

# **MODERN TRIAL ADVOCACY**

**Analysis and Practice**

**SIXTH EDITION**



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**NATIONAL INSTITUTE FOR TRIAL ADVOCACY**

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*To Anne Miller*

*SL*

*To Melissa Lore*

*JCL*



# INTRODUCTION

The format of advocacy has changed dramatically in recent times. Much of an attorney's work is now being done via videoconference, perhaps from the attorney's living room. While at the time of this writing it is unclear how long and how deep into the trial process these transformations will reach, there will definitely be changes in how trial advocacy will be practiced. Despite the differences in the outward appearance, however, the basic principles of trial advocacy have remained constant.

*Modern Trial Advocacy* presents timeless techniques on how to win trials. The skills taught in these pages are equally applicable to online trial preparation, online hearings, and perhaps even online trials as to in-person litigation. Just as Shakespeare's stories are compelling in both theater in the round and a university English class, the skills taught in *Modern Trial Advocacy* transfer to any trial in any venue.

This sixth edition of *Modern Trial Advocacy* incorporates graphics and an introductory chapter from *Modern Trial Advocacy: Law School Edition*. By merging these two editions, we have created a seamless advocacy tool for attorneys at all stages of their careers. We will continue to provide *Modern Trial Advocacy: Canada* to our northern colleagues, as Canadian trial procedures differ from those in the United States.

As an accompaniment to this text, the authors have created a teaching manual for use both in law school classes and professional development courses. The teaching manual is intended to foster success in classes by providing guidance to teachers on how to best utilize *Modern Trial Advocacy* as a supplement to hands-on trial skills training.



# ONLINE CATALOG

Throughout the text, there are references to the Online Catalog which include demonstration videos and electronic visuals.<sup>1</sup> These are available at:

<https://www.nita.org/modern-trial-advocacy>

Password: NITAModTriAd6

## **Chapter Three. Trial Tools**

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Demonstrations 2.1 and 2.2  
Demonstrations 3.1 and 3.2  
Demonstration 4

## **Chapter Five. Direct Examination**

Demonstrations 1.1 and 1.2  
Demonstrations 2.1 and 2.2  
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Demonstration 5  
Demonstration 6  
Demonstrations 3.1 and 3.2

## **Chapter Six. Cross-Examination**

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1. We would like to thank Trial Technologies of Philadelphia for providing the sample electronic visuals in chapter twelve.



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# CHAPTER ONE

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## TRIAL BASICS

### 1.1 Trials and Justice

The objective of a trial is to do justice. Although that goal may sometimes be obscured in the heat and frustration of combat, it is well worth remembering that the ultimate purpose of the adversary system is to seek the truth and thereby distinguish right from wrong. A lawsuit is typically initiated because someone believes that a wrong has been done. Perhaps a crime has been committed or a contract has been broken. Perhaps a large corporation believes that its copyright has been infringed by an equally large competitor, or parents believe that their child has been mistreated in school. Whatever the nature of the dispute, our judicial system provides a forum for resolution. Any person, any business, any club or organization may come to court and ask to be heard. Every defendant may likewise retain counsel to dispute the allegations of the complaint. Some cases are dismissed for legal insufficiency, of course, and many more are compromised or settled. But cases that cannot be resolved—where the parties resolutely disagree about the blame or the consequences—will eventually be set for trial.

Popular imagination notwithstanding, a trial is truly something more than a soap opera or a sporting match. Most of all, a trial is a contest of ideas, a process in which the law is applied to the facts. To tell her client's story, an attorney takes the raw and splintered observations of witnesses and attempts to organize them into a coherent and powerful narrative. To do this, the lawyer must sift through all potential claims and defenses to determine the requirements of the applicable law. The lawyer must next consider the vast and indeterminate array of facts and details attendant to every case, separating relevant from irrelevant, admissible from inadmissible, persuasive from unconvincing, truth from deceit.

Eventually, the client's case will take shape. Through logical theories and artful techniques, the advocate will present the most compelling arguments for her client. The opposing parties will do the same. To be sure, one side's gospel is bound to be the other side's subterfuge, but that is inherent in the human condition—a phenomenon long predating the practice of law. In response, we have devised an adversary system designed to sort out competing claims to accuracy and justice.

The system, as we all know, is hardly free of errors. Mistakes happen, injustices are done. The goal of the process, however, is to engage vigorous advocacy on both sides, relying on the self-interest of the parties (and their counsel) to ensure that no stone is left unturned.

## **1.2 Getting Started**

Trial preparation begins with a thorough understanding of the substantive law, rules of evidence, rules of procedure, and legal ethics.

Every cause of action and defense may be divided into legal elements, and every item of evidence must be relevant to one or more of the legal issues in the case. In other words, each fact offered at trial must either add some quantum of support to an aspect of your case or detract in some way from the opposition's case. Moreover, there must be some discernible relationship between the item of evidence and a recognized claim or defense.

In an automobile accident case, for example, imagine that the plaintiff wants to introduce evidence that the defendant is nasty and irascible, and often inclined to lose his temper. That testimony would not be allowed simply to show that the defendant is a bad person, since no legal consequences follow from the defendant's disagreeable disposition. On the other hand, it might be possible to connect the evidence to the plaintiff's cause of action for negligence, one element of which is "due care." Was the hot-headed defendant inclined to lose his temper while driving? Did something happen on the day of the accident that might have provoked him? If so, it could be said that the defendant's temperament is relevant to the question of due care, since a splenetic outburst would tend to distract him from his driving. It is the lawyer's knowledge of the substantive law (here quite obvious, but in other situations far more subtle) that allows a trial strategy to emerge.

A process of cross-evaluation continues throughout trial preparation. In light of the applicable law, counsel assesses the usefulness of the available information, considers possible interpretations of the known facts, and determines where and how to search for new evidence. At the same time, the attorney constantly reevaluates her legal theories in light of the evidence at hand. In our hypothetical automobile collision, new information about the defendant's explosive outbursts of temper might prompt the plaintiff's lawyer to amend her complaint, perhaps adding a cause of action for recklessness or willful and wanton conduct.

The rules of evidence are therefore inseparable from the substantive law. A cause of action must be supported by admissible evidence, but admissibility itself is a function of the particular legal theory.

The law of trial procedure provides a third consideration in trial planning. Evidence must be introduced in an orderly fashion, according to the rules of the court in which the trial is being held. For example, some courts require elaborate pretrial

orders, specifying every potential exhibit and document, along with anticipated objections and responses. Some courts even require a list of the facts that each attorney expects to prove at trial. And even in courts where such complex orders are not in use, there will nearly always be pretrial discovery procedures, calling on the parties to provide extensive disclosures to their adversaries. Failure to comply with such procedural rules may result in otherwise valid evidence being excluded; in extreme cases it may lead to a dismissal or default judgment.

Finally, the rules of ethics establish an important constraint on the conduct of trial lawyers, as will be discussed in nearly all of the following chapters.

### 1.3 Trial Procedures

A trial typically begins when the clerk of the court calls the parties before the bench. One by one, the lawyers will be asked if they are ready to proceed. If the case has been set for trial by court order, this initial question is usually a formality. In the event that a party is not ready to proceed, the court will listen to the reason, determine the position of the other parties, and decide whether the trial will go forward as scheduled. Assuming that the lawyers all answer “Ready”—or that the court denies any requests for a continuance or adjournment—the trial will probably track the following broad outline.

The first step will be to resolve any outstanding pretrial motions. Even if there has already been a pretrial conference in the case, there might still be procedural or other matters that need to be decided by the judge. There may be objections to certain evidence or exhibits (motions in limine), questions about witness scheduling or the order of proof, or other issues that need to be addressed before the trial begins. Following disposition of the pretrial motions, the next step is jury selection, or *voir dire*.<sup>1</sup> Every jurisdiction approaches jury selection differently. Some allow lengthy, “wide-open” lawyer participation, while in others the entire process is handled much more expeditiously by the trial judge. Whatever the approach, it ordinarily begins by bringing a group of prospective jurors—called the *venire* or *venire panel*—into the courtroom. The judge will often address the entire *venire*, giving them an overview of the case and perhaps asking a series of general questions. Thereafter, individual jurors may be questioned by either the attorneys or the judge. Jury *voir dire* follows innumerable variations—from jurisdiction to jurisdiction, and even from courtroom to courtroom—regarding number of jurors, form and scope of questioning, and the format for exercising challenges (also called strikes). At some point in the process, however, the attorneys will be allowed to object to certain prospective jurors on either of two bases. Parties are allowed an unlimited number of “challenges for cause,” which must be justified to the court. In addition, each party is allowed a set number of “peremptory challenges,” which require no explanation.

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1. See chapter fifteen.

Once the jurors and alternates have been seated, many judges address the panel directly, presenting a more detailed description of the issues in the trial and often providing preliminary instructions regarding the applicable law.

Next come the opening statements of counsel, intended to provide the jurors with an overview of each side of the case.<sup>2</sup> This is the attorneys' first opportunity to speak directly to the jurors, although the law of opening statements requires that counsel refrain from argument. Nonetheless, lawyers may use their opening statements to begin the process of persuasion by explaining exactly how the expected evidence will lead to the desired verdict.

Following opening statements, the testimonial phase of the trial begins. The plaintiff proceeds first, calling witnesses for direct examination.<sup>3</sup> At the completion of each direct examination, the witness is tendered for cross-examination by the opposing party or parties.<sup>4</sup> Under the prevailing American rule, cross-examinations are limited to the scope of the direct, meaning that new issues may not be raised for the first time on cross-examination. It is within the court's discretion, however, to relax that restriction.

| Outline of a Trial                                                                                                                                                                                                                                                                                                                                                                              |                                                                                                                                                                                                                                                                                                                                                                                                                   |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Pretrial Motions<br>Objections to evidence<br>Procedural matters<br>Jury Selection<br>Voir dire<br>Challenges for cause<br>Peremptory challenges<br>Opening Statements<br>Plaintiff (or Prosecution)<br>Defendant<br>Plaintiff's Case-in-Chief<br>For each witness:<br>Direct examination<br>Cross-examination<br>Redirect<br>Recross<br>Introduction of exhibits<br>Plaintiff rests<br>Motions | Defendant's Case-in-Chief<br>For each witness:<br>Direct examination<br>Cross-examination<br>Redirect<br>Recross<br>Introduction of exhibits<br>Plaintiff's Case-in-Rebuttal<br>Defendant's Surrebuttal<br>Final Argument<br>Plaintiff's argument-in-chief<br>Defendant's argument-in-chief<br>Plaintiff's rebuttal<br>Judge's charge to the jury<br>(jury instructions)<br>Deliberation<br>Verdict (or mistrial) |

2. See chapter thirteen.

3. See chapter five.

4. See chapter six.

Once the cross-examination is finished, the plaintiff may conduct a redirect examination of the witness, which will similarly be restricted to subjects that were raised or covered on cross.<sup>5</sup> In the same manner, recross-examination is confined to the scope of the redirect. The attorneys may continue to alternate redirect and recross-examinations as long as the judge is willing to allow it (although they will likely be cut off as soon as the questioning becomes repetitive). Eventually, all of the examinations will be completed, and the witness will be excused.

The plaintiff will then call the next witness, and the process will be repeated: direct, cross, redirect, recross, and so on. In addition to the testimony of witnesses, counsel may present evidence in the form of exhibits, primarily either tangible objects or documents.<sup>6</sup> Most exhibits will be offered in the course of a witness's testimony, but they may also be received by agreement of the attorneys, usually called a stipulation. Of course, not all of the proffered testimony and other evidence will be clearly admissible. In that case, opposing counsel may make an objection, which will be decided (sustained or overruled) by the court.

Once she has presented all of her evidence, plaintiff's counsel will inform the court that she "rests." At that point, the defense may present a motion aimed at testing the legal sufficiency of the plaintiff's case. In federal court, this motion is called a "motion for a judgment as a matter of law." Most states continue to use the older term, "motion for a directed verdict." The point of the motion, whatever the terminology, is that the plaintiff has failed to present sufficient evidence, and that some or all of the plaintiff's case should therefore be dismissed. The plaintiff in a civil case has the burden of producing "some evidence" in support of each element of every cause of action (sometimes referred to as claims or counts). In criminal cases, the prosecution must meet a higher standard by presenting sufficient evidence on which a reasonable jury could find the defendant guilty of the crime charged. In either case, a failure of proof regarding one or more elements will result in the midtrial dismissal of the particular charge or cause of action.

The defense case then proceeds in the same manner as the plaintiff's case. Witnesses are called to the stand for direct, cross, redirect, and recross, each of which is limited to the scope of the preceding examination.

After the defense has rested, the plaintiff may call witnesses or offer other evidence in rebuttal. Rebuttal witnesses may only be called to controvert matters raised during the defense case; rebuttal may not be used merely to accumulate additional evidence in support of plaintiff's claims. The same is true of the defendant's surrebuttal, which is only available to refute or deny points raised by plaintiff's rebuttal case.

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5. See chapter eight.

6. See chapter eleven.

Following the close of the evidence, the attorneys have another opportunity to speak directly to the jurors, this time for final (or closing) argument.<sup>7</sup> In sharp contrast to the opening statements, there is nothing subtle about the level of advocacy in final arguments. The lawyers may—and should—draw inferences, urge conclusions, comment on witness credibility, and otherwise use all of their adversarial and forensic skills to persuade the jury to render a favorable verdict. In most jurisdictions, the plaintiff goes first (argument-in-chief) and last (rebuttal), whereas the defendant argues only once.

At the conclusion of the final arguments, the court will instruct the jury on the law and often on the range of verdicts that may be entered. The jury then retires to the jury room for deliberations, which will continue until they reach a verdict or an impasse.

## 1.4 Demeanor

In a very real sense, a lawyer is “on trial” from the first moment she steps in front of the fact-finder. The judge and jurors will constantly evaluate (and reevaluate) your credibility as they assess your behavior, appearance, bearing, and conduct. They will observe your interactions with your client, with opposing counsel, with witnesses, and with the court. They will be alert to signs of confidence, authority, and professionalism, as well as subtle displays of doubt, misgiving, weakness, or betrayal. All lawyers want to make the right impression, yet there is no formula that tells you how to act, much less how to react. There is a place in the courtroom for lawyers of every background, origin, appearance, temperament, and personality type. Perhaps the only universal indicator of success is sincerity. Insincere lawyers may yet win cases, but they do it in spite of themselves.

This section is not intended as a one-size-fits-all guide to lawyers’ preferred appearance. Rather, the following sections will point out three important components of demeanor that can be helpful to all lawyers.

### 1.4.1 Integrity

Throughout every trial you will be asking the fact-finder to trust you, to believe you, to credit your witnesses, to accept your arguments, and, ultimately, to bring back the verdict you request. Why should a judge or juror do that? Certainly, the compelling nature of your evidence should provide one reason, but most trials feature cogent evidence on both sides. And when the evidence is most nearly equal, the credibility of the lawyers can play a large part in shaping the trial’s outcome. Integrity inspires trust, and, in trial work, trust leads to success.

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7. See chapter fourteen.

What does integrity have to do with demeanor? Isn't integrity something that you have rather than something that you do or show in front of a jury? In the deepest sense, of course, integrity is part of your character, your fiber. You live your life according to principles because they are right, not because their display will help you win a trial. But judges and jurors are not blind, and they are not easily fooled. Lawyers who lack integrity almost inevitably reveal themselves in court.

The word integrity comes from the Latin *integritas*, meaning wholeness or soundness, complete in itself. Thus, our concept of integrity has come to mean unsullied, unbroken, undivided moral principle. In other words, it is a quality of the "whole lawyer." It refers to you and everything you do. When you are seen to depart from a principle, you diminish your standing as an honorable advocate. Thus, there are a number of courtroom behaviors that can add to or detract from your realization as a "whole lawyer."

If nothing else, integrity means honesty. An honest lawyer does not overstate her case, does not promise evidence that she cannot deliver, and does not make arguments that she cannot support. Most importantly, an honest lawyer does not try to sneak excluded evidence into the trial and does not misuse objections or argument as a means of presenting inadmissible material.

Courtesy is also an aspect of integrity. It means that you do not use bullying tactics to intimidate your opponent or to put a timid witness in a bad light. It means that you do not attempt to distract the fact-finder during your opponent's case, and you do not try to disrupt opposing counsel's legitimate presentation. You do not use facial expressions, grimaces, or gestures to "argue" your case while other arguments or examinations are proceeding.

Much more can be said of integrity as demeanor. For now, suffice it to say that integrity cannot be faked. It is not a face or costume that you put on and take off. If you are truly committed to trying a case with integrity, it will show. If you are not, it will also show.

### **1.4.2 Confidence**

A lawyer demonstrates confidence by knowing and operating within the rules of the court, by understanding how the judge wants the trial to proceed, and by demonstrating her awareness of proper procedure. A confident lawyer has prepared her examinations, is ready to call and cross-examine witnesses, and can argue evidentiary objections on the basis of advance preparation. A confident lawyer enters the courtroom knowing what she wants to accomplish, why she wants to accomplish it, and how she intends to do it.

A competent lawyer is well organized and well prepared. He knows where his exhibits can be found, how they are supposed to be numbered, and which witnesses are necessary to introduce them. He understands which documents

can be used to impeach which witnesses, as well as the difference between impeachment and refreshing recollection. He realizes that not every valid objection must be made, and he knows how to explain to the court why his objections have merit.

In short, competence leads to confidence, and confidence is apparent to the fact-finder. Disorganization and incompetence lead to insecurity, which is also obvious and can be damning.

### **1.4.3 Consideration**

Consideration is a third component of winning demeanor. In a sense, consideration is an aspect of confidence, since insecurity and thoughtlessness are surely companion traits. In another sense, consideration is a facet of integrity since the “whole lawyer” will be concerned about the impact of her work on the court, jurors, witnesses, and others in the courtroom. Consideration is discussed as a separate category because it sums up the need to recognize the limits of what a lawyer may do in the name of advocacy.

A considerate lawyer is a forceful advocate who nonetheless understands the impact that his advocacy may have on others. That depth of understanding can be made evident in many ways. He will not interrupt the court, the witnesses, or opposing counsel (other than for an extremely good reason). He will make certain that he can be heard throughout the courtroom. He will listen to the judge’s rulings and instructions, and he will try in good faith to comply. (And if his duty to his client ever compels him to talk back to the court or to resist a ruling, he will respectfully explain why.)

A respectful lawyer will not wage a war of attrition against witnesses or other lawyers, and certainly not against the court or the jurors. She will know when to request breaks in the proceeding and when to proceed for the benefit of others despite her own preferences. She may attack witnesses, but only when they have shown themselves to deserve it. She may joust with opposing counsel over professional issues, but not over personalities. She will not back down from a fight, but she will not start one as a tactic.

Most importantly, a respectful lawyer will realize that the trial is being conducted for the benefit of the fact-finder. She will not conduct a seemingly private dialogue between herself and the witnesses. Rather, she will be sure to structure her examinations (both rhetorically and physically) so that they include the fact-finder. Her exhibits will be large enough to be seen. Her language will be straightforward and uncomplicated. Her pace will be intelligible. She will make certain (within her power) that the fact-finder has plenty of time to hear, digest, understand, and appreciate her evidence.

Need it be said? Judges and jurors appreciate considerate lawyers.

## 1.5 Trial Ethics

There is nothing in the practice of law that is more important than professional responsibility. The entire adversary system is premised on the assumption that attorneys will make the strongest possible arguments for their clients while remaining scrupulously within the bounds of the law. This means that trial lawyers must be vigorous advocates, but they must also be honest and trustworthy. Therefore, specific ethics issues, as they may arise in a precise context during trial, are discussed in nearly every chapter of this book. What follows here is a broader outline of lawyers' general ethical obligations.

### 1.5.1 Duties to Clients

An attorney owes her clients three basic duties: competence, confidentiality, and loyalty.

For trial lawyers, the obligation of competence includes the obvious duty of zealous representation. A trial attorney must be her client's champion, taking the case to heart and making every sincere effort to "see it" the way the client sees it. In addition, a competent lawyer must know and understand the law and, perhaps most importantly, must engage in a thorough investigation of the facts. No lawyer, of course, would ever care to admit incompetence. But some cases may be too big or too complex for certain individuals, in which case the lawyer must bring in capable co-counsel or perhaps refer the representation to another office.

Lawyers must also be secret keepers. Confidences entrusted by a client to an attorney must never be misused and may not be revealed without consent except in a few narrowly defined circumstances.<sup>8</sup>

Thus, certain information may remain undisclosed to adversaries and to the courts. The attorney-client privilege, however, protects only the specific communications between attorney and client and does not apply to discovery of the underlying facts. In civil cases, for example, parties are subject to depositions and other discovery requests, and the information sought may not be withheld simply because it has also been communicated to a lawyer. In criminal cases, a defendant may be required to produce physical evidence. The Fifth Amendment, however, prevents compelled testimonial disclosures even in the absence of attorney-client privilege.

The third duty is loyalty, which means that a lawyer's representation of a client must not be diluted by competing interests. Thus, a trial lawyer's advocacy must not be constrained by an obsequious desire to please the court or to remain in the good

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8. Lawyers have an ethical obligation to maintain the confidences of their clients. MODEL RULES OF PROF'L CONDUCT R. 1.6. In addition, the attorney-client privilege, a closely related concept in the law of evidence, permits lawyers to resist disclosure of client confidences unless there is an applicable exception.

graces of a powerful adversary. Equally important, an attorney must be extremely cautious about agreeing to represent multiple clients in the same litigation. The possibility of a conflict of interest is ever-present, even if it is not immediately apparent. Even in those situations where multiple representation is permissible, counsel must take care to obtain the knowing consent of everyone involved.

### 1.5.2 Duties to the Court

A lawyer's primary obligation to the court is one of candor and honesty. The adversary system cannot function unless judges can rely on lawyers to tell them the truth. In certain circumstances, as when protecting client confidences, attorneys are allowed to withhold information, but they may not lie or dissemble.

This duty is never greater than when lawyers make representations about the law. Judges do not have time to check every citation and read every case, especially in the midst of trial, so they often depend on the lawyers to apprise them of the law. In doing so, counsel must be scrupulously accurate and may even have to provide the court with citations adverse to his client's position.<sup>9</sup>

While there is no corresponding obligation to volunteer "bad facts," attorneys must not make deliberately false statements of fact or otherwise participate in the creation or preservation of false evidence. But what if a lawyer presents testimony in good faith, only to learn later that the witness was lying? Under the Model Rules of Professional Conduct, adopted in most states, the attorney is then required to "take reasonable remedial measures," up to and including disclosure to the court.<sup>10</sup> Moreover, this obligation applies even to testimony by the attorney's client and even if compliance requires disclosure of an otherwise privileged communication.

Fortunately, perjury and false testimony are infrequent occurrences, especially since good lawyers do everything they can to discourage witnesses from lying. A more common problem is the misuse of evidence or the use of unsupportable innuendo, either in argument or during cross-examination. In that regard, the rules provide that a lawyer shall not "allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence."<sup>11</sup> This is the source of the well-known statement that counsel must have a "good-faith basis" for every question on cross-examination. The "relevance" requirement also means that a lawyer may not simply throw mud at witnesses or attempt to inject bigotry or intolerance into a trial.

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9. A lawyer may not knowingly fail to disclose to the tribunal "legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2).

10. *Id.* 3.3(a)(3).

11. *Id.* 3.4(e).

On a more mundane level, attorneys in trial must also refrain from asserting personal knowledge of facts in issue and must not state their personal opinions as to the justness of the client's case or the credibility of a witness.<sup>12</sup> And of course, lawyers must adhere to the rules of the court and obey the directions of the judge, although a lawyer may test the legal validity of a rule or order by openly refusing to comply.<sup>13</sup>

| Trial Ethics                                                                                                                                                                                           |                                                                                                                                                                                                      |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Duties to clients<br>Competence<br>Confidentiality<br>Loyalty<br>Duties to the court<br>Candor<br>No use of false evidence<br>Good-faith basis for examinations<br>No assertions of personal knowledge | Duties to adversaries and third parties<br>Courtesy and respect<br>No obstruction of access to evidence<br>Good-faith fulfillment of agreements<br>No false statements<br>No ex parte communications |

### 1.5.3 Duties to Adversaries and Third Parties

There is considerable overlap between a lawyer's obligations to the court and counsel's duties to adversaries and third parties. For example, the citation of adverse legal authority, not to mention the disclosure of a witness's false testimony, will obviously benefit the opposing party. In addition, there are other rules of ethics that apply directly to a lawyer's treatment of adversaries.

First and foremost, a lawyer may not make a "false statement of material fact or law" to a third party.<sup>14</sup> The adversary system gives lawyers tremendous leeway to represent their clients, and a certain amount of "puffing" is expected in litigation, but lies and deceptions can quickly undermine the integrity of the entire process. Closely related is the lawyer's obligation to keep her word. Lawyers regularly make commitments to their adversaries in the course of litigation, often orally rather than in writing. Principled advocates will complete their undertakings in good faith, even those that may not be easily enforceable by opposing counsel. If it turns out that a commitment cannot be fulfilled, the reasons should be explained to opposing counsel.

All parties must have fair access to evidence. Consequently, counsel must not "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy,

12. *Id.*

13. *Id.* 3.4(c).

14. MODEL RULES OF PROF'L CONDUCT R. 4.1(a).

or conceal a document or other material having potential evidentiary value.”<sup>15</sup> Nor may an attorney request a person other than a client (or a client’s relative or employee) to “refrain from voluntarily giving relevant information to another party.”<sup>16</sup>

Similarly, all parties must have equal access to the court—hence the rule against *ex parte* communications, meaning that a lawyer may not attempt to communicate privately or secretly with the judge outside the presence of the other lawyers (other than in certain narrow circumstances authorized by law). Needless to say, a lawyer may never communicate with jurors or prospective jurors other than in open court.

Every person involved in the legal process is entitled to be treated with dignity and respect. This includes opposing counsel, adverse parties, and all witnesses, even in the most furiously contested trial. Lawyers should not stoop to tactics that are meant only to embarrass, burden, or harass a witness or opponent, no matter how strategically effective that might seem.

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15. *Id.* 3.4(a).

16. *Id.* 3.4(f).