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THE ART & SCIENCE OF TRIAL ADVOCACY

SECOND EDITION

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DEDICATIONS

For Lucy, Hannah, Sam, and Will with thanks for their love and laughter.

–L. Timothy Perrin

For Joyce, Eric, Jack and Kay for their unflagging enthusiasm and support.

–H. Mitchell Caldwell

For John, Warren, Meredith, Harrison, Bonnie and Bob, with gratitude for their love and support.

–Carol A. Chase
ACKNOWLEDGMENTS

The authors gratefully acknowledge the generous support they have received from Pepperdine University School of Law in the preparation of this book; and in addition they express heartfelt gratitude to their trial practice students who planted the seeds of inspiration for this book. The authors are deeply indebted to the faculty support staff and, in particular, to Candace Warren, Roberta Nebgen, Sheila McDonald, and Courtenay Stallings for their tireless assistance (and patience) in preparing this manuscript. They gratefully acknowledge the invaluable contributions of Richard Gabriel and Sharon Gross to Chapter Six and Christopher Frost to Chapter Eleven. Finally, they would like to thank the following law students for their research and editorial assistance: Nathan Newman, Brett Fenoglio, Ryan McNamara, Bryan Rotella, Joshua Pakstis, and Brittany Kelley.
More than seven years have passed since the publication of *The Art & Science of Trial Advocacy* and during that time we have been gratified by the positive response to our book from students, professors, and practitioners. While much has changed in the world since publication of the book, the fundamentals of trial advocacy remain very much the same. Successful trial advocates understand that their credibility—their ethos—is central to trial success. You can not control the facts in the case, but you can control what you do with the facts. Effective advocates do not sacrifice their credibility with the factfinder by stretching, distorting, or otherwise misusing the evidence in the case.

If the fundamentals are unchanged, then why publish a second edition of the book? The answer is that while effective trial advocacy is still rooted in the same values as before, the tools of advocacy continue to evolve. In particular, the rapid development of technology and its use in the courtroom is changing the way that trials are conducted and the way that lawyers present evidence and argue to the jury. Some of these changes are for the better and some for the worse. In this edition, we have sought to pay particular attention to the use of technology. We have added “Tech Tips” throughout the book, providing specific suggestions regarding how technology might be used to enhance advocacy at various points of the trial. In addition, we have emphasized the technologies available to trial lawyers as they prepare and present evidence.

Technology is merely a tool, of course. It will not magically turn poor advocacy into effective advocacy, or transform the boring and uninteresting into something that is compelling and persuasive. Yet, most jurors live in a world that is high-tech and are conditioned to enjoy plenty of visual and aural stimulation, preferably at the same time. Effective advocates are aware of and responsive to the expectations of jurors; thus, we must master the available technologies and become adept at their use.

In addition to this updated edition of the book, we have also put together additional tools to assist the aspiring or less experienced trial advocate. As part of the on-line resources that are available for readers of this book, we have developed two videotaped trials—one civil and one criminal—to provide an application of the principles of trial advocacy contained herein. The advocates and witnesses in the trials are Pepperdine law students and we hope that the addition of this visual
simulation of advocacy in practice will prove helpful and instructive. The student efforts are not perfect and indeed are not intended to represent the perfect example of good advocacy, to the extent there is such a thing, but provide another means of thinking deeply about the art and science of trial advocacy.

Our best wishes to you in your pursuit of success and meaning in this honorable profession.

Tim Perrin
Harry Caldwell
Carol Chase
October 2010
Malibu, California
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5 J. Wigmore, Evidence § 1367 (Chadbourn rev. 1974).......................278
Bugliosi, Vincent & Gentry, Curt, Helter Skelter, at 407–12
   (W.W. Norton & Co. 1994) (original publication date 1974).............436
Cacioppo, John T. & Petty, Richard E., Effects of Message Repetition
   and Position on Cognitive Response, Recall, and Persuasion,
   37 J. Personality & Soc. Psych. 97, at 105–07 (1979)......................32
<table>
<thead>
<tr>
<th>Author(s)</th>
<th>Title</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Caldwell, H. Mitchell</td>
<td>Name Calling at Trial: Placing Parameters on the Prosecutor</td>
<td>467</td>
</tr>
<tr>
<td></td>
<td>8 Am. J. Trial Advocacy</td>
<td></td>
</tr>
<tr>
<td>Caldwell, H. Mitchell et al.</td>
<td>The Art and Architecture of Closing Argument</td>
<td>42, 423</td>
</tr>
<tr>
<td></td>
<td>72 Tulane L. Rev. 1 (2002)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>76 Notre Dame L. Rev. 423 (2001)</td>
<td></td>
</tr>
<tr>
<td>Coleman, Howard &amp; Swenson, Eric</td>
<td>DNA in the Courtroom: A Trial Watcher’s Guide</td>
<td>386</td>
</tr>
<tr>
<td></td>
<td>at 54 (Nov. 1982)</td>
<td></td>
</tr>
<tr>
<td>Darrow, Clarence</td>
<td>“Attorney for the Defense,” Esquire</td>
<td>84</td>
</tr>
<tr>
<td></td>
<td>May 1936, at 3, 211</td>
<td></td>
</tr>
<tr>
<td>Gross, Samuel P.</td>
<td>Expert Evidence, 1991 Wis. L. Rev. 1113</td>
<td>134</td>
</tr>
<tr>
<td>Gross, Samuel R. &amp; Syverud, Kent D.</td>
<td>Don’t Try: Civil Jury Verdicts in a System Geared to Settlement</td>
<td>352</td>
</tr>
<tr>
<td></td>
<td>44 UCLA L. Rev. 1 (1996)</td>
<td></td>
</tr>
<tr>
<td>Hill, Frederick Trevor</td>
<td>Lincoln the Lawyer, at 216–17</td>
<td>451</td>
</tr>
<tr>
<td>King, Stephen</td>
<td>On Writing, at 214 (2000)</td>
<td>45</td>
</tr>
<tr>
<td>McElhaney, James W.</td>
<td>McElhaney’s Trial Notebook, (2nd ed. 1987)</td>
<td>43, 453</td>
</tr>
<tr>
<td>McElhaney, James W.</td>
<td>McElhaney’s Trial Notebook, (2nd ed. 1987)</td>
<td></td>
</tr>
<tr>
<td>Neitzel, Michael T. &amp; Dillehay, Ronald C.</td>
<td>Psychological Consultation in the Courtroom, at 143 (1986)</td>
<td>20, 124</td>
</tr>
</tbody>
</table>

Roberts, Margaret, *Trial Psychology*, at 23 (1987) ................. 22, 73, 425

Spence, Gerry, *How to Argue and Win Every Time*, at 47 (1995) ...... 17, 443


Wellman, Francis L., *Day in Court*, at 125 (1914) ........................ 84