This introduction to *Trial: A Guide from Start to Finish – Perspectives from Opposing Counsel* is intended to briefly introduce the reader to the scope of the topics in this book.

In chapters 1 and 2, authors Mikal Watts and Sawnie McEntire discuss the concepts of personal jurisdiction (where a defendant may be sued) and subject matter jurisdiction (whether the defendant may be sued in federal or state court). Jurisdictional options have changed dramatically in light of changes to the law of general personal jurisdiction based on U.S. Supreme Court recent decisions. In addition to the discussion of general personal jurisdiction, the authors include detailed discussions about specific and pendent personal jurisdiction. As for subject matter jurisdiction, the authors have included discussions on the topic generally, on supplemental jurisdiction, and on removal procedures and deadlines. Watts sets forth both the general venue statute and the venue provided for in specific statutes, and the law as it pertains to discretionary venue transfers and transfers for improper venue. In his chapter “Jurisdiction and Venue: Forum Shopping and Forum Swapping,” McEntire addresses important venue considerations and factors, including the jury pool, the trial court’s reputation, local procedures and remedies, docket speed, and the scope of permitted discovery. McEntire also addresses the factors a defense lawyer should consider in deciding whether to remove a case to federal court. Finally, the authors discuss the world of multidistrict litigations (“MDLs”), with statistics demonstrating an ever-increasing percentage of all federal court litigation being handled by MDL courts. MDLs are sought by parties who argue that different lawsuits around the country should be consolidated for pretrial purposes before one MDL court. The Judicial Panel on Multidistrict Litigation (“JPML”) would then decide whether to consolidate such cases into an MDL. Additionally, the JPML decides which judge to appoint to handle the MDL, considering the most geographically central forum, the location of counsel’s offices, docket congestion, the convenience of the parties and the witnesses, the location of relevant documents, a transferee court’s prior MDL experience, whether a proposed transferee judge has handled prior litigation activity in the particular litigation at issue, the parties’ first and second choices, where the early plaintiffs chose to file suit, diversity, and a district court’s willingness to serve.

Chapters 3 and 4 address the final pretrial conference. Watts provides detailed advice about how to prepare and argue pretrial motions and motions in limine, prepare trial briefs...
on significant legal issues, and prepare, prosecute, and defend expert challenges. He also gives brief thoughts about the preadmission of exhibits. McEntire’s chapter addresses the importance of local counsel during the pretrial conference, the significance of the timing of the hearing itself, and the duration and scope of the pretrial conference. McEntire also provides advice about expert surprises, exhibits, and depositions; substantive rulings that can be expected; equalizing jury strikes; and the voir dire procedure.

Chapters 5 and 6 focus on Daubert challenges—the effort to exclude the testimony of expert witnesses. Watts provides the legal backdrop of Daubert and its progeny, and the fact that challenges to a plaintiff’s experts have become ubiquitous as defense lawyers prophylactically use Daubert to “preserve the record” for appeal. Of course, because the plaintiff has the burden of proof, such an exclusion of a critical plaintiff’s expert might mean the end of the case. To prevent this form of judicial Armageddon, Watts discusses techniques to protect the plaintiff’s expert from exclusion under Daubert, including advice about choosing one’s experts, developing the foundation for opinions to be expressed, writing the expert report, the expert’s deposition, and responding to a Daubert motion. In his chapter from the defense perspective, “Daubert Challenges: Closing the Expert Gate,” McEntire defines the standards for admissibility, setting forth the key elements of the Frye standard and key elements of the Daubert standard. Like Watts, he also addresses the prevalence of Daubert, and then discusses tactical considerations, including preparing for and taking the expert’s deposition, “Daubert-proofing” defense experts, using consulting experts to attack opposing experts, searching for the opposing expert’s Achilles heel, and how to keep enemy experts at the gate.

Chapters 7 and 8 address pretrial preparations that take place after jurisdiction is established, a proper venue has been chosen, and discovery is completed. Watts’s chapter “The Pretrial Warm-Up” first discusses jury studies and focus groups, with three case studies addressed at length, and then gives thoughts about witness selection, witness order, exhibit selection, demonstrative exhibits, trial logistics, and stipulations. McEntire’s chapter “Pretrial: In the Batter’s Box” provides the defense lawyer’s perspective on a litany of topics involving pretrial preparation, including trial protocols, trial themes, developing useful exhibit lists—with thoughts about exhibit numbering, internal exhibit lists, and consulting with experts about exhibits—demonstrative exhibits, exhibit objections and stipulations, keeping the bad staff out through motions in limine, witness lists and witness order, client witnesses called adversely, witness examination outlines, technology in the courtroom, courtroom reconnaissance, dress rehearsals, pocket briefs, the jury charge, and how to wrap up pretrial preparations.

Chapters 9 and 10 address the intangibles of a successful trial. From the plaintiff’s perspective, Watts provides advice on controlling the courtroom, with ways to win over the judge and the court’s staff, seizing and maintaining momentum while developing jury rapport, and prosecuting a logical, commonsense case that is both appealing and emotional. Watts also provides ways to efficiently present the plaintiff’s case by using both technology and stipulations. In his chapter “The Intangibles of Trial,” McEntire focuses on interactions with the court, the demeanor of both the lawyer and the client, the importance
of preparation and organization, and techniques for making objections and proper communications between counsel in the courtroom. After discussing jury behavior, McEntire gives his thoughts on how the defense lawyer can control the courtroom and the momentum inside it.

Chapters 11 and 12 are lengthy chapters that address jury selection. Having written considerably on the subject, Watts provides detailed thoughts from the plaintiff's perspective on starting the case with momentum by picking a winning jury. He assesses characteristics of favorable and unfavorable jurors, discusses the use of questionnaires and jury consultants, and offers voir dire tactics of demonstrating empathy to the panel, how to begin the voir dire, developing rapport via courtesy and transparency, using business leaders to gain insight on juror values, and hitting the points that jury research has identified as key. The process of attempting to rehabilitate otherwise disqualified jurors and the exercise of strikes for cause and peremptory challenges also are discussed as Watts provides important conclusions about jury selection. In his chapter “Voir Dire: Striking a Winning Jury,” McEntire addresses the defense's advantages of going second, after the plaintiff's lawyer. While divergent voir dire practices exist among the different jurisdictions, common best practices apply equally everywhere; these include making good first impressions, effective information management, and focusing questions on specific panel members. McEntire provides his research on the typical venire panel, and how to obtain information about potential jurors before voir dire begins. He discusses how to develop jury rapport; how to assess potential jurors on paper through jury questionnaires and in person, through their behavior and body language; and how to look for and protect leaders for the defense on the panel. Basic examination strategies are shared, including using favorable jurors as teaching assistants, responding to questions from the panel, and preventing one's opponent from asking commitment questions. The use of jury consultants and jury studies is also analyzed.

Chapters 13 and 14 concern the opening statement. From the plaintiff's perspective, Watts sets forth the goals of opening statements and explains their importance, provides practice tips for substantive content and presentation, gives advice about using demonstratives and substantive evidence during opening statements, and warns plaintiff's lawyers to remember that the defense has the option to defer its opening statement until the end of the plaintiff's case-in-chief. In his chapter "Opening Statements: The First Final Argument," McEntire cautions defense lawyers to avoid reactionary responses during the plaintiff's opening statement. With respect to the defense opening, he advises preparation, preparation, and preparation, and to not waste time. McEntire offers guidance on the elements of an effective opening, advice to avoid an inflated argument, teaches how to combat the "reptile" arguments now so prevalent among the plaintiff's bar, and shows how to readjust momentum with simplicity, repetition, and illustration. McEntire then discusses opening statement techniques, including using Microsoft PowerPoint, demonstrative evidence, and deposition excerpts, and offers advice on how to focus on defense leaders, avoid demonstrative overkill, how to make and how not to make objections during opening statements, and how to address bad evidence.
Chapters 15 and 16 involve the plaintiff’s case-in-chief. From the plaintiff’s perspective, Watts suggests maximizing impact by sequencing witnesses by topic area and maintaining momentum by changing the manner in which witnesses are called and evidence is introduced. Concerning witness order, he advises to “start strong, finish strong” by starting in one of six good ways: with captivation, brilliance, live confrontation, a sure thing, safety, or emotion. Watts provides six critical “do’s” concerning the use of depositions during one’s case-in-chief, and also provides advice for live witness examinations, including preparing witnesses for direct and cross-examination, conducting direct and cross-examination, and utilizing effective techniques for impeachment. Watts also provides techniques for putting on expert witnesses; special considerations for appealing to the jurors’ five senses; and techniques for depriving the defense lawyer of evidence before resting the plaintiff’s case-in-chief. In his chapter, McEntire focuses on defining the defendant’s goals during the plaintiff’s case; how to effectively prepare for effective cross-examinations of both fact and expert witnesses to undercut the plaintiff’s case; whether to waive Daubert challenges on certain expert witnesses that may be particularly vulnerable to cross-examination; and preparing corporate witnesses or individual defendants if they are called as adverse witnesses by plaintiff’s counsel.

In chapters 17 and 18, the authors address the directed verdict stage. From the plaintiff’s perspective, Watts recommends preparing for the directed verdict response before discovery begins, and continuing preparation throughout the discovery period and plaintiff’s case-in-chief. In writing the rough draft of the motion for directed verdict response, Watts suggests that the writer prominently remind the court of the standard applicable to a Rule 50(a) motion for directed verdict, and the efficiency of timing options for bringing, or ruling on, a motion for judgment as a matter of law. In sum, the written response should be submitted while arguing it orally, but every argument should include the suggestion that the court can efficiently continue the progress of the trial by simply deferring the ruling until after the jury’s verdict. From the defense perspective, in his chapter “Direct Verdicts: Crossing the Rubicon,” McEntire advises lawyers to know the elements of the claims being defended, the directed verdict standards, and the evidentiary standard involved. McEntire advises against shotgun motions—brevity and precision are key, and a party should pursue directed verdicts only in areas where the plaintiff’s proof does not match the elements of the pleaded causes of action. Obtaining daily copy of the trial transcript allows counsel to point out the holes in the proof brought by the plaintiff and prepare written motions that carefully put forth legal defenses contained in prior summary judgment motions before the plaintiff rests his case.

In chapters 19 and 20, the authors address in detail the defendant’s case-in-chief. On behalf of the defense, McEntire sets forth the basic rules for the defense case, including being organized, denying the plaintiff’s lawyer an opportunity to score additional points, empowering defense-minded jurors, and doing more with less. The defense case should follow a dual-focus plan of poking holes in the plaintiff’s case while putting in evidence to support the affirmative defenses pleaded by the defendant. McEntire advises time management because some cases are tried with court-imposed time limits. To humanize corporate
defendants, the client or corporate representative should always attend the trial and be prepared to testify. However, in selecting witnesses to call during the defendant’s case-in-chief, McEntire advises that there’s no need to call every witness; instead, particular witness types should be selected, and they should be called in an order that makes the defense case exciting. McEntire offers techniques for witness preparations; the direct examination, including leading questions and witness responsiveness; and dealing with aggressive cross-examinations. During these segments of the defense case-in-chief, McEntire offers important advice about dressing well, behaving appropriately, and optimizing witnesses’ attitude, demeanor, and posture. In his chapter from the plaintiff’s perspective, Watts reminds the reader of the importance of using key witness examinations during depositions in the plaintiff’s case-in-chief; however, if this was not done, key admissions should be utilized via a cross-examination that shows video clips of these key admissions. Another strategy is to quietly induce the defense lawyer into calling witnesses that the defense simply does not know are about to be exposed to annihilation on the stand. Cross-examinations should never be winged; they should be prepared. Watts suggests a trial brief for the court on the subject of cross-examination in the form of a general primer on proper cross-examination topics and the limited constrictions on cross-examination. In constructing the cross-examination outlines, he suggests outlining the goals of each cross-examination well in advance of trial. Watts suggests that important goals of cross-examination include achieving the psychological objectives of recency and repetition, achieving admissions about helpful facts, populating the evidence with published statements that are helpful to the plaintiff, utilizing the defense expert to immunize the plaintiff’s own experts from Daubert exclusions on appeal, forcing defense witnesses to provide evidence to meet the plaintiff’s required elements of proof, and injecting money into the case via the expert cross-examination.

In chapters 21 and 22, the authors address the rebuttal case, a rarely employed segment of the trial in which the plaintiff may introduce rebuttal evidence after the defendant’s case-in-chief; the defendant may then, in some instances, offer surrebuttal evidence in response to the plaintiff’s rebuttal evidence. From the plaintiff’s perspective, Watts cautions about the use of rebuttal experts, including rebuttal expert disclosure rules, requirements for rebuttal expert reports, and the consequences of failing to disclose rebuttal experts. With trial courts enjoying considerable discretion to refuse rebuttal witnesses, Watts cautions that there are important strategic considerations for and against saving witnesses for rebuttal. From the defense perspective, McEntire addresses the rebuttal case and focuses on procedures for challenging the rebuttal witness, objecting to the rebuttal witness, effective techniques for handling a rebuttal expert, taking expert rebuttal witnesses on voir dire, taking trial depositions or conducting interviews of rebuttal witnesses, and time management issues.

Chapters 23 and 24 concern multiparty cases. From the plaintiff’s perspective, Watts discusses the law concerning consolidation and severance of multi-plaintiff and multi-defendant petitions—first the joinder of multiple plaintiffs in a single complaint, and then the joinder of multiple defendants in a single complaint. Next, Watts discusses the practice—particularly in MDL bellwether cases—of joining the claims of multiple plaintiffs together in a single trial. Strategically, Watts gives advice about choosing the target
defendant by attacking the weakest lawyer—the defendant shown to be at highest risk during jury research—and avoiding the defendant who has the strongest expert. Multi-party cases also present opportunity for skullduggery; shifting alliances and informal Mary Carter agreements allow for special strategies for plaintiffs in multi-plaintiff cases and for defendants in multi-defendant cases. In his chapter “Managing the Benefits and Perils of a Multi-Defendant Case,” McEntire reflects on the perils of a house divided, where different defendants aim their guns at each other. He provides illustrations of red flags he has observed when one defendant is surreptitiously leaving the defense team and joining an alliance with the plaintiff, and offers remedies including the discovery of Mary Carter agreements and a subsequent motion to realign the parties for purposes of jury strike allocations. McEntire discusses joint defense agreements, even offering an exemplar of one in his chapter, and recommends taking the lead with experts, both in depositions and at trial, lest a lawyer be victimized by riding coattails that are cut when a codefendant that is leading the defense settles out.

In chapters 25 and 26, the authors address the jury charge. From the plaintiff’s perspective, Watts counsels that one should prepare the jury charge before discovery even begins, utilize available pattern jury instructions, and keep it simple (K-I-S-S). Watts reminds the reader that the trial court has wide discretion in formulating the jury charge. He recommends making a plea for simplicity while reminding the Court that a refusal to give jury instructions tendered by the defense will be reviewed only for an abuse of discretion, and that the defendant is not entitled to have a jury instruction about every word ever spoken in a prior opinion. Rather, the court should be reminded that such instructions requested by the defendant may also be denied with the comfort of knowing that the court’s charge will not be the basis of an appellate reversal unless the alleged error actually influences the jury’s verdict. Finally, Watts offers the reminder that charge error must be preserved, first through an objection, and second, if applicable, by obtaining a ruling to overrule a tendered question or instruction. From the defense perspective, McEntire’s provides an important overview of jury charge law, agrees with Watts on the wisdom of using pattern jury charges, and discusses defense strategies that differ from plaintiff strategies. McEntire also reminds the reader that meeting and conferring in advance will reduce the number of charge disputes after a healthy dose of trading and swapping of language by good trial lawyers. McEntire describes how a charge conference should be handled by the defense, teaches how to properly make objections to the charge, and recommends ways to avoid compound jury instructions.

Chapters 27 and 28 concern posttrial motions. From the plaintiff’s perspective, Watts first reviews the law concerning motions for judgment as a matter of law or for judgment notwithstanding the verdict (judgment n.o.v.), including the need to preserve issues for appeal through a Rule 50(a)(2) motion made before the case is submitted to the jury, and then again after the verdict is received and the judgment entered. He then lists the reasons for granting a motion for judgment n.o.v., and lays out the de novo appellate standard of review. Next, with regard to motions for a new trial, Watts discusses the deadline to file such a motion and sets forth the reasons a new trial may be granted, including failure to produce
materials in discovery, error in evidentiary rulings, or jury answers that may give rise to a
new trial. Of course, there can be no new trial for matters that are harmless error, and Watts
sets forth his research on appellate review of orders on new trials, including cases that set
forth the standards for reviewing denials of motions for new trial and orders that grant
motions for new trial. Watts then discusses conditional rulings on motions for new trial pur-
suant to Rule 50(c) or Rule 50(e) and Motions for Relief from Judgment under Rule 60. From
the defense perspective, McEntire's chapter “Posttrial Motions” addresses the importance of
polling the jury, interviewing the jury, and practice tips for effective briefing. McEntire also
addresses the wisdom of retaining separate appellate counsel to review appellate options
and briefing requirements during the posttrial motion stage.

The conclusion of Trial: A Guide from Start to Finish – Perspectives from Opposing Counsel
ends the book with the authors’ profound hope that their readers will find the book helpful
to their practices, and that they will now feel equipped to better represent their clients in
courtrooms across America. They further hope their readers will feel confident enough to
stand in the gap between their clients and the jury verdict that many of them so badly need
to achieve justice.