11
  How Should a Litigator View Case Management? .............. 12
  How Do Judges View Motions Filed with the Court? .......... 13
  What about Potential Evidentiary Problems? ................... 13
Chapter 3
Discovery Disputes ........................................ 19
What Is the Proper Attitude of a Litigator toward Discovery? .. 20
What If Discovery Becomes Acrimonious? .......................... 20
What Is the Problem with Aggressive Discovery Tactics? ........... 21
When Should the Judge Be Brought In? ........................... 22
What Is the Best Advocacy Standpoint? ............................ 22
How Specific Should the Litigator Be? ............................. 23
When Should the Litigator Request Sanctions? ...................... 23

Chapter 4
Expert Witnesses ............................................. 25
What Is the Role of the Expert Witness? .......................... 26
What about the Decision to Retain an Expert? ....................... 28
What Is the Court's Gatekeeping Function? ......................... 28
What about Other Evidentiary Rules? ............................... 29
Where Does Cross-Examination Fit In? ............................ 30
Is There a Difference between Consulting and Testifying Experts? . 31
What about Expert Qualifications? .................................. 31
How Does the Judge Determine Admissibility of Expert Testimony? ... 32
What Expert Witness Materials Must Be Disclosed? ............... 33
What about Expert Compensation? ................................. 34
What Is the Standard of Review? ................................... 34

Chapter 5
Pretrial Motions .............................................. 35
Are Frivolous Motions a Problem? .................................. 36
How Do Courts View Incivility? ................................. 36
What Are the Most Frequent Issues? ............................... 38
What Constitutes a Well-Written Motion? .......................... 39
Contents

How Does the Litigator Reduce Verbal Excess? ......................... 40
Is Oral Argument Useful? .................................................. 41
What Are Some Pointers for Oral Arguments? ......................... 42
How Should the Litigator Argue a Motion? .......................... 42
What about Questions from the Bench? ................................ 43
What Then Are the General Principles of Pretrial Practice? ....... 44

Chapter 6

Settlement Negotiations ................................................. 45
What Are the Most Effective Ways to Settle a Case? ................. 46
What Is the Right Settlement Figure? .................................. 47
How Do the Parties Arrive at a Consensus? .......................... 49
How Flexible should the Litigator Be? ................................. 50
Any Other Factors the Litigator Should Consider? .................... 50
What about the Psychological Aspects of Settlement? ............... 51
What about Litigation Risk Assessment? ............................... 51
Is Settlement Authority from the Client Necessary? ................. 52
What about Settlement Discussions in Bench Trials? ............... 53
How Then Does a Litigator Achieve the Best Results
in Settlement? ................................................................. 53

Chapter 7

Trials .............................................................................. 55
A. In General ................................................................. 56
   What Do Judges Ultimately Want in a Trial? ....................... 56
   What Is the Key to a Litigator’s Success at Trial? ................. 58
   Are There Differences between Bench Trials and Jury Trials? . 61
   What about the Judge’s Perspective? ................................ 62
B. Jury Selection .............................................................. 63
   What Are the Initial Considerations in Jury Selection? .......... 63
   Does Persuasion of the Jury Begin at Voir Dire? .................. 63
   How Does a Litigator Learn about the Jurors? .................... 63
   What Makes for an Effective Voir Dire? ............................. 64
   Any Other Suggestions for Voir Dire? ............................... 65
C. Opening Statements ..................................................... 66
   Are Opening Statements Important? ................................. 66
   How Does a Litigator Generate Enthusiasm for Her Case? ..... 66
   Should an Opening Statement Follow the Course
   of the Argument? .......................................................... 67
   What Then Makes for an Effective Opening Statement? ......... 67
D. The Jury ............................................. 68
    What Is the Key to Effective Courtroom Communication? .... 68
    What Is Meant by “Showing” Rather Than “Telling”? ....... 69
    How Can the Litigator Help the Jury Understand His Case? ... 69
    How Does a Litigator Best Relate to the Jury? ............. 71
E. Power of Persuasion ..................................... 73
    How Does a Litigator Most Effectively Make His Point? ...... 73
    What Should a Litigator Avoid When Trying a Case? ....... 74
F. Examination of Witnesses ................................. 75
    Is There an Art to Questioning Witnesses? ................ 75
    Is There Power in Nonaggression? ........................ 76
    How Does a Litigator Best Prepare a Witness
      for Direct Examination? .......................... 76
    What about Cross-Examination? .......................... 76
    What about Hearsay Objections? .......................... 77
    What about Failure to Memorialize Nonverbal Aspects? .... 78
G. Evidentiary Issues ....................................... 78
    What about the Presentation of Evidence? .................. 78
    Does It Help to Keep the Evidence Simple? .............. 79
    How Important Is the Order of Presenting the Evidence? .... 79
    What Is the Best Way to Present Deposition Evidence? .... 80
    How Important Is the Visual Presentation of Evidence? .... 80
    How Should Exhibits Be Presented? ........................ 81
    What Are the Biggest Challenges of Exhibits? ............ 82
    How Can the Litigator Help Jurors with Exhibits? ....... 83
    What about Preserving the Record for Appeal? ........... 83
H. Courtroom Decorum ..................................... 83
    What Is Considered Proper Behavior in the Courtroom? .... 83
    What Is the Judicial Code of Conduct? .................... 84
    What If the Litigator Is Faced with an Unfair Judge? ....... 85
    What If the Judge Is Advocating against a Litigator? ...... 87
    What If the Judge Is Advocating for You? ................ 88
I. Closing Statements ....................................... 89
    Are Closing Statements Important? ........................ 89
    How Long Should the Closing Statement Be? .............. 90
    How Aggressive Should the Closing Argument Be? ........ 90
    What Makes for an Effective Closing Argument? ........... 90
    Any Advice for Jury Instructions? ........................ 91
    Why Does the Jury Have Trouble with Instructions? .... 92
    What about Pattern Jury Instructions? .................. 93
J. Miscellaneous Matters .................................... 93
    Is a Rural Trial Different from an Urban One? ............ 93
    Any Other Recommendations for Small-Town Trials? ....... 94
    What about Video-Presentation Devices? .................. 95
    What about Narrative Videos? .......................... 96
Why Are Narrative Videos Controversial? ........................................... 96
What Advice Do Judges Then Give to Litigators Going to Trial? ........ 97

Chapter 8
Appeals ........................................................................................................ 99
Who Should Handle the Appeal? ............................................................. 99
What Is the Goal for Appellate Counsel? ................................................. 100
What about the Perspective of Appellate Judges? ................................. 100
What Else Should the Judicial Profile Contain? ..................................... 101
Are the Court’s Internal Procedures Important? .................................. 102
Why Is the Appellate Brief Important? .................................................. 103
What Makes for an Effective Brief? ......................................................... 104
What Is Meant by Honing the Argument? .............................................. 104
Any Other Suggestions for Dealing with the Court? .............................. 105
Any Other Suggestions for Improving the Argument? .......................... 106
How Can Briefs Be Made More Effective? .............................................. 108
What about the Length of Briefs? .......................................................... 111
What Defines Poor Writing? ................................................................. 111
Are Oral Arguments Important? ............................................................ 112
Is It Wise to Waive Oral Argument? ...................................................... 113
What about the Litigator’s Knowledge of the Record? ............................ 114
How Critical Is Legal Analysis? .............................................................. 114
What about References to Previous Cases? .......................................... 115
Is Presentation That Important? ............................................................. 115
What about Interruptions from the Bench? ............................................ 116
How Does the Litigator Best Present the Substance of Her Argument? .............................................................................. 118
How Does the Litigator Eliminate the Superfluous? ............................... 118
What about the Rebuttal? ..................................................................... 119
Should Litigators Share Oral Argument? .............................................. 119
What Makes for an Effective Appellate Argument? ............................... 120
Any Other Suggestions for Oral Argument? ......................................... 122
What Then Do Appellate Judges Ultimately Want in a Brief? ............... 123
What Then Do Judges Ultimately Want in Oral Argument? ................. 124

Epilogue: The Ethical Litigator ............................................................... 127
About the Author ..................................................................................... 129
Index ....................................................................................................... 131