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Building Your Civil Litigation Skills

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Table Of Contents

How to Settle Before Going to Trial

Submitted by James M. Susag

Building Your Pre-Civil Litigation Skills
James M. Susag

I. How to Settle Before Going to Trial

A. Accepting/Rejecting Cases

One of the most important decisions in pre-civil litigation comes at the very beginning: whether to accept or reject the case in the first place. Careful work in screening the case before accepting it can avoid problematic surprises down the road. An attorney will want to consider a variety of factors. Then, upon making a decision, the attorney will want to be careful of the procedure followed in accepting or rejecting the client.

(1) Factors to Consider when Considering Cases

When considering whether to take a case, an attorney needs to balance the inquiry necessary for this decision with the need to avoid unnecessary conflicts of interest should they decline representation.[1] One of the first issues an attorney should determine in considering a case is who exactly the client is.[2] This determination is particularly important where minors or third-party payers are involved.[3] In the case of an organization, the individual bringing the case to the attorney may just be a representative.[4] A lawyer will want to ensure the individual is authorized to act on the organization's behalf.[5]

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[1] MODEL RULES OF PROF'L CONDUCT r. 1.18 (Am. Bar Ass'n 2016) (discussing duties to a prospective client) [hereinafter MRPC].

[2] MINNESOTA STATE DISTRICT COURT PRACTICE DESKBOOK § 3.3(C)(1) (Kieth S. Moheban & Kenneth R. White, eds. Minn. CLE 2016) [hereinafter MINN. DESKBOOK].

[3] MRPC r. 1.18.

[4] *Id.* at 1.13.

[5] *Id.*

An attorney cannot properly screen for conflicts of interests without determining who the attorney represents and their relation to other parties.[6] Another section looks more closely at conflicts of interest, but proper screening for conflicts of interest is an essential component of case consideration.[7]

In assessing the case itself, an attorney will want to explore both potential fact and legal issues.[8] When looking at the facts, an attorney should consider the reliability of the client's version of the facts.[9] In some cases, an attorney may want to follow up on some of the facts or even get a second opinion from an expert or fellow attorney.[10]

In looking at the legal issues, an attorney should consider both the substantive issues and likelihood of prevailing as well as potential foreclosures to litigation.[11] Even the best substantive case can be scuttled by statutes of limitations, prior settlement, or immunity problems.[12]

Before accepting any case, an attorney should also ensure both client and attorney understand the case expectations.[13] The attorney needs to understand the client's objectives to properly represent their interests.[14] At the same time, the client should understand the lawyer's role and communication style.[15] Both attorney and client need to

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[6] *Id.* at 1.7, cmt. at 3 (discussing the need for screening procedures).

[7] *Id.* at 1.7 (prohibiting representation creating a conflict of interest).

[8] *Id.* at 3.1 (prohibiting frivolous claims).

[9] Roger S. Haydock, et al., FUNDAMENTALS OF PRETRIAL LITIGATION 20–23 (7th ed. 2008) [hereinafter FUNDAMENTALS].

[10] MINN. DESKBOOK § 3.3.

[11] *Id.* at § 3.2.

[12] *Id.* at §§ 3.2(B), 3.3(H)–(I).

[13] *Id.* at § 3.3(C)(5).

[14] MRPC r. 1.2.

[15] *Id.* at 1.2, 1.4.

agree on any limitations to the scope of representation.[16] The attorney and client should also discuss expectations for the likelihood of success and the likely timelines involved.[17]

Related to the likelihood of success and timelines, the attorney and client should discuss the kind of monetary and temporal resources necessary for the case.[18] Both attorney and client will need to consider whether they possess and are willing to invest the necessary resources.[19]

In exploring these considerations, an attorney will want to watch for red flags.[20] For example, multiple prior attorneys on the case or with the client might indicate problems with the case or client.[21] Unrealistic expectations on the client's part might foreshadow difficulties when reality catches up with the case. Unwillingness to pay a retainer reflects the client's attitude towards paying for the attorney's services and likely foreshadows billing issues. Even the case itself could raise concerns where the case involves a client's attempts to avoid payments to another party. Overall, an attorney should take a moment to do a "gut check" to consider whether potential problems warrant special precautions or even case rejection.[22]

(2) Procedures for Accepting or Rejecting Cases

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[16] *Id.* at 1.2.

[17] *Id.* at 1.4, cmt. at 5.

[18] *Id.* at 1.5 (requiring fee and scope communication with the client); MINN. DESKBOOK § 3.3(C)(4).

[19] MRPC r. 1.3, cmt. (discussing the attorney's commitment).

[20] MINN. DESKBOOK § 3.3(C)(3).

[21] *Id.*

[22] *Id.* § 3.3(C)(2).

When accepting or rejecting a case, an attorney should follow procedures to protect themselves from problems down the road. In either case, the decision should be documented in a letter to the accepted or rejected client.[23]

A letter to an accepted client should document both the scope of representation and basic expectations, including the fee structure.[24] Where appropriate, an attorney may want to require a retainer.[25] An attorney should retain a copy of the letter signed by the client agreeing to the terms of representation.[26] The attorney will also need to set up a file for the case and perform the other internal logistics to ensure proper case management.[27]

A letter rejecting representation, on the other hand, should simply, explicitly decline the representation and clarify the absence of an attorney-client relationship.[28] The attorney will also need to ensure they comply with the ethical requirements regarding any files created in reviewing the case.[29]

B. Early Case Investigations and Policy Limits Information

Once an attorney accepts a case, they will want to learn as much about the case as possible to prepare a clear picture for settlement discussions. This includes exploring the potential limitations on collecting from a relevant insurance policy.

(1) Early Case Investigation

Building on the case-screening inquiry, an attorney will want to flesh out and focus their legal and factual research as well as determine the best sources for

[23] *Id.* §§ 3.3(M), 3.4(D).

[24] *Id.* § 3.4(D).

[25] *Id.*

[26] *Id.*

[27] *Id.* § 3.4(E)

[28] *Id.* § 3.3(M).

[29] MRPC r. 1.16.

information.[30] While the goal of this preparation may be to settle, at attorney should prepare as if the case will go to trial—both as a precaution and to improve their settlement position.[31] Legal research will obviously need to include clarification of the applicable choice of law, confirmation of the applicable statutes of limitation, as well as the applicable substantive law.[32]

In building the factual inquiry, an attorney will want to consider both facts supporting their position and facts potentially raised by opposing parties.[33] Existing documentation, emails, and even prior witness statements can provide valuable information.[34] In collecting this information, an attorney should also identify and prioritize potential sources for additional information, such as those worth exploring during formal discovery. In addition to collecting facts supporting the case itself, the facts should also develop the damages aspect of the case.

Even at an early stage, an attorney can begin identifying potential witnesses.[35] While some of these witnesses will need to wait for deposal during discovery, others might warrant early interview. Willing and favorable witnesses might even provide affidavits that could prove valuable during early motion practice.[36] Similarly, use of experts may also benefit early case development, though care should be taken to ensure the attorney understands the potential confidentiality issues raised with use of experts.[37]

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[30] FUNDAMENTALS at 43–44.

[31] 3 LITIGATING TORT CASES § 33:6, Westlaw (updated Dec. 2015); Charles B. Craver, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT 54 (7th ed. 2012) [hereinafter Craver].

[32] Craver at 58; FUNDAMENTALS at 44–50.

[33] Craver at 62–63; FUNDAMENTALS at 50.

[34] FUNDAMENTALS at 55–60.

[35] *Id.* at 61.

[36] *Id.* at 72.

[37] *Id.* at 76–77.

(2) Policy Limits Information

The amount of insurance available to provide compensation can significantly influence the value calculations applied to a case, so understanding the limitations on first- and third-party insurance is essential.[38] Several types of policy limitations may play a role, including temporal, scope, and monetary. Attorneys should also note that state statute may override policy limitations.[39]

Many policies will have their own limitations on when payout can occur that may differ from the applicable statute of limitations.[40] Obviously, the circumstances of the case itself must also fall within the scope of the policy.[41]

Additionally, insurance policies usually have limits on the amounts they will pay out in given circumstances. This in turn can affect an insured party's willingness to accept a settlement or a plaintiff's reasonable ability to collect.[42] Additionally, an insurer may be liable for failing to settle in good faith within the policy limits.[43] Accordingly,

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[38] 58 AM. JUR. TRIALS 283 § 142, Westlaw (updated Mar. 2017).

[39] *See, e.g.*, *Beasley v. Allstate Ins. Co.*, 184 F. Supp. 2d 523 (S.D.W. Va. 2002) (voiding the policy limitation for violating a statutory floor—holding the statute of limitations applied instead)

[40] *Id.* (considering a policy with a 1-year limitation where the statute of limitations provided 10 years).

[41] *See, e.g.*, Lou Shipley, *How Small Businesses Can Fend Off Hackers: Seventy-One Percent of Cyberattacks Hit Companies With Fewer Than 100 Employees*, Wall Street Journal (July 16, 2015 7:09 PM) (discussing a case where a cyberinsurance claim was rejected because a vendor failed to keep systems updated), http://www.wsj.com/articles/how-small-businesses-can-fend-off-hackers-1437088140.

[42] *See Feijo v. GEICO Gen. Ins. Co.*, No. 15-1497, -- Fed. Appx. --, 2017 WL 429254 (11th Cir. 2017) (affirming rejection of plaintiff's bad faith claim against insurer brought by injured party in an attempt to collect on an excess judgment).

[43] *Higgins v. West Bend Mut. Ins. Co.*, 85 So. 3d 1156 (5th Cir. 2012) (considering a case in which Florida and Minnesota laws differed on first-party bad faith claims).

where the damages far exceed the limits and likelihood of further collection is minimal, an attorney might wish to make a policy limits demand.[44]

C. Putting Together the Demand Package

The timing and contents of a settlement demand help an attorney leverage their client's case in the strongest manner possible. The demand package will need to both present the demand itself and the case for why the opposing party should accept the demand.

When considering the timing of the demand, an attorney should take care to ensure they have as clear a picture as possible before making their demand.[45] That said, the client's needs, resources, and potential recovery will also affect the amount of investigation an attorney can undertake and the timing of the demand.[46] An attorney will also want to consider whether circumstances warrant initiating or responding to the negotiations.[47] Additionally, key settlement opportunities may present themselves as the case proceeds through discovery—such as after an opposing witness makes a key admission during deposition or the eve of trial.[48] That said, where venue issues may play a key role in a case, an attorney may want to take care that a demand letter does not result in the opposing party rushing to file first and steal the venue advantage.

The actual demand provides the focal point for a demand package and accordingly requires a careful balancing of client, pragmatic, and strategic interests. The strategic and psychological impact of the opening demand must not be underestimated.[49] Good negotiators will open with the highest, reasonably and principally defensible

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[44] 3 LITIGATING TORT CASES § 33:8.

[45] *Id.* § 33:22.

[46] *Id.*

[47] *Id.* § 33:23.

[48] *Id.* § 33:22.

[49] *Id.* § 33:25

demand possible.[50] However, certain situations might call for a different approach, such as a policy limits demand where excessive damages might play a role.[51]

Attorneys take many approaches regarding the form and support for their settlement demand.[52] Often, the demand takes the form of a letter, but may need to include multimedia to provide supporting evidence.[53] No matter the form, the demand should be comprehensive and well supported. With solid grounding in objectively presented case law and facts, an opposing counsel cannot simply dismiss the demand as hyperbole.[54] Accordingly, the demand will benefit from accuracy and evidentiary support.[55]

To add further leverage, an attorney should consider drawing attention to any attorney fee or litigation costs provisions that will continue to accrue absent settlement. Additionally, including a copy of a draft complaint can serve to emphasize the seriousness of a plaintiff in pursuing their remedies through litigation.

D. Negotiating with Insurance Adjusters

Insurance adjusters come to the negotiation table with their own incentives based on the policy limitations at play. At the same time, insurers risk liability for failing to negotiate in good faith.[56]

An insurer is not required to accept offers within a policy's limits as long as it exercises good faith.[57] However, it is required to share the offer with the insured.[58] The

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[50] Carver at 64–70.

[51] 3 LITIGATING TORT CASES §§ 33:24–25.

[52] *Id.* § 33:27.

[53] *Id.*

[54] *Id.*

[55] *Id.* § 33:30.

[56] 21 AM. JUR. TRIALS 229 § 1, Westlaw (updated Mar. 2017).

[57] *Id.* § 3.

insurer also must share with the insured its assessment the likely outcome of the case as well as the risk the insured faces from potential excess judgment.[59] Additionally, failure to settle within the policy limits may subject the insurer to excess liability through a bad faith claim.[60] Accordingly, excessive damages may warrant a policy-limits settlement offer.[61] In health insurance scenarios, attorneys also need to ensure they understand the impacts of any lien recovery.[62]

Insurance adjusters will try to low ball offers in a variety of ways and for a variety of reasons.[63] An attorney can identify and counteract these efforts by entering settlement negotiations well prepared and informed of the case and the applicable policy limitations and subrogation rights.[64] A well-prepared client will mitigate the influence an adjuster may exert by taking advantage of emotional ploys.[65] Attorneys should also ensure they understand the settlement offers being made and compare them directly to their own calculations—particularly in the case of a structured settlement.[66]

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[58] *Feijoo*, 2017 WL 429254 at *1.

[59] *Id.*

[60] 21 AM. JUR. TRIALS 229 § 1.

[61] 3 LITIGATING TORT CASES § 33:24

[62] *See* MATTHEW L. GARRETSON, HANDLING HEALTHCARE LIENS §§ 4:4, 4:17, 4:22, Westlaw (updated Feb. 2013) (discussing the impact of Medicaid and ERISA liens on settlement recovery).

[63] 3 LITIGATING TORT CASES § 33.47.

[64] *Id.*

[65] *Id.*

[66] *Id.*

E. Documenting the Settlement

The devil, as they say, is in the details. The best settlement negotiation is worthless if poorly documented. An attorney will want to ensure they reduce any settlement agreement to writing.[67] An attorney should ensure they take into account contract law principles that will apply to the agreement.[68] A wide array of provisions and approaches might apply to any particular settlement, so an attorney needs to consider the particular circumstances of the case in drafting the agreement.

Where the case is already in the court system, the parties will need to agree on what will happen to the case.[69] Will they ask the court to dismiss the case?[70] If so, will they dismiss with or without prejudice?[71] On the other hand, the parties may wish to stay the litigation and have a "standstill" agreement to give them the option of picking back up the litigation without starting over again.[72]

Most settlement agreements will contain some form of release. The parties will want to consider how expansive they want the release.[73] Will the release only apply to certain claims? An expansive release could accidentally foreclose other unrelated claims involving unexpected parties.[74] Additionally, where the litigation involves multiple parties, an attorney will want to take into account the impact of the "release to one; release to all" theory that could operate to release parties not mentioned in the

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[67] FUNDAMENTALS at 662.

[68] *Id.* at 662–63

[69] *Id.* at 663.

[70] *Id.*

[71] *Id.* at 663–64.

[72] *Id.* at 664–65.

[73] *Id.* at 665–66.

[74] *Id.*

agreement.[75] To avoid this rule, the parties may wish to pursue a covenant not to sue instead of a release.[76]

An attorney will also want to take into account the tax implications of a settlement for their client.[77] The use of the "loan receipt" legal fiction, where the payments are classified as a loan, could provide beneficial tax treatment in insurance settlements.[78] Alternatively, the parties may wish to string out payments through a "structured settlement."[79]

When considering the tools available to enforce a settlement, an attorney may wish to include a confession of judgement provision. These provisions enable a party to pursue enforcement of their agreed to damages through a judgment in the event of a breach without necessitating litigation.[80]

F. When Direct Negotiations Fail: Mediation vs. Arbitration vs. Trial

While negotiations can continue throughout the course of litigation, attorneys will want to keep in mind various other avenues for pursuing resolution. Mediation, arbitration, and full trial all present pros and cons that could fit a client's needs in differing circumstances.

Where negotiation just needs a little help navigating roadblocks to achieve success, the parties may want to consider mediation.[81] Mediations take less time and cost

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[75] *Id.*

[76] *Id.* at 666.

[77] *Id.* at 666, 669.

[78] *Id* at 666.

[79] *Id.* at 669–71.

[80] *See* 21A Fed. Proc., L. Ed. § 51:19, Westlaw (updated Mar. 2017) (discussing the operation of a confession of judgment or "cognovit").

[81] FUNDAMENTALS at 30–32.

less than the other options.[82] Mediation also provides the broadest array of relief options—allowing the litigants the opportunity to customize a resolution that fits their particular needs.[83] Because the litigants understand the circumstances of their dispute best, this method may present a particular benefit for situations involving complex, difficult to understand issues.[84] Mediation also allows the parties to avoid judgment, maintain confidentiality, and, due to the less adversarial approach, avoid burning the bridge in their relationship.[85] However, mediation also requires cooperation and good faith in the negotiations.[86] The litigants may also need to be able to share up front in the cost of mediation, which might pose a problem for destitute parties.[87] Finally, mediation early in litigation may cut off discovery and suffer from inadequate information.[88]

Arbitration is an increasingly popular alternative form of dispute resolution and is being written into many business contracts.[89] Accordingly, it may be the parties' preferred approach.[90] Arbitration provides efficiency and affordability compared to trial.[91] Complex issues can also benefit from arbitration where the parties can select an arbitrator with experience in the subject matter at issue.[92] Arbitration also provides a

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[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] FUNDAMENTALS at 32–34.

[90] *Id.*

[91] *Id.*

[92] *Id.*

balance by not being as adversarial as trial, but not requiring compromise necessary for mediation or negotiation.[93] They can also maintain privacy while still achieving binding finality.[94] However, this binding finality comes at the cost of the ability to appeal a decision a party dislikes.[95] Additionally, arbitration does not provide as thorough an exploration of the issues as a trial.[96] Accordingly, and due to its non-public nature, arbitration may be inappropriate or unavailable for some issues, such as regulatory, constitutional, or public policy matters.[97]

While much of this section has focused on how to avoid trial, some situations may benefit from trial. Trial provides full discovery and review of the issues by a judge and jury.[98] Trials permit adversarial argument of highly contentious issues under the careful monitoring of the court.[99] The parties have the opportunity to appeal adverse decisions.[100] The public process caters to review of public issues and have the potential to establish new or different legal precedent.[101] This all comes at a price though. Litigating through trial and potential appeal is costly and lengthy.[102] The predictability of results suffer from the variability of the decision makers. The fact-finders may have difficulty understanding complex or technical situations and may not have the

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[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] FUNDAMENTALS at 33.

[99] *Id.* at 31

[100] *Id.* at 34.

[101] *Id.*

[102] *Id.* at 30–31.

opportunity to review key evidence that doesn't meet the strict evidentiary standards involved.[103] Finally, the public and adversarial nature of the trial may harm the reputations of the parties—not to mention their relationship.[104]

[103] *Id.* at 29, 33.

[104] *Id.* at 33.

How to Effectively Use Pleadings and Motions

Submitted by Amanda N. Pittman

HOW TO EFFECTIVELY USE PLEADINGS AND MOTIONS

- What are your options for filing?
    - Can you file in federal court?
        - Is there diversity of jurisdiction?
            - Are the damages over $75,000.00?
        - Is a federal question involved?
    - Should you file in federal court?
- What type of pleading must you file?
    - FRCP, Rule 8(a): "a short and plain statement of the claim showing that the pleader is entitled to relief" a/k/a **notice** pleadings
    - SCRCP Rule 8(a): "a short and plain statement of the facts showing that the pleader is entitled to relief" a/k/a **fact** pleadings
    - Of note, there is also a fact pleading standard for an Answer pursuant to SCRCP Rule, 8(b): "[a] party shall state in short and plain terms the facts constituting his defenses to each cause of action"
- When is your Answer/Responsive Pleading due?
    - FRCP, Rule 12: 21 days.
    - SCRCP, Rule 12: 30 days.
- Which responsive pleadings are available?
    - Affirmative Defenses. *See* FRCP, Rule 8(c); SCRCP, Rule 8(c).
        - Assumption of risk, duress, fraud, laches, res judicata, statute of frauds, statute of limitations, contributory negligence, etc.

- Motions.
    - Rule 12(e): motion for a more definite statement.
    - Rule 12(b) motions. (More detailed information below.)
    - Rule 12(f): motion to strike.

- How much information should be contained in each paragraph of a pleading?
    - FRCP, Rule 10(b): "[a] party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances"
    - SCRCP, Rule 10(b): "the contents of each [paragraph] shall be limited as far as practicable to a statement of a single set of circumstances"

- What does it mean to sign pleadings, motions or other papers?
    - FRCP, Rule 11:
        - That there is no improper purpose for the filing.
        - That the allegations are "warranted by existing law."
        - That there is "evidentiary support" for the content of your pleading.
        - That any denial is warranted.
    - SCRCP, Rule 11:
        - That you read the documents.
        - That there are "good grounds" to support the pleadings/motion/etc.
        - That it is not being filed to delay.
    - What happens if you violate Rule 11?

- FRCP, Rule 11(c): "appropriate sanctions" to "deter repetition of the conduct."

    - Of note, sanctions are imposed upon the attorney AND the law firm.

- SCRCP, Rule 11: "an appropriate sanction" on the individual who signed the document.

- When do you plead 12(b) motions?

    - Either in the Answer or by motion. HOWEVER, if you choose to file a motion, it must be filed before the responsive pleading.

    - If you select to file a motion, and the motion is denied, you have 14 days in Federal Court and 15 days in Circourt Court to file responsive pleadings.

    - Regarding personal jurisdiction, improper venue, insufficiency of process, insufficiency of service of process, or, in South Carolina, another action is pending between the same parties, if you don't use it, you lose it.

- What are the 12(b) grounds for motion to dismiss?

    - Lack of Subject Matter Jurisdiction

    - Lack of Personal Jurisdiction

    - Improper Venue

    - Insufficiency of Process

    - Insufficiency of Service of Process

- Failure to State Facts Sufficient to Constitute of Cause of Action

- Failure to Join a Party Under Rule 19

- In South Carolina, another action is pending between the same parties for the same claim.

- Motions for summary judgment in Federal Court? FRCP, Rule 56.
  - Standard:
    - No genuine dispute as to any material fact; and
      - Must cite facts in the record.
    - Movant is entitled to Judgment as a Matter of Law.
  - Timing: Must be filed before 30 days after the close of discovery.
- Motions for summary judgment in Circuit Court? SCRCP, Rule 56.
  - Standard:
    - No genuine issue as to any material fact; and
    - Movant is entitled to Judgment as a Matter of Law.
  - Timing: Motion must be served at least 10 days before the hearing; supporting affidavits must be served at least 2 days before the hearing.
- Other Motions to Consider:
  - Motion for Entry of Default.
    - However, default is set aside for "good cause." FRCP, Rule 55(c); SCRCP, Rule 55(c).

- Motion to Alter/Amend Judgment

    - FRCP, Rule 59(e): must be filed within 28 days after the entry of the judgment.
    - SCRCP, Rule 59(e): must be filed within 10 days after the entry of the order.

- Motion for Relief from Judgment.

    - One can only assert 60(b)(1)-(3) during the first year after judgment has been entered.

    - After one year, the only grounds for relief from judgment are that the judgment is void or that it has been satisfied. SCRCP, Rule 60(b)(4)-(5).

- Motions in Limine:

    - FRE, Rule 104; SCRE, Rule 104.

    - Evidentiary Issues.

        - Criminal History.

        - Hearsay.

- Miscellaneous

    - Do you know the name of the Defendant?

        - SCRCP Rule 10(a)(1): Be sure to plead in the fact pleadings that the adverse party's name is unknown.

    - Have you consulted with opposing counsel before filing a motion?

- Local Civil Rule 7.02 DSC; SCRCP, Rule 11: Motions must be supported by an affirmation that you have tried to work this out with opposing counsel.

    - Exceptions: Consultation would serve no useful purpose OR motion to dismiss, motion for summary judgment, motion for new trial, or motion for judgment NOV.

- In District Court, supporting memoranda requirements are outlined in Local Civil Rule 7.05 DSC, including the maximum number of pages allowed.

    - Responding memoranda must be filed within 14 days. Local Civil Rule 7.06 DSC.

- How should a motion be presented?

    - FRCP, Rule 7(b); SCRCP, Rule 7(b)

    - In writing OR on the record;

    - Specific grounds for the motion; and

    - What you are asking for.

- SCRCP, Rule 43(g): Remember - Pleadings can be read to the jury.

How to Apply the Law of Damages

Submitted by H. Asby Fulmer III

III How to Apply The Law of Damages

A. Types of Damages

1. Nominal Damages

a. Even when no actual loss has occurred, a party can be liable for at least nominal damages if a technical conversion is shown. Charleston Foundation v. Murray, 286 S.C. 170, 333 S.E.2d 60, 65 & (Ct. App.1985)

b. Proof of nominal damages can support an award of punitive damages. Cash v. Atlantic Coast Line R. Co., 183 S.C, 279,190 S.E. 923 (1937); Charleston Foundation v. Murray, 286 S.C. 170, 333 S.E.2d 60 (Ct.. App. 1985)

c. A claimant alleging misappropriation of identity need not prove actual damages, because the court will presume damages if someone infringes another's right to control his identity. Gignilliat v. Gignilliat, 385 S.C. 452, 684 S.E.2d 756, 762 (2009)

d. Our Court of appeals has addressed a situation in which a jury found a defendant negligent but failed to award any damages. The Court of Appeals found the result "facially inconsistent." The Court of Appeals cited precedent and held that, "Once a plaintiff proves damages proximately caused by the defendant, the verdict of zero damages is inconsistent or incomplete as a matter of law. In the case *sub judice,* assuming the jury were correct in finding Allen proximately caused the injuries of Stevens, the jury should have calculated some amount of damages, either actual or nominal. If there was little or no damage, but

there was fault on Allen's part then nominal damages (i.e. one dollar) would be appropriate." Stevens v. Allen, 336 S.C. 439, 520 S.E.2d 625 (Ct. App.1999)

2. **Actual Damages**

a. Actual damages are properly called compensatory damages, meaning to compensate, to make the injured party whole, to put him in the same position he was in prior to the damages received insofar as this is monetarily possible. Actual damages are awarded to a litigant in compensation for his actual loss or injury. They are such damages as will simply make good or replace the loss caused by the wrong or injury. Actual damages are damages in satisfaction of, or in recompense for, loss or injury sustained. The goal is to restore the injured party, as nearly as possible through the payment of money, to the same position he was in before the wrongful injury occurred." (Citations omitted.) Austin v. Specialty Transportation Services, Inc., 358 S.C. 298, 594 S.E.2d 869 (Ct. App. 2009)

b. **Types of actual damages**

i. **Economic Damages:**

property damage
medical bills
lost income

ii **Non-economic Damages:**

pain and suffering
loss of enjoyment of life
mental anguish
aggravation of pre-existing injury

loss of consortium

damage to reputation

3. **Consequential Damages**

a. Consequential damages are most frequently appropriate in the context of a breach of contract action. In the content of a tort action, our Court of Appeals has held that attorney fees and litigation costs are not appropriate unless provided for by contract or statue. Pickett v. A&B Electrical Services Inc., 286 S.C. 123, 311 S.E.2d 402 (Ct. App. 1984)

4. **Liquidated Damages**

a. If you have a claim for liquidated damages, it is absolutely essential that you follow the requirements of Rule 55 (b) (1), SCRCP. Beckman Concrete Contractors Inc. v. United Fire and Casualty Co., 360 S.C. 127 600 S.E.2d 76 (Ct. App. 2004)

b. Rule 55 (b) (1), SCRCP provides:

(1) *Cases Involving Liquidated Damages or Sum Certain Amounts.* When the claim of a party seeking judgement by default is for a liquidated amount, a sum certain or a sum which can by computation be made certain, the judge, upon motion or application of the party seeking default, and upon affidavit of the amount due, shall enter judgement for that amount and costs against the party against whom judgement by default is sought, if that party has been defaulted for failure to appear and if such party is not a minor or incompetent.

5. **Punitive Damages**

a. Since the Gamble case, South Carolina appellate discussions have greatly clarified how punitive damages are to be handled in litigation.

b. In considering the issue of punitive damages, the South Carolina Supreme Court in Atkinson v. Orkin Exterminating Co., Inc., 361 S.C. 156, 664 S.E.2d 355 (2004) discussed at length the United States Supreme Court decision of State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 123 S.C.T. 1513, 155 L.Ed. 585 (2003) and BMW of North America, Inc. v. Gore, 517 M.S. 559, 116 S. Ct. 1589, 155 L. Ed. 2d 585 (2003). The court identified three "guideposts" that should be used to determine if a punitive damage award is constitutional. The guideposts are (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. In the Atkinson case, the trial judge permitted the plaintiff to put into evidence past instances of questionable practices by Orkin in dealing with other persons. The jury awarded $ 6,191.00 in contractual damages, $69,068.33 in actual damages, and $ 786,500.00 in punitive damages. Our Supreme Court determined that the 127 to 1 ratio of punitive damages & actual damages was too sizably a disparity and established a presumption that the punitive damage award was an unconstitutional deprivation of property.

c. In Barnwell v. Barber-Coleman Co., 301 S.C. 534, 393 S.E.2d 162 (1989) the Supreme Court held that because the tort of strict liability was a statutory creation in South Carolina that the statue controlled where damages could be awarded with that cause of action.

d. O'Neil v. Smith, 388 S.C. 246, 695 S.E.2d 531 (2010) addresses the question whether a plaintiff can still pursue punitive damages after executing a covenant not to execute. The Supreme Court held that a plaintiff could. The Court reasoned that a plaintiff is not required to pursue a defendant's assets and it was irrelevant that excess damages are not actually paid by the at-fault motorist. The definition of S.C. Code Ann. Section 38-77-130 (4) defines damages to include both actual and punitive damages. The Court emphasizes punitive damages vindicate private rights so that it is not dispositive that the defendant would not be punished or deterred due to the covenant.

6. **Special Damages**

a. McNaughton v. Charleston Charter School for Math and Science, 411 S.C. 249,768 S.E.2d 389 (2015) includes an extensive discussion of "special damages". The McNaughton court begins by clarifying that "Special damages, also known as consequential damages, are actual damages." The Court goes on to explain "Unlike general damages, which must necessarily result from the wrongful act upon which liability is based and are implied by law, special damages are damages for losses that are natural and proximate - but not the necessary - result of the injury, and may be recovered only when sufficiently stated and claimed… Therefore,

where a plaintiff seeks special damages in addition to general damages, he must plead and prove the special damages to avoid surprise." The Court goes on to discuss special damages in the context of a breach of contract case and require that the breaching party be aware of whatever unusual circumstances existed at the time of entering into the contract.

b. Holtzscheite v. Thomas Newspapers Inc., 332 S.C. 502, 506 S.E.2d 497 (1998) defines special damages as tangible losses or injuries to the plaintiffs property, business, occupation, or profession in which it is possible to identify a specific amount of money as damages.

c. Sheek v. Lee, 289 S.C. 327, 345 S.E.2d 496 (1986) comments that "These damages (special damages) occur because of the special circumstances of the sellers, and therefore must specifically pleaded."

7. **Treble Damages**

a. Treble damages are available if specified by statue.

b. An example is the South Carolina Unfair Trade Practice Act, Section 39-5-140:

(a) Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by Section 39-5-20 may bring an action individually, but not in a representative capacity, to recover actual damages. If the court finds that the use or employment of the unfair or deceptive method, act or practice was a willful or knowing violation of Section 39-5-20, the court shall award three times the actual damages sustained and may provide such other relief as it deems necessary or proper. Upon the finding by the court of a violation of

this article, the court shall award to the person bringing such action under this section reasonable attorney's fees and costs.

B. **Quantifying Damages**

1. Economic Damages

a. Past medical expenses quantify themselves by collecting the bills of all relevant medical providers. Clients often believe their attorney are telepathic. Meet with your client before sending out a settlement package to make sure all providers have been identified.

b. To quantify future medical expenses, a client /patient will have to receive specialized care for an extended period of time. Then the specialist will need to be contacted for an opinion as to what future medical care will be required and the frequency of that care. A staff member from the specialist's practice will have to provide the practice's charges for the specific care predicted.

c. Past lost wages will have to be set forth by the client's employer. All carriers are going to want to look at past years' tax returns to corroborate the lost wages.

d. For future lost income, vocational experts and economists are required. Promotion and salary, wage increases can then be projected.

e. Certain injuries will require modifications to the home, personal vehicles, and the like. A life care planner can specify and quantify these needs.

2. Non-economic Damages - pain and suffering, loss of enjoyment of life, mental anguish, etc. – are best quantified not by per diem arguments but by references to past medical records and S.C. Code Ann. Section 19-1-150. In past medical

records look for descriptions of pain, indications of pain frequency. Look at the frequency of appointments and administration of injections. These are the best way to build an argument that your client's pain and suffering is very significant. Go through past activities with your client and get future limitations from the treating specialist to construct an argument as to future loss of enjoyment of life.

C. Documenting the Extent of the Injury

Once a client has reached maximum medical improvement, a meeting with the treating specialist is the best way to document the permanency and extent of the injury. For a permanent impairment rating a specialist will have to consult the AMA Guidelines, either the 5th or 6th editions. The 5th edition is generally felt to be more favorable to plaintiffs. A functional capacity evaluation is commonly used to document limitations in regard to certain activities.

D. Lien and Subrogation

Both jury verdicts and settlements have declined significantly in the past thirty years. Thirty years ago an attorney could try a soft tissue injury case inclusive of emergency room care and chiropractic care and get a jury verdict of three, three and a half, or even four times the medical expenses. Settlement for similar cases could also be obtained in this range with persistence.

In the past Medicare pursued its liens less vigorously. Private health insurance companies pursed their liens less vigorously and less frequently.

Today Medicare pursues reimbursement with the aid of new regulations. The Internal Revenue Service functions as Medicare's enforcement arm when necessary. ERISA and other insurance plans sometimes claim entitlement to all of an insured's settlement proceeds.

Health care providers also claim liens, some through letters of protection, some based on documents signed by patients prior to being represented by an attorney. The representing attorney cannot change the landscape but through

cautions and demands, he can weed out the pretenders. When a health insurance carrier claims a right to all or most of a client's settlement proceeds, it is imperative to ask for a copy of the insured's policy and plan. A reading of the policy and plan may reveal rights that are very different from those claimed by the health insurance carrier.

To get a client without health insurance into a medical provider, the client may have to sign forms that assign settlement proceeds in exchange for treatment. The attorney will usually have to provide a letter of protection. But the client may have received treatment prior to being represented. Those medical providers may ask for a letter of protection or for the attorney to sign a form promising payment upon settlement. It is rarely advisable to protect past medical providers that do not have to be protected. Most automobile cases now settle in a range of 1.5 to 1.8 times the medical expenses. If all providers are promised payment, where is your client's net recovery going to come from? Be very careful.

Often hospitals have patients sign forms upon admission. When the attorney requests medical records, in addition to an invoice for the records he or she will often also get an inquiry about the personal injury case. First of all, there is no requirement that you respond to the inquiry. Even if inquiries persist, silence can be golden. Second, unless you the attorney sign forms or letters further obligating your client to pay a hospital, the hospital's right to payment is subject to a three (3) year statute of limitations. Hospitals are in the same position as many other creditors in South Carolina. They have to weigh the cost of litigation against the difficulty of collecting a judgment.

S.C. Code Ann. Section 15-41-30 provides South Carolina residents with a homestead exemption. Many South Carolina residents do not have assets that exceed the $100,000.00 or $ 50,000.00 protections afforded by the statute. It is therefore imperative that a plaintiff's attorney not unwittingly expand a hospital's right to payment.

F. Handling Medicare Set Asides

Medicare takes the position of a secondary payer in cases where there is another culpable party, such as employer and it's workers' compensation insurance carrier or a liability insurer as set forth in the Medicare Secondary Payer Act 42 U.S.C. §1395y and 42 C.F.R. §411.20, et al. The purpose of the Medicare set-Aside arrangement (MSA) is to provide funds to the injured party to pay for future medical expenses that would otherwise be covered by Medicare, known as "qualified medical expenses". If the injured party incurs qualified medical expenses that exhaust the anticipated set-aside sum, Medicare will pay for allowable expenses in excess of the properly exhausted MSA funds. By establishing a Medicare Set-Aside Account, parties to a settlement are protecting Medicare's interest and complying with the Medicare Secondary Payer Act.

The Medicare Secondary Payer Act requires that Medicare's interest be considered in Worker's Compensation cases, there are no rules or regulations under the Act requiring the same in Liability cases. In Worker's Compensation cases a set-aside is required if the settlement exceeds $25, 000.00 and the claimant is currently eligible for Medicare or all settlements if for more than $250,000.00 and the claimant can reasonably be expected to become eligible for Medicare within 30 months. These rules can serve as a guide in liability cases.

The case of Avanki v. Burrwell, 151 F. Supp 2d 1638 (2015) addressed whether a Medicare set-aside was necessary in a medical malpractice case. The court held that the case was not ripe for review because no federal law mandates CMS to decide whether a plaintiff is required to create a Medicare set-aside. Because of this, the court lacked subject matter jurisdiction to hear the case.

In Sipler v. Trans Am Trucking, Inc., 881 F. Supp 2d 635 (2012) and other cases the conclusion has been the same. Medicare does not yet require a MSA for the liability cases.

As to Worker's Compensation cases and Medicare set-aside, there are regulations to guide the process of establishing and adequately funding the set-aside.

F. Calculating Non-Economic Damages, Pain and Suffering

By their very nature, non-economic damages are difficult to calculate. Some plaintiff's attorneys try to guide consideration with per diem arguments. Some arguments focus on life expectancy. Other arguments reference medical bills jurors often want some guidance.

The most persuasive arguments designed to quantify non-economic damages have a concrete foundation. That means a plaintiff's attorney needs to marshall as much detail as possible. For loss of enjoyment of life, pre-accident activities - vocational, household, and recreational activities – need to be detailed not just by the plaintiff but by witnesses who know the plaintiff well.

Likewise, pain and suffering is most persuasively presented by way of detail. Most people have a difficult time describing pain. So work on your client's ability to do so with them. Severity of pain, frequency of pain, psychological effects of the pain, and so on are needed. The best pain and suffering witnesses know the plaintiff well of course. Co-workers are especially strong witnesses because their testimony does not sound as though offered in vacuum or in the abstract. There is a context of the work environment that can help jurors fully appreciate a plaintiff's pain.

How to Apply the Rules of Discovery and Evidence

Submitted by H. Asby Fulmer III

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IV. How To Apply Rules To Discovery and Evidence

A. E Discovery – Civil Rules and Procedure

1. E-Discovery, short for electronic discovery, is the electronic aspect of identifying, calculating, and producing electronically stored information in response to a request for production in a lawsuit or investigation.

2. Common examples of e-discovery are emails, documents, presentations, databases, voicemail, audio files, video files, social media, and websites.

3. In addition to the particular item of e-discovery itself, the requesting party is seeking time-date stamps, other information, recipient information, and file properties.

4. As part of the production process, the e-discovery is converted to a TIFF or PDF. Privileged or non-relevant information have to be identified.

5. Often appropriate software will have to be utilized.

B. Handling Social Media, Email and Text Messages

1. Various hosts and websites have their own proprietary formats in which data is stored. This is one of many reasons that email, social media, texts and videos are challenging to obtain in discovery. Social media information presents special challenges. X1Social Discovery will capture

a client's social media information and associated metadata and help with presentation and production. A client's mobile device is not configured to save every text ever sent or received. It is best to use a software program that allows for extractions, downloading, and searching of text message conversations that will save the user a great deal of time. If only a few text messages are relevant and of minimal importance a screen shot can suffice.

C. **Preservation of Evidence**

1. In QZO, Inc. v. Moyer, 358 S.C. 246, 594 S.E.2d 541 (Ct. App 2009) the circuit court granted a TRO ordering the appellant to immediately surrender a business computer. Seven days later the appellant turned the computer over. An expert's examination revealed the computer had been reformatted the day before it was turned over. Respondent moved for sanctions pursuant to Rule 37, SCRP. The court found appellant willfully destroyed relevant evidence. The court struck Appellant's pleadings and entered a judgement of liability in favor of the Respondent. The Court of Appeals confirmed that "When a party fails to obey an order relating to discovery, the trial court may strike that party's pleadings and enter a default judgement." Despite the harsh remedy the Court of Appeals felt the same was justified because the trial judge had commented that the reason offered for non-compliance was a "great mysterious sequences of coincidences that strained credibility".

2. Another possible judicial response to a party's failure to preserve evidence when previously ordered to do so is found in Kershaw County Board of Education v. Limited State Gypsum Company, 302 S.C. 390, 396 S.E.2d 369 (1990). Gypsum was supposed to be notified before asbestos removal but was not. The Supreme Court cites precedent that "when evidence is lost or destroyed by a party an inference may be drawn by the jury that the

evidence which was lost or destroyed by that party would have been adverse to that party." This is commonly referred to as a spoliation charge.

D. **Authentication of Evidence**

1. Rule 901 of the SCRE provides:

(a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

2. There are of course numerous issues that can arise for the purpose of authentication. One such issue that has been revisited numerous times by appellate courts is chain of custody.

3. In South Carolina Department of Social Services v. Cochran, 391 S.C.136, 614 S.E.2d 642, (2005) Appellant tested positive for cocaine and DSS took custody of Appellant's child. The Supreme Court begins by noting that DSS had the burden to establish the chain of custody for blood samples. The chain should extend from the time the specimen is taken until the time it is analyzed. In the first trial, DSS only offered a witness who testified as to standard procedure. The Supreme Court cautions that "We have never held that the chain of custody rule requires every person associated with the procedure be available to testify or identified personally depending on the facts of the case." The sample was secure at the collection site and arrived at the testing facility sealed and intact.

4. In Hartfield v. The Getaway Lounge & Grill, Inc., 388 S.C. 407, 697 S.E.2d 558 (2010) the Supreme Court clarifies that the procedural due process concerns and S.C. Code Ann. Section 56-5-2950 are not applicable in a civil case. In a civil case "So long as a sufficient chain of

custody exists to authenticate the evidence in a civil case, this type of evidence is admissible."

5. The case of State v. Brockmeyer, 406 S.C. 324, 751 S.E.2d 645 (2013) I involves chain of custody in a criminal proceeding. The defendant wanted every evidence custodian called to the witness stand. At issue here was a t-shirt, pistol, and other items. The Court comments, "Because the challenged evidence in this case is not fungible", unlike the cocaine in Melendez or the blood sample in Bullcoming, here strict chains of custody are not required for admissions into evidence. The Court also cites Rule 901, SCRE.

E. Admissibility of Evidence

1. Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000) dealt with the admissibility of an animated reconstruction video. The plaintiff at trial had wanted to introduce a video containing a computer generated animation of the accident through her expert witness. The defendant objected on the basis that the video did not reflect the testimony of the expert or some of the lay witnesses. The trial judge refused to admit the video. The Supreme Court begins by clarifying that demonstrative evidence includes photography, charts, diagrams, or video animation that summarizes other evidence to testimony. Demonstrative evidence often is admitted only for use in the courtroom to explain and illustrate a witness's testimony, but it also may be admissible as an exhibit for the jury to examine and consider during deliberations. The Court then addresses admission of a computer generated video:

> **Despite the dangers, computer animations can serve worthwhile purposes if screened carefully and admitted cautiously. We hold that a computer-generated video animation is admissible as**

demonstrative evidence when the proponent shows that the animation is (1) authentic under Rule 901, SCRE; (2) relevant under Rules 401 and 402, SCRE; (3) a fair and accurate representation of the evidence to which it relates, and (4) its probative value substantially outweighs the danger of unfair prejudice, confusing the issues, or misleading the jury under Rule 403, SCRE.

F. **Hearsay Objections and Exemption**

1. The older case of Cooper Corporation v. Jeffcoat, 217 S.C. 489, 61 S.E.2d 53 (1950) does a nice job of setting forth the historical reasons for the rule against hearsay and include "The real basis for the exclusion, however, appears to be in the fact that hearsay testimony is not subject to the tests which can ordinarily be applied for the ascertainment of the truth of testimony" and "… the declarant is not present and available for cross examination."

2. Hawkins v. Pathology Associates of Greenville, P.A., 302 S.C. 92, 498 S.E.2d 395 (Ct. App. 1981) involved a young mother who died of cancer. After Mrs. Hawkins knew she was dying, the family made a video and she wrote letters to family members. The defendant objected to the video as hearsay and extremely prejudicial. The Court of Appeals holds that "The letters, card, and video were not offered to prove the truth of any matter asserted, but to show the close family relationship, and they were clearly relevant to the issue of damages. In addition, the card and videos would fall under the hearsay exemption of an existing state of mind, emotion, sensation or physical condition."

3. In R&G Construction, Inc. v. Lowcountry Regional Transportation Authority, 343 S.C. 424, 540 S.E.2d 113 (Ct. App. 2000) Dr. Sieck was

the property manager for a soil removal project. The trial Court allowed a closure report and closure letter to be entered into evidence. The Court of Appeals agreed that the closure letter and report were not offered for the truth of the matters asserted within them. Instead, they were offered to show that the job in question had been completed and that DHEC protocols and procedures complied with.

4. Hatfield v. Epps, 358 S.C. 185, 594 S.E.2d 526 (Ct. App 2009) is an appeal of a legal malpractice case. At issue were some child custody affidavits. The trial judge refused to let the affidavits into evidence. The Court of Appeals found that the affidavits were not offered for the truth of the matter asserted, that Van Epps should have been awarded custody, but to show the extent of the law firm's negligence in not calling any of these witnesses at trial.

5. The case of Fields v. Regional Medical Center Orangeburg, 354 S.C. 445, 581 S.E.2d 489 (Ct. App 2003) concerns a party's use of an expert witness. A physician/expert offered in the field of emergency medicine was not board certified. The expert explained that he was the first president of the Board of Emergency Medicine and helped develop the board certification exam. He had also served as editor for both the written and oral exam. Defendant objected to the reason for the lack of certification coming into evidence on the basis that the same was hearsay. The circuit court agreed that it was hearsay. The Court of Appeals ruled otherwise:

> **Podgorny's statement is a classic example of showing an action based upon information and is not offered for the truth of the matter asserted.**

6. SCDMV v. Mc Carson, 391 S.C. 136, 705 S.E.2d 425 discusses a statutory exception to the rule against hearsay. Mc Carson had challenged

the suspension of his driver's license. Mc Carson at the administrative hearing objected to the incident report of his DUI arrest as hearsay. The circuit court reviewed the admission of the incident report and other documents and relied on what it felt was a common law exemption to hearsay. Under the exemption, hearsay testimony would be admissible to establish probable cause to arrest. The Supreme Court drew a distinction between a probable cause hearing in a criminal proceeding and an administrative hearing. A preliminary hearing is not a final adjudication of a defendant's rights. By contrast, a license suspension hearing may potentially terminate an important interest of the licensee. The Supreme Court interpreted S.C. Code Ann. Section 56-5-2951 to require a determination of whether a person was lawfully arrested or detained for DUI. The legislature placed a burden on the DMV to present sufficient evidence of probable cause. The Supreme Court goes on to equate sufficient evidence to admissible evidence.

7. The appeal in Ex Parte Morris 369 S.C. 56, 624 S.E. 2d 649 (2006) resulted from a family court judge basing her decision in a permanent placement order on the arguments of counsel, the guardian's report, and an examination of the case file and pleadings. The Supreme Court agreed with the appellant that S.C. Code Ann. Section 20-7-766 required the family court to hold an evidentiary hearing wherein witnesses could be examined and cross-examined.

8. Loan documents had been objected to as hearsay in Deep Keel, LLC v. Atlantic Private Equity Group, LLC, 413 S.C. 58, 773 S.E.2d 607 (Ct.. App. 2015) the master in equity relied on the business records exceptions to the hearsay rule to admit the loan documents as found in Rule 803 (C), SCRE and S.C. Code Ann. Section 19-5-510. The Court of Appeals did not view loan documents as hearsay but as establishing the existence of a contract and the terms of the contract.

G. Exhibits

1. One of the more frequently issues concerning exhibits in litigation in recent years has been on computer animations. Webb v. CSX Transportation, Inc., 364 S.C. 639, 615 S.E.2d 440 (2005) sets forth specific and complete criteria for the court to use to determine if a computer animation is admissible. The Supreme Court holds:

> **A computer animation is admissible if it is: 1) authentic under Rule 901, SCRE; 2) relevant under Rules 401 and 402, SCRE; 3) a fair and accurate representation of the evidence; and 4) more probative then prejudicial under Rule 403, SCRE. Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000). When an animation is admitted, the trial court is to give a cautionary instruction that the video represents only a recreation of one party's version of events, and may call attention to any assumptions upon which the recreation is based. *Id.* The trial court has broad discretion in determining whether to admit an animation, and its decision will be reversed on appeal only for an abuse of that discretion. *Id.***

How to Select the Right Jury

Submitted by Jacqueline A. Moss

HOW TO SELECT THE RIGHT JURY

Applying Federal and State Rules

1.

FRCP 48

a.

Number of jurors. A jury must begin with at least six and no more than 12 members, and each juror must participate in the verdict unless excused under Rule 47©. Many courts will seat an alternate juror.

South Carolina

Generally, the jury trial coordinator calls between 50-60 potential jurors at a time for jury selection. The judge will begin with a brief opening statement. Any possible conflicts with the parties and/or their representatives are addressed at that time. Through asking questions to both the entire jury pool and individual jurors, everyone involved becomes more familiar with the jury pool as a whole, this is called *VOIR DIRE.*

B. Preparing for Jury Selection:

1.Watch the jury panel interact with each other:

- Who is sitting beside whom?
- Are they reading? What genre?
- Who seems to be friends?
- Are they likely to vote together?
- Make sure that they are "good jurors," block voting can help or hurt.

2. Give the jurors your undivided attention, let them know that they are important.

3. Remember that many will not be comfortable speaking in public. Start with questions that will put jurors at ease about the process so they will open up. Avoid questions that make the jurors feel inferior. **Be humble!**

4.Paralegal Help

If resources allow, a paralegal can be very helpful in the process. The goal of a successful jury is to have a conversation with the potential jurors. It is easier to have a conversation with people when you are not too busy writing down notes of what they say.

- Have a paralegal write down the names of the jurors as they are called. The list should have them in a seating chart. This will assist you in deciding whether a juror is

good for your panel. Having a seating chart and a description of each juror will also help you identify which juror you are talking about when you go back to select your peremptory challenges. In South Carolina, we receive a list in advance.

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5.Open ended questions

- Jury selection is not a cross-examination, but more like a direct examination. In cross, you ask leading questions to illicit a specific answer. In direct, you want witnesses to tell their side of the story. That is what you are trying to get out of the jurors. You want to start up a discussion with them about certain topics.

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6. Be Flexible:

- Listen! If a juror gives an answer that raises a potential problem area, follow up on the issue with that juror. Listen not just to the answers to your questions, but to the answers (and questions) of your opponent's jury selection examination.

These are guidelines that may be helpful in finding jurors that will be more inclined to follow your side of the case thereby stacking the deck and setting up the win.

C. Uncovering cultural/prejudicial biases, Attitudes, Biases, and Values:

It is imperative for litigators to take this into consideration when selecting a jury and to actively include questions in jury selections, designed to uncover relevant prejudices that will help predict verdicts. This includes prejudices of gender, race, natures of the case, nature of the businesses or persons involved, police involvement, etc.

- The awareness that prejudice, especially racial, plays a significant role in perception of intelligence, guilt, or deservedness of severe punishment is one that all litigators must have in selecting juries and presenting cases. Research and practice shows that directly addressing this in Voir Dire with carefully selected questions is an extremely effective method of controlling for hidden bias

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- A skillful trial consultant with expertise in this area can assist lawyers in uncovering conscious and unconscious bias in ways that are not offensive and contribute to laying a foundation for a winning case.

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Lifetime Experiences, Attitude Formation and Juror Bias

Lifetime experiences and attitudes tend to be much more powerful predictors of verdict choices than demographic characteristics. [5] In order to get at juror bias in the best possible way, attorneys must uncover the lifetime experiences and attitudes of all potential jurors.

2.

Jurors' Limited Disclosure of Attitudes and Biases

There are two important additional reasons jurors do not fully self-disclose in court. First, potential jurors do not recognize or want to admit they are biased. Second, they are being questioned by and are trying to please a judge. These reasons, combined with those above, provide us with discouraging, counterproductive results in jury selection.

D. FAQs About Jury Instruction

You have been asked to prepare a set of jury instructions and a verdict form for trial . . . for the first time. What do you do? Where do you start? We offer some basic guidelines for drafting jury instructions or a verdict form, preparing for the charge conference, and preserving any error that may occur during or after the charge conference. The importance of having clear jury instructions, objections, and rulings on objections cannot be underestimated. Jury instructions are usually a fertile ground for appeal. Because they involve questions of law, jury instructions are often reviewed de novo, so it is imperative that you preserve all potential issues.

Drafting Instructions

When you begin to draft jury instructions, consult a number of sources. Start with your jurisdiction's standard or pattern instructions. Many jurisdictions provide model instructions and verdict forms for particular claims or defenses. Trial courts will usually use these instructions, unless you can show that they do not accurately describe the current state of the law or are otherwise insufficient. If you determine that additional instructions are necessary, these instructions are referred to as "special instructions."

If you think the standard instructions do not adequately state the law, or if you would like to argue that a change in the law is appropriate based on some authority, you should submit special instructions. Special instructions should be drafted after you have reviewed the statutes and case law that apply to your claims or defenses. ***Keep special instructions as short and simple as possible***. Additionally, ask your colleagues for special instructions they may have used in similar cases, or before the same judge. They may provide insight not only with respect to appropriate special instructions, but also as to the court's charge conference procedures.

Be organized. Make sure that the instructions are numbered or otherwise identified so that they are easy to refer to when discussing them with opposing counsel, or on the record during the charge conference. Indicate what authority supports each instruction. It is helpful to have each instruction on a separate page. Consider referring to the parties by their names (or a shortened version of their names) rather than as plaintiff or defendant. Parties are seldom referred to as plaintiff or defendant during trial—their names are used instead. Instructions that refer to the parties only as plaintiff and defendant, as many pattern instructions do, can be confusing to jurors, especially when there is a counterclaim or cross-claim in the case.

Once you have a first draft of your instructions, read them as a whole to ensure that all issues are addressed and that there are no internal inconsistencies or conflicts. Next, compare them to the verdict form to ensure that they complement each other. Then ask someone who knows nothing about the case (preferably a non-lawyer) to read them or, better yet, to listen to you read them.

Preparing for the Charge Conference

Bring to the charge conference copies of all pertinent authority for instructions or verdict forms. Consider providing the court with a binder that includes the instructions, verdict form, and authority you will rely on. But it is not enough to simply hand this to the judge. You must file the instructions and verdict form with the clerk's office, so that you have a proper record for appeal. Likewise, make sure all other parties' requested instructions are filed with the court. Be sure to compare your instructions to the opposing parties, so that you can bring any differences to the trial court's attention during the charge conference. It is helpful to cross reference the instructions on your copy, or to create a chart that reflects your numbered instructions and how they correspond to the other side's instructions. Also, have written notes of your objections to the opposing party's instructions at the charge conference. Every appellate lawyer who has ever reviewed the cold record of a charge conference will tell you that the record is almost always confusing, with people interrupting each other, talking in shorthand, and referring to things that are never identified on the record. To avoid such confusion, follow these simple steps:

1. Create a chart that reflects your numbered instructions in one column and the other side's corresponding instruction in the next column.

2. Cross-reference your instruction to opposing counsel's instruction (i.e., note on your #3 instruction for legal cause that it is similar to opposing counsel's #7 instruction). That way it is easier to go back and forth between different sets of instructions.

3. Make notes of every objection right on the instruction. That way you will always have your objection handy, even if the judge is jumping around between instructions.

4. Cross-reference on opposing counsel's instructions why your instruction is different or better.

5. Make sure you have extra clean sets of unstapled instructions, so that you can merge your instructions with those of opposing counsel according to the court's rulings.

6. File your written objections and the final version of the instructions.

7. Do the same with the verdict forms.

See S. Walbolt & C. Alonso, "Jury Instructions: A Road Map for Trial Counsel," *Litigation*, Vol. 30, No.2 (Winter 2004).

During the Charge Conference

You have your instruction and arguments ready, but what should you expect at a charge conference? Some judges may not schedule charge conferences, and you may have to specifically ask for such a conference. If the judge refuses to hold a charge conference, object on the record. Also, *always* ensure that a court reporter is present whenever the instructions or verdict form are discussed. If discussions occur outside the court reporter's presence, be sure to state for the record what was argued and ruled on when the court reporter is present.

At the charge conference, do not be afraid to object and, where appropriate, to reject suggestions from the court that instructions have been agreed upon. A specific objection to the failure to give your requested instruction may be required to preserve an issue for appellate

review. Likewise, an objection to the other party's requested instruction may not suffice, and you may be required to request a correct instruction. Make sure you know the requirements for preserving these issues in your jurisdiction before you go to the charge conference. At a minimum, the objections must be specific enough to raise the points you would want to assert on appeal. See *Voohries-Larson v. Cessna Aircraft Co.*, 241 F.3d 707, 713 (9th Cir. 2001) ("Objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error."). For example, if you believe a requested instruction does not correctly state the law, you need to explain why. Also, be sure that you explain to the court on the record how the language of the other side's requested instruction is either legally inaccurate or not supported by the evidence.

Object to instructions that are confusing or misleading when considered in light of other instructions, the facts of the case, or the verdict form. Also, object to instructions that use words that are too legalistic for a lay person to understand.

What do you do when the court has overruled your objection and you now want to modify the instruction? First, you must be clear that you are only suggesting such "alternative" instructions or modifications in light of the trial court's rulings, which you object to, and that even the giving of this modified or alternate instruction will not cure the prejudicial harm from that ruling. Sometimes proposing a new instruction or the modification of an instruction reads on the transcript like you are agreeing that this resolves the objection you originally raised. This is because the trial court is trying to get agreement on the instructions. Do not hesitate to advocate for your requested instructions, without compromise. Making it clear that an alternate or modified instruction is not enough to correctly charge the jury on the point should allow you to balance your desire to get the best instruction against your desire to preserve the record for appeal.

Be sure the record reflects that the trial court ruled on all of your instructions, what all the rulings are, and any reasons given for granting or denying a requested instruction. You must be sure that the instruction is identified on the record, by page or by number. Sometimes instructions may not be considered in the order they are requested. Do not forget to return to instructions that were left for later consideration. It helps to place a check at the top corner of each instruction when it is ruled upon and to tab with a sticky flag those that have not been ruled upon. This allows you to flip through each page quickly to ensure you have a ruling on each instruction. It is also helpful to bring a laptop to court so that you can modify instructions in court and provide a copy to the court and parties immediately.

The Verdict Form

The verdict form should go hand-in-hand with your instructions. There are important strategic and legal issues you must consider when drafting the verdict form. First, consider whether the "two-issue rule" applies to your claims or defenses in your jurisdiction, so that questions are requested that will preserve your points for appeal. Under the two-issue rule, an appellant cannot show reversible error when an error relates to one claim or defense, but the verdict does not reveal whether the appellee prevailed on that basis or on another not affected by the error. See, e.g., *Colonial Stores, Inc. v. Scarbrough*, 355 So. 2d 1181 (Fla. 1977) (appellate court will not grant a new trial where the jury has rendered a general verdict and the appellate court finds

no error as to one of the theories on which the jury is instructed and could have based its verdict).

Next, consider the number of questions you want to ask on the verdict form. The more questions the jury is asked, the more opportunities it has to deny liability. (Frequently, answering "no" to any question on liability will result in a defense verdict.) On the other hand, the more questions the jury is asked, the more opportunities it has to make mistakes and reach an inconsistent verdict. Just as you did with the jury instructions, file with the court a copy of your requested verdict form and that of other parties.

Lastly, at the conclusion of the charge conference and again before the jury deliberates, be sure to renew your objections to the instructions and verdict form as given to the extent they deviate from what you requested. *Never preface your objection by saying it is merely "for the record."* It is not. It is an effort to provide the jury with correct instructions and a proper verdict form. Ask the court to

confirm that your objections are preserved through the end of trial, and need not be repeated after the charges are given to the jury, if that is sufficient in your jurisdiction. Absent such a ruling, ask for a side bar either immediately before or after the charges are given and before the jury deliberates and again state your objections on the record.

The Court's Reading of the Instructions to the Jury

Once the instructions and verdict form are finalized, try, if at all possible, to read them in their entirety before they are read to the jury. When the court reads the instructions to the jury, listen and compare them to the instructions the court agreed to give. Make sure they are the same as any written instructions that will be submitted to the jury. If there is any difference between the two, the oral instructions will likely control on appeal.

If there is an error, ask the judge to correct the oral instruction and specifically advise the jury that its initial instruction was given in error. Consider whether a motion for a mistrial is warranted. If you do not move for a mistrial, and the jury is told the instruction was incorrectly given and should be disregarded, the issue may be waived.

Drafting jury instructions and a verdict form can be challenging, but preparing ahead of time and staying organized will make the process smoother. Start thinking about the jury instructions and verdict form early on and well before the trial starts. Continue thinking about them and modifying them in light of the court's rulings and evidence adduced at trial. Do not forget to ensure that all instructions are filed and the record is complete.

E. What are Jurors Thinking?

One of the easiest ways to learn what your jurors are thinking is by letting them ask questions during trial. By listening to the questions, they pose, you can quickly decide whether you need to clarify a witness's testimony, whether you pursue a line of questioning, or whether

you should back away from an impeachment topic. By letting jurors ask questions, not only will you gain insight into what they're thinking, but you'll also gain a few additional benefits including better and more involved jurors and clarity.

F. Jury Surveys & Questionnaires:

1. Jury Questionnaires Jury questionnaires, which are used to gather information concerning jurors for use in jury selection, address a variety of aspects of the jurors' lives, including: Background characteristics:

(e.g., age, occupation, race, educational background, and marital status) General experiences (e.g., prior jury service, military service, hobbies, television viewing habits, and organizational membership) Case-related experiences (e.g., unsatisfactory experiences with doctors or other relevant entities, prior use of a party's product, being a victim of a relevant crime, and involvement in traffic accidents) Knowledge of the witnesses, attorneys, or parties (e.g., Do jurors know any of the individuals, parties, or entities connected to the case who are listed in the questionnaire?) Awareness of the case (e.g., How much have the jurors heard about the case and what do they recall?) Opinions (e.g., What are the jurors' opinions concerning "sting" operations, use of force by police, and various legal principles)

- Often, jurors complete these questionnaires when they arrive at court for the trial. In some cases, the questionnaires are sent along with the jurors' summonses for service and are completed and returned by mail.

- Condensing the Information
- One of the difficulties in using jury questionnaires, particularly lengthy ones, is that they can be bulky and awkward to use in court. This problem is heightened when the questioning of jurors occurs in a group setting where the attorney must examine several questionnaires at one time. The often-used strategy of employing "post-its" and/or highlighting markers to identify critical information often is defeated by markers falling off or notes overlooked in the process of shuffling papers. One way is the use of a juror summary form. A standardized form for recording desired information from the jury questionnaire. This form will usually be one or two pages in length, depending on the size and complexity of the jury questionnaire. The facing page illustrates part of a sample juror summary form for use with a jury questionnaire in an excessive force case. This juror summary form represents a checklist approach (with comments) to reducing information contained on a 15-page, 66-question jury questionnaire to one legal-size form.

G. Preemptory Challenges and Challenges for Cause

During the voir dire period, attorneys may challenge jurors for cause to get them dismissed from the pool. Jurors must have revealed a legal reason for disqualifying them from service to be dismissed by such a challenge. Once that period is over, though, the peremptory challenge period begins, During the phase:

- Either computer selection or qualified and trustworthy random drawing of names occurs to decide the order in which jurors will be presented.
- After the juror's name is presented, the prosecutor is asked what the state says. The responses are to excuse the juror, present the juror, or swear in the juror.
- If excused, jurors are seated at the back of the courtroom.
- Otherwise, the defense is asked the same question.
- The process is repeated until twelve jurors have been seated and sworn in, at which point jury selection has concluded.

Importance:

Since the jury is in charge of weighing the evidence and deciding the case, the selection of a fair and impartial one, is one of the most important factors. Anyone facing charges should have a firm understanding of how jurors work and why they are so important. If you ate in this situation, in addition to studying the details of jury selection, you should look for an experienced attorney who understands how to make the most of this process.

F. **Arguing Damages to the Jury**

1. Give a single, firm damage amount.

Many attorneys hold by the rule of asking for a single, firm amount regardless of the damages they're seeking. After all, you can find data to arguably support even the most difficult-to-measure claims. In this approach, it's especially important to use that data to lead your jury step-by-step to your final number.

2. Present a Detailed Range of Damages

Leading your jurors through a detailed range of damages provides them a clear path to calculate an award while giving them the flexibility to modify damages based on their view of the case. By detailing a range of damages, you can rely on hard numbers while insulating yourself from appearing to ask for too much.

3. Present a Damage Range as "Inspiration"

When a case presents unusual circumstances, the best approach may be to acknowledge the difficulty in calculating a damage award, and simply give the jury factors to consider. This tactic minimizes the risk of alienating your jury while still providing the groundwork to calculate an award.

How to Present You Civil Case at Trial

Submitted by Thomas M. Gagne

BUILDING LITIGATION SKILLS IN PI CASES: WOUND AND REDEMPTION THEMES, STRATEGIES AND OTHER ISSUES

By

Thomas Gagne, Esq.

For

The National Business Institute

Good morning. I'm Attorney Thomas Gagne. I'd like to thank the fine folks at NBI for making this CLE possible. I'm a Personal Injury Attorney with a practice in Greenville, South Carolina. I'm entering my twenty - seventh year as a trial attorney. This is my sixth CLE module.

This afternoon I'll be discussing a few litigation principles I've found helpful. During my career, I've prosecuted and defended hundreds of criminal and administrative cases as well as hundreds of personal injury cases.

I must cover several topics today, each of which could easily occupy the entire time allotted me. So, excuse me if I proceed with some haste. But that said, please feel free to ask a question at any point. I believe dialogical exchanges are more fruitful than pedagogical monologues, and your question is likely on the minds of other participants. And since you have a complete copy of my remarks, occasional colloquies should be no problem.

So, why study trial techniques, when the number of cases that make it to the trial decrease every year, when many commentators see ADR, even the discovery process as the new forum for dispute resolution? The short answer is: if you don't prepare your case as if it's going to trial, you're likely to miss a strength or weakness of your or your opponent's case, thereby handicapping your bargaining positions come negotiation time.

So, let's begin by exploring opening statements. For the sake of argument, let's assume we've already developed our legal and factual theories as well as our preliminary strategy.

What is a trial? A trial is an argument – an argument about which party's version of the law and facts makes the most sense, is the most emotionally compelling, and is the most equitable, or just. Therefore, argue. Novice attorneys tend to merely recap the testimony of their witnesses at closing. Which is fine. But you ultimately must move from what your evidence ***is*** to what your evidence ***shows***, what your evidence ***means***, and how your version of things is superior to your opponent's.

What we are talking about is rhetoric one of the oldest art forms to man. Western rhetoric emerged from the courts and political assemblies of antiquity. Lawyer were arguing contract, criminal and tort cases at least half a millennium before Christ. Aristotle holds that the best arguments are logical in form, graceful in delivery, and equitable in result. ***Logos. Ethos. Pathos.*** As your entire case executes these rhetorical principles, so should your opening. However, a legal argument is not a formal argument, the kind you may suffered through in high school debate, as I did. Surviving one's education with one's mind and personality intact is the first victory of a freethinker.

Lawyers deliver cases in the form of a story, or narrative, which is much more engaging and is why the novel stands at the pinnacle of literature next to poetry.

Now, a few remarks and ground rules before we begin our analysis.

At the simplest level, the opening is a summary of your case, cluing the jury in to who you and your client are, why you're at trial, what evidence is, what the procedure will be, the roles of the plaintiff, defendant, witnesses, judge and jury, and most importantly, what you want. The opening also should introduce the jury to the law of the case. No easy task as the law is ***terra incognita*** to most juror, despite what they believe. Feed the concepts to them in bite-sized chunks.

Still, this poses a challenge at times as some legal concepts are inherently confusing. What's the difference between likely and most likely? What is a reasonable degree of medical certainty? Doesn't certainty by definition exclude degree? The law is a fine tool. But like anything man made is imperfect, yet it is perfectible if you are careful, diligent, compassionate and patient.

Remember, you're a product of intense legal education. You probably have some litigation experience. But jurors are largely babes in the wood when it comes to law and medicine, and if the jury fails to grasp the ideas, you'll lose them, and you most certainly will pay the price.

As you compose your opening, avoid big words. The jurors probably don't have your degrees and may not understand complicated, technical jargon. Simple words are usually the best. Technical words do violence to your style and make you look pompous. This holds true for most writing, unless, I suppose, the writing is peer to peer.

The opening is your golden opportunity to begin selling your case, you client and yourself to the judge and jury. While the closing is concerned with arguing why your theory of the law and facts should prevail, by the time you get there the jury has probably already made up its mind. So the opening must not be merely a summary of what's to come but why your theory of the facts and law makes the most sense - considering the totality of the circumstances In other words, why your theory is the most credible.

But, you say, you're not supposed to argue in your opening statement, that the rules prohibit argument in the opening. Which makes absolutely no sense since, as I've noted, argument is the soul of litigation. If your opening is meant to summarize, the why exclude the main element? Especially if the judge knows pretty much what evidence will be offered which she can easily do in a pretrial conference. If anything inappropriate does get in, it can be cured. Moreover, it's obvious the opening is not the closing, but the jury should be familiar with each side's ***basic arguments*** going in. To proceed otherwise is like staging Hamlet without Hamlet.

But if you are artful enough, get to where the fight will be and occupy that ground in your opening. That point, the point at which the contending hypotheses collide is called, in the formal theory of argumentation, the stasis, to be differentiated from the same term used when discussing the story structure. ***The stasis usually involves the credibility of witnesses.*** Remember, the battle goes to the "firstest with the mostest." Which means you must ***cultivate your ability to anticipate*** how the contest will unfold. This may be your most important takeaway today. Think in terms of moves ahead, like a chess player.

Now, plaintiff's attorneys have the additional burden of overcoming juror bias against claimants and claimants' lawyers. To neutralize this bias, impress upon the jury that you are only seeking justice — a fair result. That whatever compensation the plaintiff may receive, t's just that — compensation, not profit. Your client is not looking for a payday. Show that the plaintiff is in the red entirely because of the negligence of the defendant, and all you are trying to is return her to the ***status quo ante*** – but don't use the term.

Also, do not personally attack the defendant, especially during cross. Just be business like. Neutral. While other parts of the process demand some degree of "passion", your relationship with the defendant is cool, matter of fact, business like, or you'll run the risk of alienating the jury.

Another thing, you want to create ***empathy*** for your client, ***not sympathy***. As you work with the plaintiff before trial, stress the importance of her not breaking down on the stand. Nothing turns a jury off like a blubbering witness, or its corollary, belly - aching. Life sucks for everyone, occasionally. As she relates the hardships she's endured since the accident, she must relate them in an emotionally neutral way. Steer clear from phrases like "I'm sick and tired of being sick and tired."

Moreover, write out your opening statement. In fact, write out your entire case. The sheer act of writing will unearth elements of your case you might otherwise have overlooked. And while you should write it, don't read it to the jury. Use an outline if you must, but your delivery must be unrehearsed, authentic, and heartfelt.

The next thing I'd like to mention about the opening statement is to hit the damages portion of your case hard. In fact, two thirds of your case should concern damages. Damages is plaintiff's ground. Causation belongs to the defense, and liability should have

been settled before trial. If liability is still an outstanding issue by trial time, seriously consider settling. Fighting liability and proximate causation is a tall order.

Lastly, unless the circumstances absolutely demand it, do not waive your right to an opening statement. It's tantamount to giving a competitor in a footrace a fifty meter head start. You'll be playing catch up for the balance of the race.

So, that said, let's turn to the opening's structure. I've mentioned the classical framework of argumentation. And that the opening should be a "story" introducing the larger "story" of your case. Most trial handbooks will tell you that the opening statement functions as a roadmap for the jury. This is true -- as far it goes. But if you take a closer look at the opening, a far more interesting structure emerges as you delve into the elements of the opening and narrative structure.

Figure one imagines the opening as a set of concentric circles. The outermost circle is the story of your case, and I'll talk about the story elements in depth as we proceed. The next ring is the theme, a nice slogan encapsulating your story. Then the encapsulation itself – an opening for the opening if you will. In other words, if the opening is an introduction to the case, the encapsulation is the introduction to your introduction. The next ring is your legal/ factual theory. I don't' separate the two as these are, by nature of syllogism, intertwined. And lastly, the prayer -- what you're seeking by way of compensation – the whole point of your being there.

This Venn - like diagram is a bit misleading as these elements are actually one line of action interweaving and supporting one another, delivered in a polished, integrated whole. That's the problem with analysis. Once you dissect the butterfly, you kill it.

What does a polished, integrated whole mean? It means writing it out, revising, revising, revising. Planning your language down to its barest essentials, until the fine grain emerges. And if your language is not fluent, don't despair, at least its efficient. Don't make the mistake many lawyers make when they talk – that more is more.

The story. This is where the English majors out there get excited. There's a scene in the movie *Amistad* where John Quincy Adams, played by Anthony Hopkins, shares a bit of wisdom about trials. He said that the side with the best story usually wins. I can see this. If you bore the jury, or worse, alienate them with a dry recitation of the law and facts, they will certainly penalize you. But if you tell them a story, you're comforting them. A story is something that they recognize. All of us have been steeped in narrative since the crib. You can say narrative is hardwired in our DNA.

And what is the essence of narrative? Every narrative involves ***a quest***. The *Odyssey* — Ulysses' quest for home. *Moby Dick* — Ahab's quest for vengeance. Even contemporary pieces like *Waiting for Godot*, where there is no plot, no setting, minimal characterization, none of the conventional architecture of a story except for a quest – a quest for meaning.

You can see how easily this applies to a trial. For what is a civil trial if not a quest for compensation? My point is you can use "a quest" as a universal theme if a more particular theme doesn't suggest itself. In particular, your theme might be a quest to overcome adversity. The advantage of this theme is you can then implicitly enlist the jury in your quest. How? By the structure of the story itself. Allow me to explain.

Return to your eighth grade English class and remember the fundamental elements of a story: stasis, conflict, complication, climax and dénouement. Except the teacher discretely omitted that the fundamental structure of a story mimics *coitus* – conflict (contact), complication (arousal and tension), climax (the word speaks for itself) and dénouement (cigarettes). So when I said that stories are hardwired, I meant hardwired.

But stories operate on more than a primitive level. A story is the best way to communicate information, if only because a good story naturally retains our interest. Why does this happen? Why is ***The Catcher in the Rye*** such a perennially popular novel? We don't know too many Holden Caulfields, and I'll wager that if we did we'd steer clear of them. Nevertheless, Holden's struggle is, in many ways, *our* struggle, *and our* interior struggle to survive in a society populated by shallow, ill-intentioned, inauthentic personalities. Complications, or adversity, can be interior or exterior, usually both. As such we empathize with the character. We share in his struggle, we identify with him (hey, the author is talking about me!) And thus we pay closer attention to the protagonist's plight and hence his story.

This is why you don't want your client to appear pathetic. We all struggle. And we turn a cold eye to whiners. What people really want to know, and what they respect and can become engaged in is — what do we make of the struggle? Does it destroy us, or do we overcome?

Of course, it's probably safe to say that most people prefer happy endings. So the story is a story of overcoming. Deep down, the audience wants the protagonist to suffer, so that the tormented protagonist ***learns something*** in the process. There must be a point to suffering. The story becomes a didactic enterprise. A cursory examination of religious and secular thought bears this out.

Take Buddhism: compulsive study and contemplation of suffering liberates our souls. Or the Muslim view: suffering is our fault, a result of sin, which prompts us to pursue more virtuous lives. And then there's the Christian perspective where Christ's wounds signify no less than the wholesale redemption of mankind.

Secular thought also eschews pointless suffering. Consider John Keats, the famous 19th century English Romantic poet, and his rhetorical question: "Do you not see how necessary a world of pains and troubles is to school an intelligence and make it a soul?" And then there's Nietzsche's charming Teutonic version: "That which does not kill you makes you stronger."

The question, “is suffering for naught?” is an opportunity for the plaintiff to engage the jury on a deeply psychological level. How? By answering this question with a resounding “of course not.”

Therefore, consider constructing your case within the context of, say, personal growth. Show the jury how your client’s injur(ies) revealed strengths she never knew she had, or how adversity honed her appreciation of life. Showcase her indomitable spirit. Not only will her ordeals lens meaning to her suffering, and by extension “suffering” in general, the jury will respect her fortitude and make it more likely they’ll “reward” her. The opening then becomes more than a mere “road map” or summary of your case-in-chief. It sets the stage for compelling human drama, transforming a workmanlike narrative into a poignant story of courage.

Let me share with you a workers’ compensation case history that illustrates what I’m banging on about. The theme of the case is “Ride the Bull.” Matt, a sheet metal mechanic, injured his spine arising out of and in the course of his employment with an aircraft manufacturer. An MRI ultimately disclosed that Matt suffered a herniated disc at L4-L5. He reported the injury to his supervisor, who failed to make out a report or refer him to a doctor. In pain, Matt referred himself to a chiropractor.

On the intake form, Matt checked the box indicating that his injury was not work related. He even stated that he injured his back at home a few days earlier while working on his boat. This is not unusual. Upon realizing that it might jeopardize their jobs, many claimants fail to claim their injury is work related, only to seek legal counsel later on when circumstances are no longer tolerable. However, such prior action usually handicaps their case. Factfinders show little patience for witnesses who lie, regardless of the circumstances.

As I examined Matt, he mentioned that his co-workers often horseplayed with him in a particular way. They would jump on his back and cry “ride the bull!” Now, Matt was overweight, and as many people in that predicament can attest, they are often the butt of jokes or rude behavior. On top of that there’s something about a group of men horse-playing with a fellow that’s supposed to make the object of the horseplay believe he’s “one of the gang.” Feeling that we belong to a group is perhaps the single greatest psychological motivator there is. It stems, of course, from ancient survival instincts. Tribal exclusion almost certainly meant death.

Matt’s experience, however, exceeded good - natured kidding around. Worse, according to uncontroverted testimony, management was aware of this “horseplay” and turned a blind eye.

Accordingly, I shifted strategy from an “apology” for inconsistent notice (a weak, defensive stance) to attacking the employer’s egregious behavior for allowing these

assaults to continue unabated. I largely ignored the inconsistent behavior and argued that the “ride the bull” episodes accounted for his back injury.

But I didn’t leave it there. Why was he picked on? Matt is an average fellow. Competent, not an overachiever. Overweight. On the short side. Had a hard time getting dates. Never really fit in at school or later with the gang at work. But he struck me as a sincere and kind individual. When his co-workers “rode him,” he misinterpreted it as the kind of horseplay that binds male groups. Matt thought he had achieved the social acceptance he had silently yearned for. This accounts for why he didn’t want to rock the boat by reporting the incidents.

But the cruel reality was that the guys were just getting their jollies. In fact, until discovery, Matt was unaware that they never invited him out for beers after work, or otherwise included him in other reindeer games. Despite what he thought, he was never really a member of the tribe. When he learned the score, he thanked me, and seemed a more mature person for the experience.

In telling Matt’s story, my goal was not to evoke sympathy for him, although I’m sure it generated some. Rather, I wanted his story to be full blooded. As far as story line is concerned, there’s little that’s new under the sun. But if you dig, you’ll find a unique angle to your client’s tale that makes it real.

Of course, you don’t want to give the impression from all this that your client’s injury was a blessing in disguise, or some such nonsense. Getting hurt in an accident if never a good thing. But if someone is injured, she must play the cards dealt. Help your client play them in the best possible way. Convey your client’s fortitude in the face of adversity. The jury will respect this.

Remember, as a plaintiff’s attorney, your strategy is to 1.) Play your opponent 2.) All else being equal, play the damages 3.) Stay on the attack, even in defense — keep her on her heels 4.) Cases boil down to credibility 5.) Find your own unique voice to deliver your client’s story.

Ok, I want shift to a discussion of cross examination. If you haven’t tried many cases, most of what you know probably comes from studying for the bar. You’ve learned a lot of techniques but not how to use them.

As you investigate the facts of your case and develop your factual and legal theory you should be developing a strategy of attack and defense. This strategy, which includes everything we’ve discussed so far as well as who, what, how, and at what point you plan to cross, requires you to know as much as possible about your case and about your opponent’s case. That is, you must ***build a context*** from which to deploy your litigation weapons, especially cross examination.

What are the strengths and weaknesses of your respective cases? Where is your opponent's case Achilles's heel(s)? If it has only one weak point, attack there. If several, concentrate your attack on the weakest. Don't dissipate your force. **Concentration of attack is key.** And when you breach her case, don't give her the opportunity to regroup and establish the initiative. Maintain the momentum of ***your*** argument.

A few do's and don'ts. Don't cross a witness unless you have to in order to maintain the integrity of your strategy. If the witness' testimony does not weaken your case or strategy, leave it. Never cross for the sake of crossing.

If a witness helps, or at least doesn't harm your legal/factual theory, why cross him on the basis of his, say, criminal record? It's counterproductive, wastes time, confuses the issues, and runs the risk of accidentally eliciting harmful information. That's probably the best piece of advice about cross examination that I can give you today.

Settle on a factual and legal theory, theme and trial strategy and stick to it. Don't be diverted. If your opponent throws a red ball, don't feel compelled to chase it. On the other hand, throw red balls to confuse and divert your opponent, her time and energy.

Cross techniques. The simplest solution is usually the best and ironically the first to be overlooked. Everyone wants to be novel. Call it ***avant-gardism***. But just as in sports, it's always wise to stick to the fundamentals. So question a witness on the details of her assertions, not at trial, mind you, but at the deposition.

Never ask a question at trial unless you already know the answer. Sooner or later, if she's lying, she'll fabricate a detail that wrecks her story, *that just cannot be*.

Don't corner her in the deposition though. Save it for trial. Remember, to tell a good lie, you have to be really smart, and most witnesses are not that smart. Also, remember that the truth is usually simple. You can easily tell a lie by its baroqueness.

As far as specific techniques are concerned, one of the most effective cross examination techniques is to attack the witness' ***actus reus***. We are used to seeing witnesses crossed with their depos or some other pre-existing statement. This is fine, but actions speak louder than words.

When I cross, I begin by determining if I need to cross at all. If so, I begin by eliciting all the favorable evidence I can from the witness, and then I attack inconsistent actions, and only then do I attack previous inconsistent statements. I have always found that attacking a witness' previous inconsistent conduct, as well as post inconsistent conduct, is extremely effective.

Another effective technique is to elicit testimony in conflict with another opponent's witness' testimony. You cannot "pit" witnesses' testimony, but you can certainly argue the inconsistency in closing.

Also don't waste time bringing up things like the expert is paid, (so is yours), or that the defendant was arrested for a bounced check 9 years ago. It's weak.

Also very effective — revealing a witness' basis, or lack thereof, of knowledge. More often than not it's hearsay or supposition or assumption. And if the basis of the witness' knowledge is, in fact, empirical, test the witness' opportunity to observe or hear as well as the quality of her sense organs. See if her drivers' license requires her to wear corrective lenses.

Also, since many statements are susceptible to multiple interpretations, don't allow a witness to get away with mushy language. Hold their feet to the fire by insisting they testify in simple, concrete language. Make her specify, specify, specify.
Deconstructionists (the French) hold that language (and its meaning) is inherently unreliable.
Rubbish. English is a marvelous tool -- surgical in its precision. People are mushy, not language.

Once you finish your cross, sit down. Do not extemporize unless your back is against the wall. You should know all the questions you plan to ask as well as the answers.

Don't break the cardinal rules of cross - - never ask a question you don't know the answer to, and never ask a question that gives the witness free rein, i.e., open ended questions.

Also, don't lose heart if you're not very good at any of this in the beginning. I certainly wasn't. And I'm learning all the time. Cross is not a natural or polite way to interact with others. Actually, it's quite rude. But you're not at a tea party. Just keep plugging away, and one day you'll be in the middle of a trial, and while hardly realizing it, you're doing very well, and you'll say to yourself – hey, I've got this.

Ok. Let's pivot a bit and talk about direct examination. The watchwords for direct exams are thoroughness and preparation. Make sure you know the legal elements of your claim, the caselaw, as well as the facts. Concentrate first on making a ***prima fascia*** case. Keep it simple. The more your witness talks, the more issues are introduced, the more she opens herself up to attack. Make your ***prima fascia case*** and follow up with a few pieces of choice evidence that anticipates and counters the defense strategy. Prepare your witnesses thoroughly, especially for cross. Thoroughness and less is more when it comes to direct.

Also, understand that most witnesses ramble, including experts. They're unable to come to the point quickly or stay on topic. The remedy is to practice with, and don't shy from employing tough love. Let them in on exactly what's going on, your strategy, the legal issues involved, her role, what you are trying to prove with her testimony and why. Clue

her in on the big picture. Dig. Educate. Rehearse. Repeat. The key to learning is repetition.

Also -- make sure that your witnesses are in synch with each other's testimony and your theory. Nothing is as gut wrenching as your own witnesses contradicting each other. You want to blame the witness for her stupidity. Wrong. It's your stupidity. Every witness can be trained. Moreover, internal contradictions reflect poorly on you as a trial lawyer. Your credibility is also on trial.

As far as the quantity of your witnesses is concerned, first, less is more. I'd rather have two or three high – quality, credible witnesses than five or six moderately credible witnesses. Be careful. Every witness is a time bomb, ready to blow up your case by one careless remark.

The more witnesses you have, the greater the chance of this happening. Credible, smart witnesses trump quantity every time.

Doctors and cops present a special problem. I've had them flip on me at trial. So consider deposing them to lock them into their testimony. If your witness flips, inform the court and move to treat her as a hostile. If your motion is granted, you can cross her using the depo. It's not elegant, and it's embarrassing, and probably fatal to your case, but you can still see daylight. Which means you better have some substitute witness you can call, or substitute evidence to admit to make your ***prima fascia*** case. Bottom line: be careful with doctors and cops. Most are fine. Some have their own agendas which may not match yours.

Ok. Let's move on to ***Daubert***, or the admissibility of expert evidence. Since we are discussing personal injury cases, I'm a personal injury cases, I'll discuss ***Daubert*** in that context. Recall from your study of constitutional law that cases such as ***Daubert*** establish *minimum* standards of admissibility binding on lower courts. South Carolina's Rule of Evidence 702 mirrors the federal standard.

The challenge of admitting expert evidence may be broken down into three categories. Qualifying the expert, establishing the validity of the general theory upon which the expert relies, and establishing the factual basis of the expert's opinions.

As far as qualifying the expert, record her degrees, whether she has had any specialized training in the field, if she has published, any professional associations she belongs to and if she has previously testified as an expert.

This last prong is a two - edged sword as an expert may be cross examined on the fact she's a "professional witness", i.e., she's only available for expert testimony. Also, an expert's credibility is vulnerable if she's strictly a plaintiff's or defendant's witness. You need to unearth this information before you retain her. Demand she furnish her CV which must include her forensic history. Try to use an expert one who's testified for both sides.

If your expert is a doctor, it's better if she's board certified. And make sure you get the right kind of expert in professional negligence cases.

If a suit, say, involves podiatrist malpractice, don't call an orthopedist as your expert -- you must establish the standard of care for the specific kind of medicine involved, here, the duty of a podiatrist, which is a different duty than that of an orthopedist. Your expert must also establish if that duty was beached, and if that breach proximately caused your client's damages.

Furthermore, the standard of care may differ from region to region. A Manhattan podiatrist may have a higher duty of care than one, say, from Appalachia.

Regarding the general theory the expert relies on, the elements are: that the expert used a particular theory to evaluate facts, that the theory has been experimentally verified, and that the theory is generally accepted in the particular field.

In PI practice, the expert physician may base his opinion on a personal examination of the plaintiff, or upon medical records. I strongly recommend the former: where and when the examination took place, who was present, how the examination was conducted, and of the expert's conclusions.

Frankly, I can't recall an incident when I've had a problem admitting an expert or her testimony. Just make certain you establish on record the foundation for her opinion, that she is definitely on your side, and that her testimony is compatible with other evidence in your case.

You can shortcut the process a bit by requesting that counsel stipulate to your experts' qualifications. That way you can proceed right into the substance. That's what I generally do. For tactical reasons, however, you may not want to do this if you want to impress upon the jury just what a hotshot your expert is.

Impressive credentials include board certification, published work in recognizable periodicals, like ***The New England Journal of Medicine,*** a teaching position at a top university, and other honors and awards of generally agreed upon weight.

Opposing counsel will make an ***ad hominem*** attack on your expert or contest the facts upon which your expert bases her opinion, or both. In the case of expert doctors, make certain she has a thorough knowledge of your client's medical history.

Don't depend on the client for an accurate history. Get the records yourself and make sure your entire team — lawyers, paralegals, as well as your client and other witnesses know claimant's past and current medical history.

Your expert should be able to effortlessly recite the claimant's symptoms, tests conducted and their findings, previous assessments or diagnoses, and the course of treatment you client has undergone — drugs, surgery, PT etc. You don't want your physician to be unaware of an important fact in your client's medical history, such as a history of hypertension, or a previous disorder or injury to the same body part. It could sink your whole case.

The credibility of your expert is usually a fulcrum point in your case. I am constantly amazed by doctors who have to rifle through records to answer simple questions at a deposition. I'm even more gob smacked when the doctor happens to be the treating physician.

The bottom line is: never let your expert - physician appear ignorant, disorganized or unprepared on the stand. Insist on preparation. Make sure she uses simple language, easily understood by laypersons and is unambivalent in her opinions. Don't buy the excuse she's too busy to prep or that "she's got it." In the litigation context, this is *hubris* of the most disturbing kind.

One more point. Pay your expert on time, even early. She is an important ally, critical in the construction of your case-in-chief as well as your cross of the opposing expert. Make her happy.

Now, as I was thinking about this CLE, I couldn't avoid the question — what wins trials? Understand that there is no magic bullet. Preparation? No, that's no guarantee. Preparation is necessary, but not sufficient. Superior speaking skills? Talented jury selection? Good witnesses? Yes. Yes. And yes. All necessary, yet all insufficient.

I will say that many trials usually boil down to witness credibility. Does the jury believe, and like, your witnesses more than your opponents? If so, you're on your way to winning.

I believe the answer is to keep in mind that trials are won "point by point," in a process of ***evidentiary accretion***. This, in addition to making fewer mistakes than your opponent goes a long way to prevailing. To illustrate, let me share with you a couple of war stories. The first is a DUI trial that shows success at trial is sometimes just weird luck.

I was the defense attorney. A witness appears during trial and asks the prosecutor if he could testify. It was a military case, and the witness was in the defendants' chain of command — one of his superiors. The prosecutor assumed he would testify for the government. On the other hand, I hadn't the slightest idea what the witness would say. Consequently, I vehemently objected to his testifying arguing that I had received not one shred of notice.

The prosecutor really wanted this witness to testify arguing that she also had received no notice. But I thought the prosecution was pulling a fast one. I stood there stunned, apoplectic, as the judge admitted his testimony.
The government directed him, and to everyone's surprise, he testified that he had observed defendant half an hour before his arrest and that he had appeared quite sober. That was it for the prosecution. My client was acquitted. As much as I had prepared for the trial — and I was prepared — there was no way I could have foreseen this turn of events. I wondered how much of what I had done really mattered.

Sometimes the outcome depends on what appears at first to be marginal evidence. In another criminal matter, I was prosecuting a strong arm robbery in which the issue was identification. The responding officer had failed to arrest the defendant while he was in hot pursuit, but not before noting that the defendant sported a bite mark on his left arm.

Since my witness was not a doctor, I doubted his opinion about the nature of the mark would survive a motion to strike. During prep, I thought this detail too weak to hit hard, but it came out trial nevertheless.
Under cross, defense counsel breached a fundamental rule - never ask a question unless you know it's answer. Defense counsel asked him how he knew it was a bite mark. He stated he had a similar scar on his arm courtesy of his three-year-old daughter.

The trial had been a draw up until that point. But as the responding officer uttered these words, you could feel the momentum of the case shift to the prosecution. It was not a detail that I had failed to unearth, but I erred in failing to follow through examination — a mistake which, again by sheer luck, nevertheless worked to my advantage.

Instead of summarily dismissing the bite mark as inadmissible, I should have at least tried to get it in and risk suppression instead of not developing a potentially compelling piece of evidence. Moral of the story: in general, if the evidence is "iffy," don't automatically write it off. Keep investigating until you ***are certain*** of its probable effect.

The other point of this case is that trials can turn on a dime. Chess is a good example of this principle.

Depending on the configuration of the board, a pawn, nominally the least valuable piece on the board, can, depending on the big picture, morph into a piece dearer than your queen.

The inherent unpredictability of litigation combined with inevitability of human error turns litigation into what I frequently refer to as "a wild west show." It makes it fun for someone like me who enjoys the action, but negotiated settlement is usually the saner alternative.

Thank you for your kind attention, and good hunting!
TMG JULY 2018

How to Avoid Ethical Pitfalls

Submitted by Reginald W. Belcher

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How to Avoid Ethical Pitfalls in the Legal Profession

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TOPICS

- Handling Highly Prejudicial Evidence
- Handling Questions of Jurors During *Voir Dire*
- Talking to Witnesses Before They Testify
- Identifying and Avoiding Conflicts of Interest
- Social Media: How to Avoid Sanctions

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Handling Highly Prejudicial Evidence

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Rule 403

- Under the Federal Rules of Evidence (and many state evidence laws) courts may exclude evidence if its probative value is substantially outweighed by unfair prejudice.
  - SC Rule 403 is identical
- Evidence that provokes powerful emotional response, offensive, graphic, overwhelming, or outrageous.

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MRPC: Rule 3.4

- A lawyer shall not:
- (a) unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists

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MRPC: Rule 3.4

- (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
- (1) the person is a relative or an employee or other agent of a client; and
- (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information

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MRPC: Rule 3.4 Comments

- Documents and other items of evidence are often essential to establish a claim or defense.
- The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed.
- Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen.

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Additional Reminders

- The attorney must comply with the rule of sequestration if it has been invoked.
- An attorney must be particularly mindful of the rule of sequestration and the requirements against witness tampering when speaking with a witness during breaks or recesses while the witness's testimony is ongoing.

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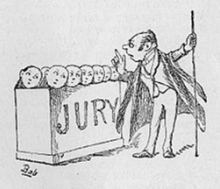
Handling Questions of Jurors During Voir Dire



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Voir Dire

- Objectives:
  - eliciting information from jurors
  - developing rapport with jurors
  - educating jurors on key concepts
  - persuade jurors to view the case from their perspective

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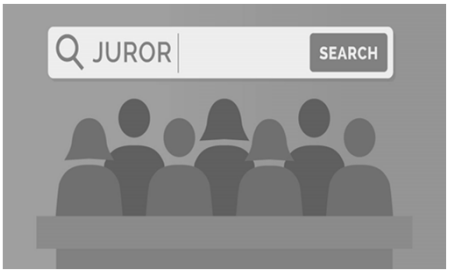
Ethics in Jury Selection

- What information is available?
- How far can we go to find it?
- When does investigation constitute improper contact with juror?



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MRPC Rule 3.5: Impartiality and Decorum of The Tribunal

- Model Rule 3.5 forbids an attorney from seeking to influence members of the jury by means prohibited by law
- This rule also forbids attorneys from communicating *ex parte* with jurors during the proceedings

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MRPC Rule 3.5: Impartiality and Decorum of The Tribunal

- This rule extends to the realm of social media.
- It ethically permissible for attorneys to research potential jurors online, however this only extends to what is publicly available.
- You cannot send a friend request to potential jurors whose accounts are set to private, for the purpose of gaining access to their private pages.

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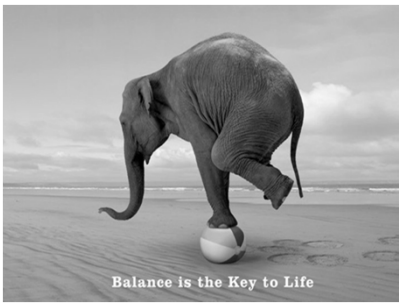
MRPC Rule1.3

- Under this rule, attorneys are required to advance every reasonable effort on behalf of their client, and serve as a "zealous" advocate.
- However it is important to balance this rule with the duty of candor towards the tribunals that is also required by these rules.



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Duty of Candor Towards The Court

- Courts may restrict certain questions that may be asked of jurors.
- But there may come a time during voir dire that an attorney feels that the door has been opened to a certain restricted question.
- Better for an attorney to ask to approach the bench, to discuss the question with the judge, rather than proceedings with the question that may still be prohibited.

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Relationships with Jurors

- Failing to disclose a relationship with a potential juror can be troublesome
- This should be addressed either immediately with the judge, or through the questioning with the potential juror, by recognizing the relationship and simply asking the potential juror if they believe existence of this relationship will have an affect on their judgement in the particular case.

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Talking to Witnesses Before They Testify

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Coaching a Witness

- Improper coaching could lead to ethical misconduct
- Failure to prepare a witness for testimony could be considered malpractice
- But coaching is essential

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Competency

- MRPC Rule 1.1 requires "competent handling" of a client's problem.
- Thus, no lawyer should present a witness in any capacity, whether that be at a deposition or trial, without first knowing the content of the witness's testimony.

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MRPC Rules to be Aware of

- **MRPC Rule 3.3(a)(3):** which provides that a lawyer shall not knowingly "offer evidence that the lawyer knows to be false."
- **MRPC Rule 3.4(b):** which provides that a lawyer shall not "counsel or asset a witness to testify falsely."
- **MRPC Rule 8.4:** which provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation; or engage in conduct that is prejudicial to the administration of justice."

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Inappropriate Witness Coaching

- This arises in several scenarios such as the following:
  - Knowingly inducing the witness to testify to something that the attorney knows is false
  - Covertly inducing the witness to testify to something that the lawyer knows is false

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Witness preparation

- Immediately insist that the witness be completely honest.
- If the witness insists on lying under oath, then attempt to persuade the witness otherwise.

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What to Discuss With a Witness:

- The witness's experience and comfortability in a court room.
- The ultimate goal that you are trying to achieve
- Your role as the attorney
- Who you represent

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What to discuss with a witness

- Their role as the witness
- Courtroom demeanor
- Their recollection and probable testimony
- Other witness testimony, and how it may effect their own testimony
- The applicable law surrounding the events

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What to discuss with a witness:

- Body Language
- Documents and other physical evidence
- Probable lines of cross-examination
- Practicing testimony, and suggesting word choice.

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Identifying and Avoiding Conflicts of Interest

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RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

- A concurrent conflict of interest exists if:
  - (1) the representation of one client will be directly adverse to another client; or
  - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- A lawyer may represent a client if:
  - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
  - (2) the representation is not prohibited by law;
  - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
  - (4) each affected client gives informed consent, confirmed in writing.

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RULE 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS

- (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
  - (1) the client gives informed consent;
  - (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
  - (3) information relating to representation of a client is protected as required by Rule 1.6.

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RULE 1.9: DUTIES TO FORMER CLIENTS

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
- (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
  - (1) whose interests are materially adverse to that person; and
  - (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

  unless the former client gives informed consent, confirmed in writing.
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
  - (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
  - (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

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- The comments to MRPC Rule 1.7 provides a 4 step analysis to resolve conflicts of interest:
  - 1. clearly identify the client(s)
  - 2. Determine whether a conflict of interest exists
  - 3. Decide whether representation may be undertaken despite the conflict; and, if so,
  - 4. Consult with the affected clients and obtain informed consent

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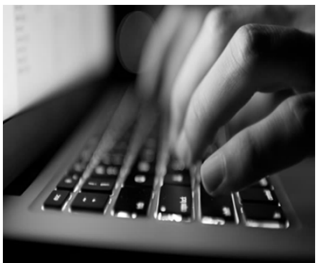
CONFLICT CHECKS



- Effective for attorneys to implement a conflict checking system within their firm
- Only as good as the information that is inputted
- Attorneys must be thorough with the amount of information they input into the program

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Social Media: How to Avoid Sanctions

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Statistics

- Global average penetration rate stood at 37 percent in 2017
  - US social network penetration rate was at around 66 percent
- US- 81 percent of population had a social media profile. This means that there were around 207 million social network users in the country in 2016.
- By 2021, the number of social network users in the United States is forecast to jump to approximately 217 million.

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MRPC: Rule 1.1

- Comment 8 to rule 1.1 requires lawyers to "keep abreast of changes in the law and practice, including the benefits and risks associated with relevant technology.
- States have begun to recognize that comment 8 extends this competency requirement to the realm of social media as well.
- Some states have even gone as far to say that attorneys cannot be sufficiently competent without a working knowledge of the benefits and risks associated with the use of social media.

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MRPC Rule 1.3

- Rule 1.3 provides that an attorney shall act with reasonable diligence and promptness in representing a client.
- May require social media be used in various aspects of an attorney's representation of client, such as screening the client's or opposing party's social media account.

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Disclosing Confidential Information

- Attorney utilizing social media run the risk of disclosing confidential information.
- MRPC Rule 1.6 requires lawyers to maintain confidential information relating to their representation of a client, absent consent to disclose, or implied authorization.
- Need to proceed with caution when posting on social media, blogs, or forums.

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Supervision

- MRPS Rules 5.1 – 5.3 impose on attorneys the duty to supervise over subordinate attorneys and staff.
- This ethical duty covers conduct such as instructing employees to send “friend requests” to witness and parties under false pretenses in order to access nonpublic social media pages.

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Advertising on Social Media

- MRPC Rule 7.2 governs an attorney’s ability to advertise their services, and includes public media.
- There have been instances where Courts have found that unsolicited invitation sent directly from one social media site to a third party to view an attorney’s page would constitute a violation of the rule.

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Misrepresentation

- Pursuant to MRPC Rule 7.1 a lawyer shall not make false or misleading communication about themselves or their service.
- Posts may result in ethical violations for false or misleading communications.

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Misrepresentation

- The South Carolina Bar Association prohibits testimonials and ordinarily prohibits client endorsements especially when they may create unjustified expectations.
- Unsubstantiated comparison of a lawyer's services or fees with the services or fees of another lawyer may be misleading

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SC Advisory Opinion

- Ethics Advisory Committee offered opinion on companies who provide information about attorney's nationwide
- Lawyers don't actively sign up
- Think Avvo.com

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SC Advisory Opinion

- Lawyer may claim the website listing, but all the information contained are subject to the Rules of Ethics once the website is claimed.
  - Communication, advertising
  - Includes peer endorsements, client reviews, and the website's rating of the attorney
- Lawyer may invite peers to rate the lawyer and invite and allow posting of peer and client comments, but comments are governed by Rules of Ethics and Lawyer is responsible for the content.

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Civility

- South Carolina lawyer's must act civil
- Rule 402:
  - To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications
- Caution when posting about other lawyers and in your responses to antagonizing posts

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