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BOOK REVIEW

Trial Technique and Evidence. By Michael Fontham.
Charlottesville, VA.: Michie Butterworth Law Publishers,
1995. xxv, 812 p. \$95.00.

*Marc W. Judice**

"Put your money where your mouth is." I did. After reading Michael Fontham's book, *Trial Technique and Evidence*, I obtained approval from our library committee to purchase a copy of this book for each litigator in our firm. I did this because this book is one of the most useful that I have seen, and it will enable the litigators of this firm to be as good as they can be. The book is well written and the organization of the material, as well as its presentation, are superb. The author's style and communication skills are excellent.

Having practiced litigation extensively for almost twenty years and having tried well over sixty cases to verdict, most being jury trials, I realize that I need a quick reference source for the constant problems, questions and difficulties that arise throughout any litigation. This book is an excellent resource reference for the most experienced litigator and an exceptional training tool for a new or relatively inexperienced litigator. It is an invaluable field manual for attorneys who have extensive trial practice and is an extremely beneficial training manual for young lawyers with little actual trial exposure.

Reading and reviewing this book also paid great dividends in my preparation for taking the National Board of Trial Advocacy's written examination for becoming certified as a civil trial specialist.

In the preface, the author states that "this book is designed to fill a gap in the literature for training lawyers."¹ The book accomplishes that goal and mission. The book is structured around a fictional case of *Danielson versus Computer Centra Associates*. This structure enables the author to maintain continuity and effectively illustrate the various phases of a trial as it chronologically unfolds. Also, this method allows the author to illustrate the interrelationships and dynamics of various aspects of litigation.

The section on trial preparation is particularly useful. This section is especially helpful for a young lawyer who has never tried a case, and is a very effective reminder of some key points for the more experienced litigator. A young associate in my firm used this section to help organize her file for her first trial. She was not comfortable with where to begin or how to organize or when, how, why, or what to present at trial. After a brief discussion with her, I asked

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1. Michael R. Fontham, *Trial Technique and Evidence* xix (1995).

her to refer to her copy of Mr. Fontham's book for guidance and assistance. She did so and won her first case. The author states, "Preparation is essential to success in litigation."² For example, the subject matter outline as presented in the book is comprehensive and practical, and I intend to use it in preparation for my next trial. It provides an excellent format for organization and appropriate assessment of the relevance of evidence in trial presentation.

The discussion on the use of a "theme" in organization as well as in presentation of the evidence to the jury is well developed. There are many useful "can do" suggestions in this section. It is obvious that the author spent considerable time in trial and was unselfish in sharing a number of his techniques with the reader. The trial notebook suggestions are practical and will assist any litigator in becoming more effective in organizing case presentations in the future. This section alone makes the purchase of the book an effective management decision.

The section on jury selection provides a good working analysis of the judge trial versus jury trial decision. The author presents some very good issues to be considered and weighed when considering whether to ask for a jury in a particular case. The author's suggestions concerning voir dire are useful and made me think. There are excellent examples on how to more effectively have a juror during voir dire reveal to the attorney the juror's natural predispositions without offending the juror or appearing to be overly intrusive into the juror's private life and feelings. There are several examples of "open ended" questions for use in voir dire. The suggestions on how to "use points of argument" in voir dire were very useful in a recent jury case in which I was involved.

The opening statement chapter made me reflect on exactly what I am trying to accomplish at this stage of the trial. I believe that Mr. Fontham is correct when he asserts "many jurors at least draw tentative conclusions at this initial stage."³ The book effectively develops the use of "theme" and illustrates how to incorporate a theme in the opening statement. The text then illustrates how to consistently follow the "theme" throughout the trial by illustrating a fact pattern and providing thorough examples.

Mr. Fontham's book provides extensive "how to" examples. There is a lengthy excerpt of an actual direct examination of an adverse party, an engineer, in litigation concerning runway failures at the New Orleans International Airport. This example, several pages in length, illustrates the types of questions an attorney can utilize to attempt to maintain control of the questioning and presentation of evidence when examining another professional.

The discussion of the evidence rules is not only an excellent refresher, but more importantly provides a great quick reference for evidence problems and issues encountered at trial. I used the evidence section for several evidentiary objections and issues in a recent trial and found the organization to be "user

2. *Id.*

3. *Id.* at 78.

friendly." The suggested format for objections to hearsay is well developed and effectively presented. The direct exam outline is very useful and provides a good working format. The book effectively distinguishes the difference in approach and objectives between direct and cross examination. The discussion of "can't lose" questions provides a practical example of how to conduct a more effective "cross" of even the most difficult adverse witness. The author correctly states and illustrates that "fishing at trial results in more damage than gain. The time to explore is in discovery."⁴

The chapter on the expert witness illustrates the appropriate use and presentation of expert testimony. As the author points out, "Presenting an expert is often a great tool of advocacy; counsel can use the expert to argue his case. Thus, learning to deal with experts is important to success in litigation."⁵ The chapter provides numerous examples on how to devise "a way to help [the expert] explain points. If an attorney fails to make the expert's testimony understandable, the evidence will not have much impact." The discussion of the case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁶ is excellent. The book provides a useful guide on how to effectively present and qualify the expert and illustrates an effective cross on the expert's qualification.

I found the interweaving of evidence rules, explanations and citations to be practical and efficient. The evidence rules discussions provide a great refresher on, not only the evidence rules, but also the reasons and rationales for the rules.

In discussing the objectives of closing argument, Mr. Fontham accurately observes, "In practice, the closing argument usually is not so dramatic. A lawyer does not have to be a genius at oration to be effective. A good closing need not be theatrical; a methodical discussion of evidence, fact and law is ever more persuasive."⁷ Mr. Fontham further observes, again correctly, "[R]ather than depending on rhetoric, counsel must demonstrate the evidentiary basis for winning."⁸ The book provides a suggested outline for the closing argument for the book's fictional *Danielson* case and also provides a narrative formulated from the outline. The use of these very explicit examples will make even an inexperienced attorney very effective in his first trial.

Throughout this book, Mr. Fontham is very effective not only in presenting the theory of the various phases and techniques of litigation, but also in providing very good, practical examples of how to put litigation theory into operation. This book will pay for itself many times over for the experienced and inexperienced litigator.

4. *Id.* at 277.

5. *Id.* at 369.

6. 113 S. Ct. 2786 (1993).

7. Fontham, *supra* note 1, at 462.

8. *Id.* at 464.

