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Civil Trial From Start to Finish

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Jury Analysis and Selection – Choose the Rght Audience

Submitted by J. Clarke Newton

I. JURY ANALYSIS AND SELECTION- CHOOSE THE RIGHT AUDIENCE

a. What Kind of Juror to Look (and Look Out) For

Theories of Advocacy

1. The 3 Jurors and Jury De-Selection

The selection of a jury is the removal of unwanted jurors. It is a "de-selection" process where you are making critical assumptions of people based on very limited information. In South Carolina state court, it's possible that the only information you will have on a juror is their age, race, gender, home address, their job and their spouse's job.

A jury pool can be broken up into three different types of jurors:

A. "For You"
   This will be a juror that is pre-disposed to lean toward your side of the case.
B. "Against You"
   This will be a juror that is pre-disposed to lean against your side of the case.
C. "Don't Care"
   This juror will have no pre-dispositions and will not assume any leadership roles. Along for the ride.

The most important juror of the three is the "For You" juror. Your job is to find "For You" jurors that will lead your jury to the decision you want them to make. Once you identify these jurors, you will spend the jury selection process removing the "Against You" jurors from the venire.

2. The Most Important Argument

The most important argument that is made in a jury trial is the one argument you as a lawyer do not get to make, see, or even hear. It is the argument that is made at the end of the trial by the jurors in the deliberation room.

3. Your Mission

Your mission is to arm your "For You" jurors with enough information and arguments that they will need to argue the case for you to the "Don't Care" jurors. Hopefully in your de-selection process you've weeded out enough of the "Against You" jurors that there will be an overwhelming majority in the room to break them.

4. What Persuades

Understanding how people learn, how they retain information and how they make decisions will help you craft your arguments persuasively and arm your "For You" jurors in deliberation.

A. How People Learn (www.learningstyles.com)
    a. Visual (Art, Drawing)
    b. Logical (Math, Systems)
    c. Verbal (Read, Write)
    d. Aural (Music, Speech)
    e. Kinesthetic (Physical)
        i. Social (Consensus, Extroversion)
        ii. Solitary (Individual, Introversion)

B. How Do Jurors Gain and Retain Information
    a. Hearing – testimony, argument, jury charges
    b. Seeing – exhibits, witnesses, demonstrations
    c. Kinesthetic – experiences, touching, smelling, doing
    d. Emotional learning- stories, imagery

Information accompanied by images increases retention, as does when information is presented in an emotionally familiar context. Remember, **conclusions urged upon jurors are resisted, conclusions reached by jurors are unshakeable.**

C. Juror Decision Making Process

Six stages of juror decision making process:

a. Stage One – Anxiety/Confusion
    i. Voir Dire
    ii. Jury (De) Selection
b. Stage Two- Recognition
    i. Opening Statement
    ii. P's Direct and Cross
c. Stage Three- Verification
    i. D's Direct and Cross
d. Stage Four- Empowerment
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e. Stage Five- Confrontation
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f. Stage Six- Resolution
    i. First Ballot
    ii. Affiliation
    iii. Consensus
    iv. Compromise
    v. Domination/Submission
    vi. (Avoidance/Withdrawal)

Juror Attitudes

Jurors bring with them to a trial their experiences, preferences, and biases. Experiences are nearly unshakeable. Preferences and biases can be moved by persuasive arguments and information. Biases tend be soft and hard. Along with identifying "For You" and "Against You" jurors, you want to key in on:

A. "Status Quo" Juror

This is somebody that likes their status in life and doesn't want to rock the boat. For civil cases, they will tend to be defensive minded jurors.

B. "Agent of Change" Juror

The person is upset with their lot and life. They want to upend the status quo and shift the dynamics of power. For civil cases, these will tend to be plaintiff minded jurors.

What Influences Jurors?

a. Law?
b. Evidence?
c. Heuristics?
d. Emotion?
e. Experiences?
f. Attitudes?
g. **Knowledge/Control**

Information on what a party knew and what a party could control are the biggest influencers on jurors.

5. "The Right Thing"

At the end of the day, a jury wants to leave the jury trial experience having done "the right thing." The key to a good litigator is putting the jury in the best position to render a verdict for you and leave them feeling good with that decision.

b. Juror Questions- How to Ask Difficult Questions and Get Truthful Answers

South Carolina is one of the few states left that does not allow for attorney conducted voir dire. If you do however try a case in a jurisdiction that does have attorney conducted voir dire, here are some tips:

A. Know the Process
B. Know the law of your jurisdiction
C. Improve conditions if possible
D. Questioning techniques:
    a. Open ended questions
    b. How Does That Make You Feel About That

c. When to use closed end leading questions
d. Self-confession (I feel this way, do you?)
e. Set the Tone – non threatening, non judgment
f. Group questions- Who agrees? Disagrees? Why?

E. Compiling and organizing your responses

In South Carolina federal court, a questionnaire is sent out to prospective jurors. A sample questionnaire is attached to the end of this discussion

c. Sample Voir Dire Techniques

To effectively participate in the voir dire process in South Carolina, you need to craft questions to submit to the Judge. Judges will employ "what's good for the goose is good for the gander" so be sure to have balanced questions. "Have you ever been the victim of an assault" needs to be balanced with "Have you ever been accused of an assault"

Another thing to consider is whether a juror believes a person is controlled by external or internal forces. Internally controlled jurors tend to be more prosecution oriented in criminal cases and more defense oriented in civil cases. "Do you think there should be more or less governmental regulation when it comes to…" is a great way to excise that information.

Goals of Voir Dire should be:

a. identify the "against you" leaders
b. Find strikes for Cause (experiences that would make it hard for the juror to be fair)
c. Inform peremptory strikes
d. Gain information about the seated jurors
e. Foreshadow your themes
f. Enhance your trustworthiness
g. Be aware of your weaknesses

d. Peremptory Challenges and Challenges for Cause

a. For cause – making, defending

b. Peremptory – **write** down your reasons
c. Batson challenges- making, defending
d. Final Strike list and Order
e. Exercising your strikes – worst first, don't strike followers, wild cards last

You must consider Batson v. Kentucky when you are making peremptory challenges and challenges for cause. Here is an outline to use:

a. Prohibited reasons for exercising peremptory strikes- race (all), sex
b. Be careful: religion, sexual orientation, national origin, physical disability
c. Process –
    i. Juror in a prohibited category is struck
    ii. Opponent – objection
    iii. Proponent – non-discriminatory reason
    iv. Opponent- pretext
    v. Ruling – must be purposeful

e. Using Litigation Support Services- Focus Groups, Jury Research Groups, Mock Trial

Organizing and participating in focus groups or mock juries is a great way to analyze the strengths of your liability case and assess what your damages mean to a potential juror. It is extremely helpful in discovering unknown weaknesses in your case.

These can be done a handful of ways:

-DIY- Particularly useful in cases where the case doesn't justify forking over $8,000-$10,000. A DIY mock jury can be done any way you can think of; my office has done it where we've reached out to friends of friends and invited them to our office after hours with promises of pizza and drinks. You could also hire people from a temp agency or labor service. Like a real jury, you will want to get to know as much as you can about the jurors' biases and preferences. An example would be to draft a juror survey and have them fill it out prior to the case presentation.

Each party would then present an opening statement to the case; you might want to have questions prepared for the jurors on what they thought about the openings, their thoughts of the motives of the parties, and where they are leaning. You can then either present critical pieces of evidence and have follow up questions, or just allow the jurors to ask questions of the party as to what their case will look like. End with a "closing" and have them reach a verdict by filling out a verdict form. Be sure to have another set of questions on how they reached their verdict. Filming the whole exercise is extremely helpful, but make sure you get their permission.

This format can be tweaked anyway you want depending on the case and your concerns of a trial.

Professional Juror Consultant – Again this can be handled in various formats depending on case size and need. Most

professional consultants put together focus groups, and create a jury to render opinions of your case. The jury will not know you are involved; a lot of times they are conducted in adjoining conference rooms and you will be watching live via video feed while they "deliberate." Other than a case summary and production of relevant evidence, you will not need to put together your own evaluations and juror questions. The consultant will present both sides and ask questions to the group along the way.

Lawyer Consultants- there is a growing field of lawyers who are conducting focus groups and mock trials for their colleagues.

Fundamentals of Local Procedure

Submitted by H. Asby Fulmer III

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1. Fundamentals And Local Procedure

A. Personal Injury Statutes

1. Statutes Of Limitation

Most practitioners are aware of the basic statutes of limitation which specify that a private party must be sued within three years of the date of an accident or for a state governmental entity within two years of the date of an accident.

There are less frequently utilized statutes of limitation which attorneys need to be familiar as well. S.C. Code Ann. Section 15-3-555 is one such statute:

(A) An action to recover damages for injury to a person arising out of an act of sexual abuse or incest must be commenced within six years after the person becomes twenty-one years of age or within three years from the time of discovery by the person of the injury and the causal relationship between the injury and the sexual abuse or incest, whichever occurs later.

(B) Parental immunity is not a defense against claims based on sexual abuse or incest that occurred before, on, or after this section's effective date.

A limit of six years after someone becomes twenty one years of age is of course much longer that most statutes of limitation and raises the question of how Section 15-3-555 interplays with the more frequently applicable three or two year statutes of limitation. If the more frequently controlling three or two year statutes of limitations applied in a situation involving sexual abuse, there would be no reason for Section 15-3-555 to exist. Section 15-3-555 utilizes a different standard, a plaintiff's age, as opposed to the length of time that has transpired since an incident. To date no South Carolina appellate decision has addressed the potential conflict between Section 15-3-555 and the South Carolina Tort Claims Act. Certainly a possible argument could be modeled after the analytical framework of Southeastern Freight v. The City of Hartsville, S.C., 443 S.E.20 395 (1994). In Southeastern Freight Lines the Supreme Court focused on whether anything in the Uniform Contribution Among Tortfeasors Act indicated an attempted exemption of the State from that act. Exploration of the reach of Section 15-3-555 can

also be furthered by looking at how other states have resolved an apparent conflict between a statute of limitations applicable to a sexual incident and a more commonly utilized statute of limitation.

2. Noneconomic Damages

In 2005 as part of South Carolina tort reform, the South Carolina Non-Economic Damages Award Act was passed. The same is found at S.C. Code Ann. Section 15-32-200 et seq. Section 15-32-210 (3) defines noneconomic damages as pain and suffering, inconvenience, physical impairment, disfigurement and so forth. In other words all those damages that are challenging to quantify. S.C. Code Ann. 15-22-220 (A), (B), and (C) then goes on to limit noneconomic damage awards to $350,000.00 against a single health care provider, a single health care institute, or each health care provider or institution when there are multiple defendants.

3. Punitive Damages

Since January of 2012 we have had an act that deals with punitive damages. This act is important for a plaintiff's attorney even as he progresses a case by filing suit. S.C. Code Ann. Section 15-32-510 requires that a claim for punitive damages be specifically pled and that a specific amount in punitive damages cannot be requested. Section 15-32-520 (D) requires punitive damages to be proved by clear and convincing evidence. A defendant can request a bifurcated trial so as to deal with punitive damages separately from liability and actual damages. S.C. Code Ann Section 15-32-520 (A). This section also requires the trial court review a jury's punitive damages award.

4. Verdicts

S.C. Code Ann. Section 15-33-125 allows a judge to grant a new trial on the issue of damages only when the only inference to be drawn from all the evidence, viewed in the light most favorable to the defendant, when the plaintiff is entitled to a verdict on liability as a matter of law.

5. Frivolous Actions

We have a South Carolina Frivolous Civil Proceedings Sanctions Act which is found at S.C. Code Ann, Section 15-36-10. Most attorneys are aware that an attorney must read a document that is signed and filed. The act adopts a reasonable attorney standard. Extensions, modifications, and reversals of existing law are not necessarily frivolous.

Sanctions may include payment of the prevailing party's attorney fees and costs, a reasonable fine paid to the court, or injunctive relief. The court must report a sanctioned attorney to the South Carolina Commission of Lawyer Conduct.

6. Costs

A prevailing party in civil litigation can recover costs. S.C. Code Ann. Section 15-37-20. There are numerous instances in which costs can be awarded as found in Sections 15-37-10 through 15-37-210.

7. Contribution Among Tortfeasors

The South Carolina Contribution Among Tortfeasors Act is found at 15-38-10 et seq. Section 15-38-15 provides:

Liability of defendant responsible for less than fifty per cent of total fault; apportionment of percentages; willful, wanton, or grossly negligent defendant and alcoholic beverage or drug exceptions.

(A) In an action to recover damages resulting from personal injury, wrongful death, or damage to property or to recover damages for economic loss or for noneconomic loss such as mental distress, loss of enjoyment, pain, suffering, loss of reputation, or loss of companionship resulting from tortious conduct, if indivisible damages are determined to be proximately caused by more than one defendant, joint and several liability does not apply to any defendant whose conduct is determined to be less than fifty percent of the total fault for the indivisible damages as compared with the total of: (i) the fault of all the defendants; and (ii) the fault (comparative negligence), if any, of plaintiff. A defendant whose conduct is determined to be less than fifty percent of the total fault shall only be liable for that percentage of the indivisible damages determined by the jury or trier of fact.

(B) Apportionment of percentages of fault among defendants is to be determined as specified in subsection (C).

(C) The jury, or the court if there is no jury, shall:

(1) specify the amount of damages;

(2) determine the percentage of fault, if any, of plaintiff and the amount of recoverable damages under applicable rules concerning "comparative negligence"; and

(3) upon a motion by at least one defendant, where there is a verdict under items (1) and (2) above for damages against two or more defendants for the same indivisible injury, death, or damage to property, specify in a separate verdict under the procedures described at subitem (b) below the percentage of liability that proximately caused the indivisible injury, death, damage to property, or economic loss from tortious conduct, as determined by item (1) above, that is attributable to each defendant whose actions are a proximate cause of the indivisible injury, death, or damage to property. In determining the percentage attributable to each defendant, any fault of the plaintiff, as determined by item (2) above, will be included so that the total of the percentages of fault attributed to the plaintiff and to the defendants must be one hundred percent. In calculating the percentage of fault attributable to each defendant, inclusion of any percentage of fault of the plaintiff (as determined in item (2) above) shall not reduce the amount of plaintiff's recoverable damages (as determined under item (2) above).

(a) For this purpose, the court may determine that two or more persons are to be treated as a single party. Such treatment must be used where two or more defendants acted in concert or where, by reason of agency, employment, or other legal relationship, a defendant is vicariously responsible for the conduct of another defendant.

(b) After the initial verdict awarding damages is entered and before the special verdict on percentages of liability is rendered, the parties shall be allowed oral argument, with the length of such argument subject to the discretion of the trial judge, on the determination of the percentage attributable to each defendant. However, no additional evidence shall be allowed.

(D) A defendant shall retain the right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party.

(E) Notwithstanding the application of this section, setoff from any settlement received from any potential tortfeasor prior to the verdict shall be applied in proportion to each defendant's percentage of liability as determined pursuant to subsection (C).

(F) This section does not apply to a defendant whose conduct is determined to be willful, wanton, reckless, grossly negligent, or intentional or conduct involving the use, sale, or possession of alcohol or the illegal or illicit use, sale, or possession of drugs.

There are a number of specifics worth noting in the act. More than one defendant must be responsible for an individual’s injury, death, or damage to property. A plaintiff’s comparative

fault is to be considered. The court can treat two or more parties as a single party if the multiple defendants acted in concert, by agency, or in another legal relationship. Parties, not just defendants, are permitted oral argument on the allocation of percentages. This statute does not apply to willful or intentional conduct or conduct involving the use of alcohol or drugs.

Section 15-38-20 (D) provides that if a defendant settles that defendant cannot recover contributions from another tortfeasor unless that other tortfeasor's liability is extinguished by the settlement.

8. Homestead Exemption

South Carolina is a very difficult state for creditors to obtain recovery in. S.C. Code Ann. Section 15-41-30 provides a homestead exemption of up to$50,000.00 for a single owner and up to $100,000.00 for multiple owners of real or personal property used as a residence. The statute provides for other exemptions as to motor vehicles, other personal property, jewelry, and cash.

9. Wrongful Death

S.C. Code Ann. Section 15-51-10 provides for recovery when a wrongful act has caused death. Section 15-51-20 specifies the beneficiaries of the decadent are a husband or wife, a child or children, and if none, then a parent or parents, and if none, other heirs. None of the possibilities includes someone's boyfriend or girlfriend. Do not proceed in an action where a boyfriend or girlfriend has signed a retainer agreement with the assurance that they are very close to or have the approval of a mother and/or father. Section 15-51-40 allows for punitive damages.

Wrongful death settlements must be court approved.

If a parent or parents failed to reasonably provide support, and did not provide for the needs of the decedent when they were a minor, the court may limit or deny such a parent their share. If you are bringing a wrongful death action, it is often advisable to bring a survival cause of action. Entitlement to a survival action can come from lay witnesses or from an expert witness. Better to plead both causes of action than wish you had as evidence and witnesses are discovered.

10. Property Damage Arbitration

People who have had their vehicles damaged in an accident are fortunate in South Carolina that we have an act that provides for property damage resolution by arbitration. Filing fees vary from county to county but are usually $5.00 or $10.00. Depending on the county, the hearing can come up in a few months. Fair market value, the extent of repairs, and depreciation can all be litigated. Liability questions can be resolved.

S.C. Code Ann. Section 38-77-710 provides that attorneys from our various counties will serve as arbitrators. Section 38-77-720 provides that three attorneys will comprise the arbitration panel. The decision of two out of the three is sufficient. I always file a typical summons and complaint but a less formal document is acceptable. Section 38-77-730. Signed property damage estimates or signed bills for property damage repair are sufficient evidence. Section 38-77-740. If any party is dissatisfied with the decision, they can appeal and have a trial de novo in the court of common pleas.

If one of the issues is depreciation, a live witness will be necessary. There are a handful of people around the state that hold themselves out as experts in depreciation. The best witnesses for depreciation are used car dealers in the county where the arbitration is being held. They buy vehicles from auctions, often with a history of repaired damages, and know how that damage affects value.

B. Case Intake, Evaluation, and Investigations

1. Initial Interview

The initial interview is as important as any step taken in representing a person in a tort case. It is essential that the interview be conducted by an attorney. An attorney brings all the experience gained not only in settling cases but in trying cases. Certain information is crucial for a successful settlement. Other information will be needed if the case goes to trial. Start preparing for the trial during the initial interview. Unfortunately, in this day and age, it is necessary to confirm your client is who he or she says they are. Get a copy of their driver's license. Get detailed information about past and present doctors, past injuries, chronic conditions, witnesses,

statements made at the scene of the accident, when pain was first experienced, where vehicles came to rest, what the officer did when he arrived and so on.

Type the notes from this interview up and give a copy to the client. Clients forget things. Their own comments are an excellent way to refresh their memory.

Also delve into the client's arrest and conviction history. Certain crimes such as those involving sexual activity or children may dictate that you have to settle the case and not put the case into litigation. Do not just accept the client's representation about their criminal background. Get a SLED report and, if the person is from another state, get that state's equivalent of the South Carolina SLED report.

Past accidents are important. Especially at first, you do not know if your client is a good historian. Get a copy of their 10 year driving history.

2. Evaluating Your Client

Two considerations that affect the value of the case are venue and the client themselves. An Allendale County case has a very different value than a Lexington County case. Likewise, look carefully at your client. Try to determine if a jury will like your client. If you are unsure, ask your staff members if they like the client. There are certain clients that you never want a defense attorney or insurance adjusters to see.

3. Investigation

Do more initially than just read the accident report and send out a letter of representation. Talk to the adjusters. If he or she has concerns about or even disputes liability, you need to know as soon as possible.

If liability is an issue, getting an accident reconstruction expert involved as soon as possible is crucial. You may need an expert who is available to go to the accident scene immediately. Evidence is already disappearing before the new client gets to your office. Photographs of skid marks and other particulars are only available for a very short period of

time. Get your own property damage photographs. Appraisers and some adjusters are experienced and skilled at taking photographs that minimize substantial property damage.

C. Pleadings, Discovery, Motions

1. Pleadings

Automobile accident pleadings can be fairly basic. My experience has revealed that a complaint in a products liability case needs to be anything but basic. If defects were known and hidden, set that out in the complaint. Make sure all possible causes of action are not only set included but plead so that all legal requirements for the cause of action are covered.

Make sure all potential defendants are named. In some instances it can be very difficult to determine the appropriate name of a business. Name them as best you can in the pleadings and include their business address as part of the party name. If you serve that business timely you can amend the pleadings to correct a business name.

2. Discovery

Similarly, automobile accident discovery can be developed by the practitioner and then used over and over. In certain type of cases such as premises liability cases and products liability cases, the discovery needs to be tailored for each individual case. In premises liability cases and product liability cases, plaintiffs are at a disadvantage. The defendants know things, a lot of things, that you do not but must learn. Written discovery should be extensive. Think through the issues. Draft interrogatories and requests for production that will illuminate each issue. If possible go to the location of a premises liability case.

Always ask for identification of business' payroll company's name and send that company a subpoena for the W2s and 1099s for all workers during the year of an accident. Former employees are one of the best sources of relevant and damaging information. Some will have been fired. All are former employees.

3. Motions

Motions for summary judgement and motions to dismiss are rarely of value except in products liability cases. Recent appellant decisions make even summary judgement a hard step to accomplish. Motions that plaintiff's attorneys do not avail themselves of enough are motions to compel. There is no reason to send out time consuming, detailed written discovery and then let defense counsel provide answers that are anything but answers and responses that are non-responsive. South Carolina law recognizes very few privileges. Pushing hard for written policies and procedures can in some instances initiate settlement negotiations.

D. Settlement Procedure

1. Pay attention to your client's medical treatment and physical recovery or lack thereof.
2. Work your case.
3. Let the other side know you are working your case.
4. For cases involving permanent injury, go and meet the specialist. Get supplemental reports and questionnaires filled out and signed.
5. Avoid the appearance of laziness and disinterest.
6. Put together thorough, detailed settlement packages.
7. Insist on an experienced mediator.
8. Know the defendant insurance company.
9. Know your adjusters.

E. Trial and Post Trial

Trial and past trial are too late in the process for most steps that need to be taken. Steps such as talking to witnesses as soon as possible, hopping on a plane and going to meet your expert, deciding who to depose and who to hold back in your poker hand. A case that is almost a great case can become a great case by taking and providing statements a few weeks before mediation. Too little time for defense counsel to undo damage but enough time to affect evaluation and authority is perfect.

F. Checklist

1. Attorney Checklist

a) Type interview notes.
b) Give typed interview notes to client.
c) Talk to adjusters.
d) Talk to witnesses.
e) Evaluate need for experts.
f) Go to accident scene.
g) Send letter for policy limits.
h) Look for previous litigation against the same defendant.
i) Client's SLED report.
j) Ten (10) year driving history of plaintiff and defendant.
k) Get ten years of past medical reports for any case indicating permanent injury.
l) Ask each medical provider to notify you or your staff if clients miss appointments.
m) Do not wait to the last minute to order medical reports.
n) Read medical reports as they come in.
o) Talk to your client; repeatedly.

Opening Statements – Tell a Compelling Story

Submitted by Thomas M. Gagne

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

By

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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 seventh 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 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 simply 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 known 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 that theorized 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.

Now, a legal argument is not a formal argument, the kind you may suffered through in high school debate, as I did. Trial lawyers deliver cases in the form of a story, or narrative.

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 you propose to prove, how the trail will proceed, the roles of the plaintiff, defendant, witnesses, judge and jury, and, most importantly, what you want, i.e., your damages. The opening should also introduce the jury to the law of the case. No easy task as the law is ***terra incognita*** to most jurors, despite what they believe. To help them understand the law and its nuances, not to mention the medical concepts involved, feed the concepts to them in bite-sized chunks.

Even 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 I believe it is perfectible, as human understanding expands, as long as we 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. Even with professionals, simple words usually have the most punch. Not only does the misuse technical language mar your style, you run the risk of looking pompous.

Now, the opening is your golden opportunity to begin selling your case, your 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 your opening must not be merely a summary of what's to come but must signal to them why, considering the totality of the circumstances, your theory of the facts and law makes the most sense - 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. This makes absolutely no sense since, as 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, and I feel it's our duty that the

jury should be familiar with each side's basic arguments going in. If you're going to talk about what evidence you will present, it's sensible to talk about what the evidence means. 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 advice may be your most important takeaway today. You must learn to think in terms of moves ahead, and be prepared for them, like a chess player. In fact, if you don't play chess, I suggest you take it up. Some people have an uncanny talent for the game from the beginning.

Now, unfortunately, plaintiff's attorneys have the additional burden of overcoming juror bias against claimants and their 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, it's just that — compensation, not profit. Your client is not looking for a payday. Show the jury 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 – of course without using that term.

Also, do not personally attack the defendant, even and 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 and matter of fact, or you'll run the risk of alienating the jury. However, and this is an important caveat, this does not mean you cannot present evidence of egregious behavior by the defendant.

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. Later on, I'll explain how to transform your client's recitation of her damages into a compelling narrarative. Steer clear from phrases like "I'm sick and tired of being sick and tired."

Also, 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 look unrehearsed, authentic, and heartfelt.

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.

Figure one imagines the opening as a set of intersecting ovals. (See Exhibit One) One is the story of your case, and I'll talk about the story elements in depth as we proceed. The next is the theme, a nice slogan encapsulating your story. Then the encapsulation itself – an opening for the opening if you will. 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 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.

What does a polished, integrated whole mean? It means writing it out, revising, revising, revising, weaving the elements together, and then sanding 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. This is true. 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 and the structure of narrative is hardwired in our DNA, or at least it's a major component of our environment.

So, 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. For instance, 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. Let me explain.

Return to your eighth grade English class for a moment and remember the fundamental elements of a story your teacher outlined: 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, 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. Because of the universality of adversity, 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 engage

with — what do we make of the struggle? Does it destroy us, like it does Ahab, or do we triumph?

Of course, it's probably safe to say that most people prefer happy endings. So the story is a story of overcoming. The audience unconsciously wants the protagonist to suffer adversity, so that the tormented protagonist learns something in the process. There must be a point to suffering. Therefore many stories become what the Germans call a *bildungsroman* –a story about the maturation, the growth and learning of the hero. A cursory examination of religious and secular thought about the nature of suffering bears out the popularity of the *bildungsroman.*

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

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?" (Exhibit Five) And then there's Nietzsche's charming Teutonic version: "That which does not kill you makes you stronger." (Exhibit Six)

The implicit 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 and theme of personal growth. Showing the jury how your client's injuries revealed strengths she never knew she had, or how adversity honed her appreciation of life. Showcase her indomitable spirit. Not only will her ordeals lend 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 workmanlike narrative into a poignant story of courage.

Let me share with you a workers' compensation case history that illustrates what I'm talking 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 later to seek legal counsel when circumstances are no longer tolerable. However, such prior action usually handicaps their case. Factfinders show little patience for claimants 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 it's culturally normal when a group of men horse-plays with a fellow – its manifest purpose is to make the object of the horseplay believe he's "one of the gang." It's a form of hazing. Feeling that we belong to a group is perhaps the single greatest psychological motivator that exists. It stems, of course, from ancient survival instincts. Tribal exclusion almost certainly meant death, and still survives in many forms – excommunication, exclusion, bullying and shunning to name a few.

Matt's experience, however, exceeded good - natured kidding hazing. What's 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 probably 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 socially. 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 partially accounts for why he didn't want to rock the boat by reporting the incidents.

But the cruel reality was that his co-workers 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 a member of the tribe. When he learned the score, he thanked me, and seemed a more mature person for the experience – the classic elements of the *bildungsroman.*

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 is 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 your opponent 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 simultaneously be developing a strategy of attack and defense. This strategy 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 your opponent's case, don't give her the opportunity to regroup and

establish the initiative. Maintain the momentum of your argument by insisting *it is the relevant point* of the case.

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, **because you do have absolute control over what the witness might say.**

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 unintentionally 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 if you can. 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.

About 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 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 the witness is lying, she'll fabricate a detail that wrecks her story, a detail 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, know *all* the pieces, and most witnesses are not that smart. Also, remember that the truth is usually simple. You can easily tell a lie by its elaborate structure. Other tells – the witness is vague, speaks in sentence fragments, is overly loquacious, is defensive and tight-lipped, tries to change the topic, or answers questions not asked.

As far as specific techniques are concerned, one of the most effective cross examination techniques is to attack the witness' conduct, her *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. I have always found that attacking a witness' previous inconsistent conduct, as well as post inconsistent conduct, is extremely effective.

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/impossible statements.

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 inconsistent evidence 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 and unnecessarily diverts the jury's attention.

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 hold that language (and its meaning) is inherently unreliable.
Rubbish. English is a marvelous tool -- surgical in its precision. People are mushy, not language. The more interesting question is if there is one, true reality, or is reality always a matter of interpretation?

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 are the keys to direct. Remember, cross cannot go beyond the scope of direct. Hence, keep your direct powerful, yet lean.

Also, understand that most witnesses ramble, including experts. Many people are unable to come to the point quickly or stay on topic. The remedy is practice, and don't shy from employing tough love. Let your witness 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. The key to understanding is inquiry.

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. Remember, your credibility is also on trial.

As far as the quantity of your witnesses is concerned, first, and I'll repeat, less is more. I'd rather have two or three high – quality, credible witnesses than five or six moderately credible witnesses. But be careful. Every witness, even hi-quality ones is a potential time bomb, primed to demolish 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 perfectly 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'll discuss Daubert in that context. Recall from your study of constitutional law that cases such as Daubert establish minimum standards binding on lower courts. However, 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, 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 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 it's a podiatry case of malpractice, don't call an orthopedist, because you want to establish the standard of care for podiatrists under your set of facts, and if that standard was breached.

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 the 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, even if it's not directly relevant to your client's injury, 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, even more 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. The best expert is one who can effectively joust with opposing counsel during cross. Insist on preparation. Make sure she uses simple language, easily understood by laypersons, and is unambivalent in her opinions. Professionals usually, and rightly so, qualify their answers, but this does not wash well at trial. 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 providing grist for 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. Does the jury like you?

I believe the key to doing well at trial is to keep in mind that trials are won "point by point," in a process of evidentiary accretion. And you should try to know more than your opponent

- factually, legally, strategically, and tactically. This, in addition to making fewer mistakes than your opponent goes a long way to prevailing. 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, and I wasn't about to give him the chance. So I vehemently objected to his testifying, arguing that I had received 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 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 had 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 at 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; I erred in failing to follow through my examination — a mistake which, again by sheer luck, did not negatively affect my case. I should have dug deeper into how the officer knew it was a bite mark. And instead of summarily dismissing the bite mark as inadmissible, I should have at least considered trying to admit it 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 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

Thomas Gagne, Esq

Opening Statements – Tell a Compelling Story

Submitted by J. Clarke Newton

III. OPENING STATEMENTS- TELL A COMPELLING STORY

The purpose of opening statement is to introduce your case to the jury and convey your themes in a succinct, memorable way.

Opening statement objectives:

1. Preview your case
   The "Wikipedia" story of your case
2. Themes, Story, Heart
   Repetition is beneficial. You want your theme to show up throughout the trial.
3. Establish yourself as a trustworthy source of information for the jury
   Do not over promise during opening. Be sure to deliver on what you tell the jury they will see during the course of the trial.
4. If the case ended after opening, would the jury know enough to decide in your favor?

   Be sure there are no surprises.

So what is an Opening Statement?

1. A succinct, non-argumentative preview of the claims and defenses- what the lawyer believes in good faith the evidence will show, and how it will be presented.
   However, you should be arguing as much as the Judge and other side will allow. Using the phrases "The evidence will show" or "The evidence will support" helps get around any objections.

2. No rebuttals by the Plaintiff to the Defense's opening, so Plaintiff needs to open "in full."

   Again, make sure you have introduced all your theories of the case, themes and pertinent facts.
3. The Court will instruct the jury that your opening statements are not evidence – you should not be the one instructing them of this however.

   There is no reason for you to be the one to tell the jury this information.
4. Use of photos, demonstratives, models, and other visual aids is permissible if you have a good faith belief that it will be admitted, and is helpful to the jury's understanding of the case. Always let the other side know of any piece of demonstrative aid you plan to use and require them to let you know before if they have any objections to it. That way you can address the issue with the judge prior to opening statements.

What is not an Opening statement?

1. Not an argument

But push the envelope. Toe the line.

2. Not weak or neutral

You are making a first impression to this jury and if you don't come off as being convinced of your case, they will never buy into what you tell them the rest of the time. Never begin a sentence with "what I say is not evidence" – the jury doesn't know that yet. You never know what a jury is listening to throughout the trial. If

you go weak on your opening, it will be hard for the jury to ever get on board.

3. Not high risk
4. Not over the top

Dramatics in opening statements are impossible to keep up. If it's necessary that the case needs some over the top exploits, build to them and save them for closing.

5. Not a speech
    a. Don't read from notes. Ever. Have notes with you in case you lose your place, but if you are reading like it's a speech the jury will tune you out immediately. The use of visual aids, even just a poster board to write on, will help eliminate your need to use notes.
    b. Do not use legalese. The jury is already highly skeptical of you, the other side, the courtroom, the judge, everybody. Get to their level immediately and speak their language. If the case is medical malpractice, this is a good time to introduce some of the big medical words and simplify them. You will also have the advantage of your definition likely being the one they use throughout the course of the trial.
6. Not about you

    You want the jury to trust you, but this case isn't about you. It's about your client. Make your opening about them.

Things to avoid:

1. Golden Rule

2. Difficult proofs
3. Has it been/will it be excluded?
4. “I believe”
5. Reference to jurors by name or jurors’ experiences from Voir Dire.
6. Attacks on opposing counsel
7. “This is a simple case”
8. “My client”
9. Settlement/insurance/collateral source
10. Appeals to passion, prejudice of jury, or matters not in evidence

Being Believable

Some tips to help believability and gaining trust with a jury:

1. Facts first
2. Conclusions second
3. How do we know?
4. Concrete/Abstract
5. Avoid the BS
6. Time lines
7. Be Yourself
8. Never make an argument YOU do not believe in.

Common Opening Objections

1. Argument
2. Misstates Law/Evidence
3. Beyond the scope of expected evidence
4. Violates a pre-trial ruling

5. Send a message (unless you have punitives)
6. Golden Rule
7. Matters of personal opinion
8. Reference to Juror by name or circumstance
9. Ad Hominin attacks
10. Passion or Prejudice – wealth of defendant, fear of crime, reptile theory

Plaintiff's Opening- Structure

1. Grab their attention "The Grabber"
2. Give them a Wikipedia version of the case- you should have this down to 30 seconds.
3. State your themes
    a. Test- does it tell the jury why you win?
    b. Rule of threes
        i. People remember things in threes.
    c. Concrete vs. abstract
    d. Examples
    e. Knowledge/control
4. Introduce the terms and concepts you want the jury to understand are important to your case
5. Tell the story
    a. The day of the event
    b. The back story
    c. The catastrophe
    d. The denouement
6. Damages

    a. Do not be afraid to talk about money.
    b. Explain all the damages that will be presented and how much they are
    c. Consider how numbers anchor in jury's minds.
7. Undermine the Defendant
8. Address your bad facts – "but"
    a. You want to inoculate yourself from the bad facts by introducing them and explaining why they aren't as important as the defense believes they are
    b. By introducing them first, you gain the jury's trust that you aren't hiding anything from them.
9. Emotional center
    a. "Touch the heart" you can find this without going over the top
10. End strong
    a. You need to have a strong ending prepared and have it ready in the event the Judge hurries you up.

Defense Opening Structure

1. The REST of the Story
2. Why you win in 30 seconds
3. Common Understandings (law, evidence)
4. Common curiosities
5. Common suspicions
6. Spoilers
7. Bad facts
8. Negativity bias
9. Availability bias

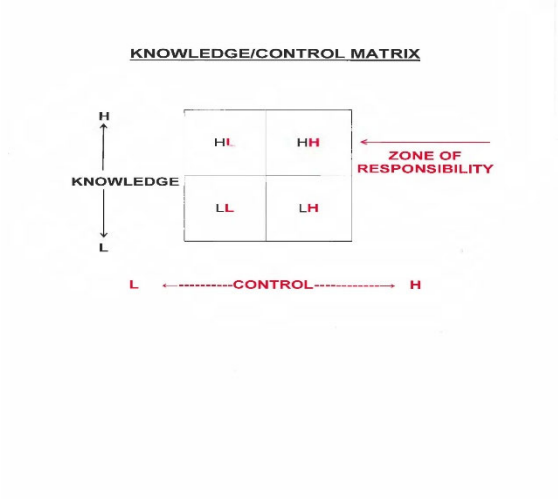
10. Negate sympathy
11. Appeal to higher emotions- fairness, right vs. wrong
12. “We hear what we listen for”

A Ten Minute Opening – give your jury a chance to pay attention. Modern day attention spans are short, and you need to recognize that a juror’s mind will wander off to everything else that is going on in their life. If you can, find a way to present a ten minute opening. Here are some suggestions:

1. Start with a “Wikipedia” version of case facts that explains why you should win (30 seconds)
2. Frame 3 questions you want the jury to answer (60 seconds)
3. What are the facts/evidence that answer these questions (6 minutes)
4. What is the Emotional Center of your case – what makes YOU pull for your client? (the right thing and WHY) (90 seconds)
    a. At the end of the day, jurors want to do the “right thing.” If you ever poll a juror after trial, they will say that’s what their goal was in coming to a verdict.
5. Conclude – what do you want to leave with the jury? (We hear what we listen for) (1 minute)

Knowledge/Control Matrix

Jurors will feel good about doing the right thing if one party has high knowledge and high control. It is important to present your evidence in a way that shows that the opposing party was the one with the high knowledge and high control and could have prevented the incident from happening.



Typical Opening Mistakes

1. Themes are too neutral
2. Wasting your first thirty seconds with "bunk"
    a. " Good morning my name is so and so and I represent X in a case"
    b. "Thank you so much for being here"
    c. "Being on a jury is one of the most important civil duties an American can perform"
3. Too many facts
4. Too much argument
5. Over-promising
6. Fawning, fibbing
7. Doing a "don't"
    a. "What I say is not evidence"
    b. Reading from a script
    c. Using notes
    d. Using legalese

    e. Failing to use visual aids
    f. Trying to cover everything
8. Weak ending
    a. End your opening strong!

Summary of a good Opening Statement:

1. Don't use notes
2. Use exhibits
3. Use powerpoint IF it's not distracting
4. Rehearse to the point it doesn't sound scripted
5. Argue without seeming to argue
6. Remember your motions in limine and don't speak out of turn
7. Bad facts-yes, but
8. Anticipate the defense
9. Don't be afraid to make objections and be prepared to respond to objections
10. Movement/blocking is important
11. Throw the rules out the window

Evidence – Get It Admitted and Present It

Submitted by Richard H. Willis

Courtroom Evidence 101

A basic review of the most frequently encountered evidence rules at trial.

NBI – Civil Trials from Start to Finish

Richard H. Willis

Bowman and Brooke, LLP

1

Evidence happens in "Real Time"

- **Substantive** evidentiary issues (hearsay, relevance, foundation, privilege, expert opinion) should be **anticipated** in advance and briefed
- **Form** objections should be a matter of timing and tactics made largely based on the ongoing dynamics of the trial
- **The "Novocane Test"** of trial objections – "what will hurt more, the shot (the objection) or the drill (the evidence)?"

2

You only need to know 6 Rules

- **There are only 11 Rules of Evidence, and only 5 come up repeatedly in trials**
- 100s – Preliminary Questions
- 400s – Relevance
- 600s – Witnesses
- 700s – Opinions
- 800s – Hearsay
- 900s – Authentication (usually resolved at pre-trial)

3

Rule 104 – "Preliminary Questions"

A) Qualifications of witnesses, privilege, admissibility may be ruled on preliminarily

B) Evidence may be conditionally admitted, subject to subsequent conditions making it relevant

C) Hearings on admissibility of confessions or statements by an accused shall be out of the presence of the jury

D) Accused does not subject himself to cross on other issues by testifying in a preliminary hearing

4

Relevance

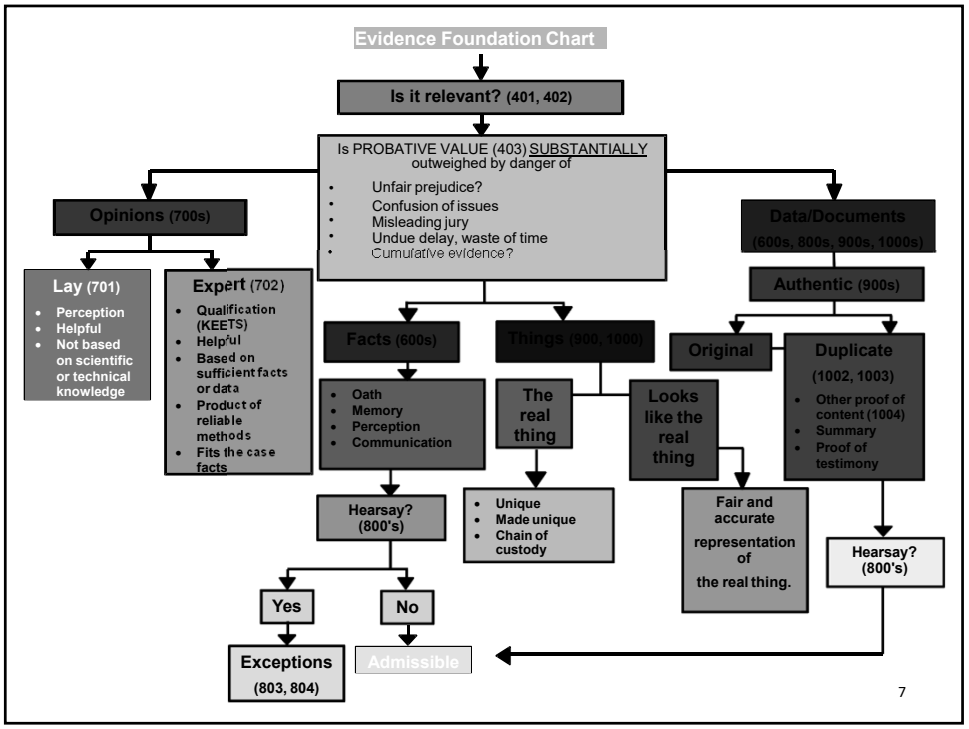
- 401, 402 – definitions
- **403** – Unfair prejudice vs probative value
- 404 – Character and propensity evidence generally inadmissible (unless…)
- 406 – Habit, routine
- 407 – Subsequent remedial measures
- 408 – Settlements and offers to pay expenses
- 410 – Pleas
- 411 – Insurance
- 412 – Prior sexual history in CSC cases

5

Witnesses/Foundations

- 601 and 601 – Witnesses must have personal knowledge, based on perceptions
- 607 and 608 – Impeachment – confirm, credit, confront, and prior convictions
- 611 – Leading questions
- 612 – Refreshing recollection
- 613 – Prior statements
- 615 – Exclusion of fact witnesses from courtroom except when testifying

6



10 Steps to getting in your evidence

- Mark it for identification
- Show it to the other side
- Ask permission to approach and show it to the witness
- "Can you identify this?" Or "Do you know what it is?" ("Just yes or no, please." Don't show it to jury yet.)
- **"How do you know**?" (the most important question to ask in laying any foundation)
- Ask any other "evidence specific" foundational pre-requirements
- Fill **both** the admissibility and persuasion buckets
- Offer it into evidence ("We offer…").
- Deal with any objections.
- If admitted, USE IT.

8

Opinions

- 701 – Lay Opinions
  - Rationally based on perception of witness
  - Helpful to jury
  - Not requiring special KEETS
- 702 – Expert Opinions
  - Qualification – KEETS
  - Basis – relevance, based on facts/data, reliable methods, fits the facts of the case (Daubert, Watson vs Ford)
- 703 – Underlying basis need not be admissible
  - Reverse 403 test for admissibility

9

SC Rule 702 - Watson v. Ford

389 S.C. 434, 699 S.E.2d 650 (2012)

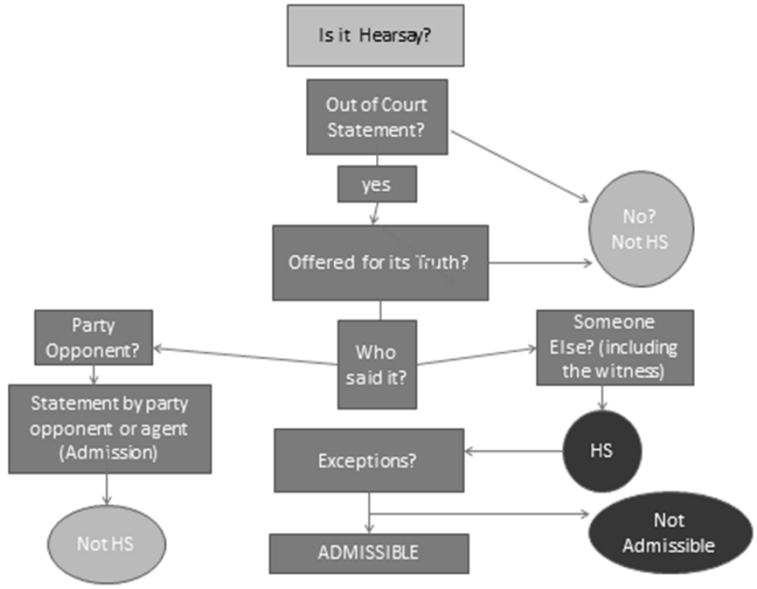
- In executing its gatekeeping duties, the trial court must make three key preliminary findings before the jury may consider expert testimony.
  - The subject matter is beyond the ordinary knowledge of the jury
  - the proffered expert has acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter (KEETS)
  - The trial court must evaluate the substance of the testimony and determine whether it is reliable in both method and substance, and relevant.
- Expert testimony is not admissible unless it satisfies all three requirements
- Only after the trial court has found that expert testimony is necessary to assist the jury, the expert is qualified in the particular area, and the testimony is reliable, may the trial court admit the evidence and permit the jury to assign it such weight as it deems appropriate.

10

800 Rules - Hearsay – 5 Qs

- Is it an out of court statement?
- Is it offered to prove truth of statement (does it have to be true to be probative/matter?)
- Is it a statement of a party opponent?
- Does it fit any exceptions?
- Is it otherwise inadmissible? (Confrontation Clause, Rule 805, Rule 403?)

11



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Authenticity

- **901** - Must have a witness who can testify from direct personal knowledge that the item is what the proponent purports it to be, or the item must be self-authenticating.

- **902** – Self Authenticating Evidence
  - Official public documents (signed and sealed)
  - Foreign public documents (signed and sealed)
  - Certified copies of public records
  - Newspapers and periodicals (may still be hearsay)
  - 902 (11 and 12) – certified documents complying with Rule 803(6) (regularly conducted activity/business records – domestic and foreign)
    - Note that this Rule does not exists in State Court
    - You still need a custodian deposition or an admitted RTA

13

Miscellaneous Rules

- 1002 and 1003 – "Best Evidence Rule"
- 1004 – Parole Evidence Rule
- Admissibility of Other Similar Incidents
  - Substantially similarity test
  - Post distribution OSIs inadmissible
- Collateral Source Rule
- Dead Man Statute
- Inadmissibility of MVA reports in SC
- Police/HP opinion on accident reconstruction
- Guilty vs Nolo Pleas
- Seat Belt Rule

14

Demonstrative Evidence and Courtroom Technology

NBI – Civil Trials from Start to Finish
Richard H. Willis
Bowman and Brooke LLP

15

The Law of Exhibit Presentation Technology

- Two kinds of **Evidence** – Testimony, Exhibits
  - Foundation for oral testimony – oath, memory, perception, communication
  - Foundation for exhibits depends on what it is:
    - The Real Thing? – unique, made unique, or chain of custody
    - Looks like the Real Thing? – true and accurate representation of the real thing
- Three kinds of **Exhibits** – real, illustrative, demonstrative
- Foundation for Demonstrative Evidence
  - ✓ Fair (relaxed 403 test)
  - ✓ Reasonably accurate (to scale or not to scale)
  - ✓ Helpful to the jury (relaxed 401 test)
  - ✓ Not misleading in some material way

16

ANYTHING SHOWN TO JURY MUST BE:

- **Admissible** (already in evidence, or if used in Opening, you must have a good faith basis to believe it will be admitted), or **Demonstrative**
- Shown to Opposing Counsel first (but beware – there are opposing views on this, depending on whether the exhibit is illustrative, or used in opening statement and/or closing argument for persuasive purposes only)
- If the exhibit is **not** offered and admitted, it should **not** go to Jury (e.g., expert CVs and reports; charts, diagrams, timelines, etc. used for persuasion rather than evidence…)
- To make something illustrative/demonstrative admissible (sent to jury), must show "substantial similarity."

17

What Works (most of the time)

- Photographs
- Medical Illustrations
- Animations if linked to real evidence
- Edited Videos
- Models
- Documents with Call Outs (beware of admissibility issues)
- Data Summaries (admissible if raw data has been made available and is in court)
- Lists (D)
- Chronologies (D)
- Comparisons, Cause and Effect (may be A or D)

18

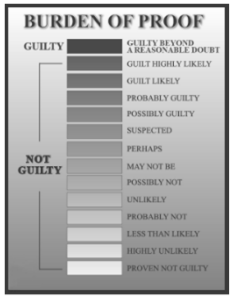
What Doesn't Work

- Text (>5 words)
- Clutter/ too much data
- Poor quality images
- Complexity
- Mixed Messages – text and images that don't go together
- Unrehearsed anything
- Handing the jury something, and then immediately moving on while they are still looking at it
- Unedited video depositions
- A Screen the lawyer cant see while looking at the jury
- Talking to a jury from a fixed screen control lectern – have an assistant run the PP
- Poor microphone technique – lawyer or witness – use remote mic
- Writing more than a few words on a flip chart while talking
- Reading PP slides to jury

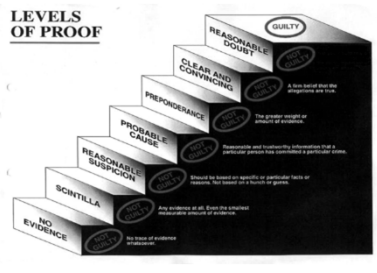
19

Examples - Burden of Proof

Good? Bad? (Anthony)



Good? Bad? (Zimmerman)



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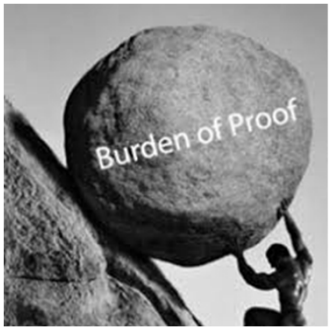
Burden of Proof – Better?



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How Rivers Are Formed

- Rivers start as very small streams and gradually get bigger as more and more water is added. Heavy rains and spring meltwater add so much water to some rivers that they overflow their banks and flood the surrounding landscape.
- The water in rivers comes from many different sources. Rivers can begin in lakes or as springs that bubble up from underground. Other rivers start as rain or melting snow and ice high up in the mountains.
- Most rivers flow quickly in the steeply sloping sections near their source. Fast moving water washes away gravel, sand and mud leaving a rocky bottom.
- Rivers flowing over gently sloping ground begin to curve back and forth across the landscape. These are called meandering rivers.
- Some rivers have lots of small channels that continually split and join. These are called braided rivers. Braided rivers are usually wide but shallow. They form on fairly steep slopes and where the river bank is easily eroded.
- Many rivers have an estuary where they enter the ocean. An estuary is a section of river where fresh water and sea-water mix together. Tides cause water levels in estuaries to rise and fall.

22

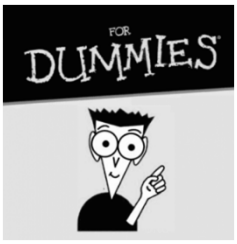
Tips from Sales and Marketing

- Don't compromise on picture quality
- Keep it **simple** – less is more
- Images should be powerful enough to carry the message even if the jury does not read the text
- Emotional Content (Pathos) - the jury must see itself in the image and identify with it
- Use bold colors, contrasting text (if you must use text)
- Avoid random "eye candy" – visual content should always have a purpose
- Always strive to move from the abstract to the concrete (idea/image)
- Show action in your images
- Viewers tend to prefer images of real people doing real things

23

Confessions of a Technology Moron

- **Stay in your Comfort Zone – (Be Yourself)**
- Using flip charts – mark pages for identification that you want to keep to use with another witness or in closing.
- Take it down and put it away if you don't want your opponent to use it or write on it.
- Foam Boards – prepare them to go to jury if possible
- Power Point Tips
  - KISS
  - Use as few words as possible
  - **Show it, talk about it, take it down**
  - Start and finish with **YOU**
- Have a Plan C – (Murphy's Law)
- Practice (X 3)
- **Don't be reluctant to object**
- Goose/Gander Rule

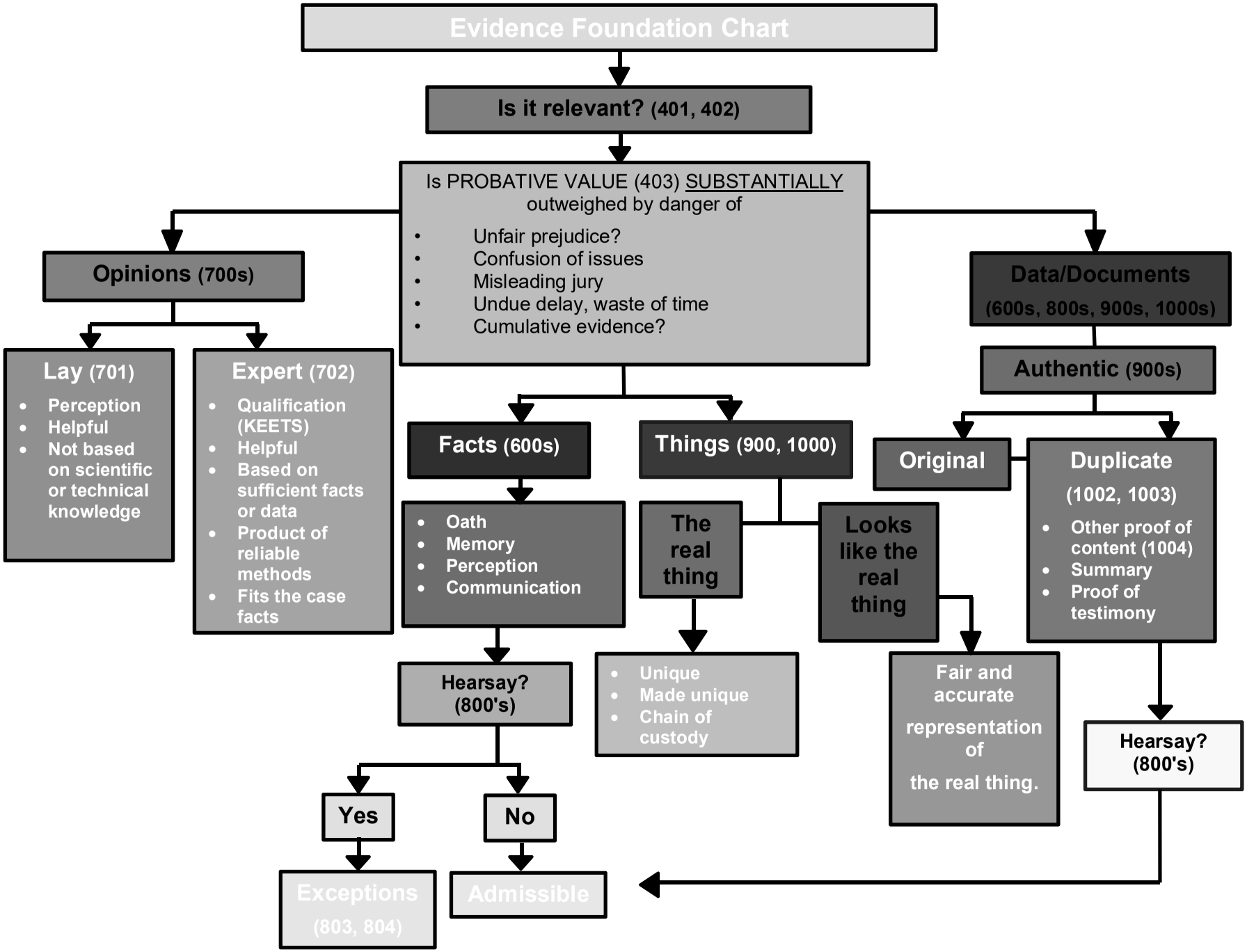


24

Jury Research on the effectiveness of computer assisted exhibit presentation

- Animations work best when jurors are unfamiliar with the subject matter (plane crash vs auto crash)
- Match your opponent
- Videos of real things are preferred to animations – connect with embedded link
- The Redundancy Effect - don't read PP slides out loud to jurors – it actually decreases cognitive retention
- Words on PP slides accompanied by different spoken words cause cognitive dissonance in many jurors
- Lesson: uses images, not text
- Highly emotional graphic images can backfire, cause jurors to feel manipulated, and interfere with intellectual processing.

25


Evidence Foundation Chart
Is it relevant? (401, 402)
Is PROBATIVE VALUE (403) SUBSTANTIALLY outweighed by danger of
Unfair prejudice?
Confusion of issues
Misleading jury
Undue delay, waste of time
Cumulative evidence?
Opinions (700s)
Lay (701)
Perception
Helpful
Not based on scientific or technical knowledge
Expert (702)
Qualification (KEETS)
Helpful
Based on sufficient facts or data
Product of reliable methods
Fits the case facts
Facts (600s)
Oath
Memory
Perception
Communication
Hearsay? (800's)
Yes
No
Exceptions (803, 804)
Admissible
Things (900, 1000)
The real thing
Unique
Made unique
Chain of custody
Looks like the real thing
Fair and accurate representation of the real thing.
Data/Documents (600s, 800s, 900s, 1000s)
Authentic (900s)
Original
Duplicate (1002, 1003)
Other proof of content (1004)
Summary
Proof of testimony
Hearsay? (800's)

Skillful Use of Objections From Jury Selection to Closing Argument

Submitted by Richard H. Willis

Civil Trials - Skillful Use of Objections

Richard H. Willis, Esq.
Bowman and Brooke, LLP
NBI Seminar Materials

1

Timing is Everything

- "The readiness is all…"
- Evidence happens in real time
- Developing an ear for inadmissible evidence and objectionable questions
- Tactical Objections – case and witness themes
- Finding the strike zone

2

Evidence 101

- 100s – Preliminary; 200s – Judicial Notice; 300s – Presumptions; 500s – Privileges
- **400s – Relevance**
  - **401/402**
  - **403 – UNFAIR prejudice**
  - **404/405 – Character, propensity generally not admissible (with exceptions)**
  - **406 – Habit/routine generally admissible (with exceptions)**
  - **407 – Subsequent remedial measures**
- **600s – Witnesses**
  - **601/602 – personal knowledge/foundations**
  - **608 – Character for (un)truthfulness**
  - **609 – Impeachment by evidence of criminal conviction**
  - **611 – scope, leading**
  - **612 – refreshing recollection**
  - **613 – impeachment with prior statement**
  - **614 – witness exclusion rule**
- **700s – Opinions**
  - **701 – Lay**
  - **702– Experts**

3

Hearsay

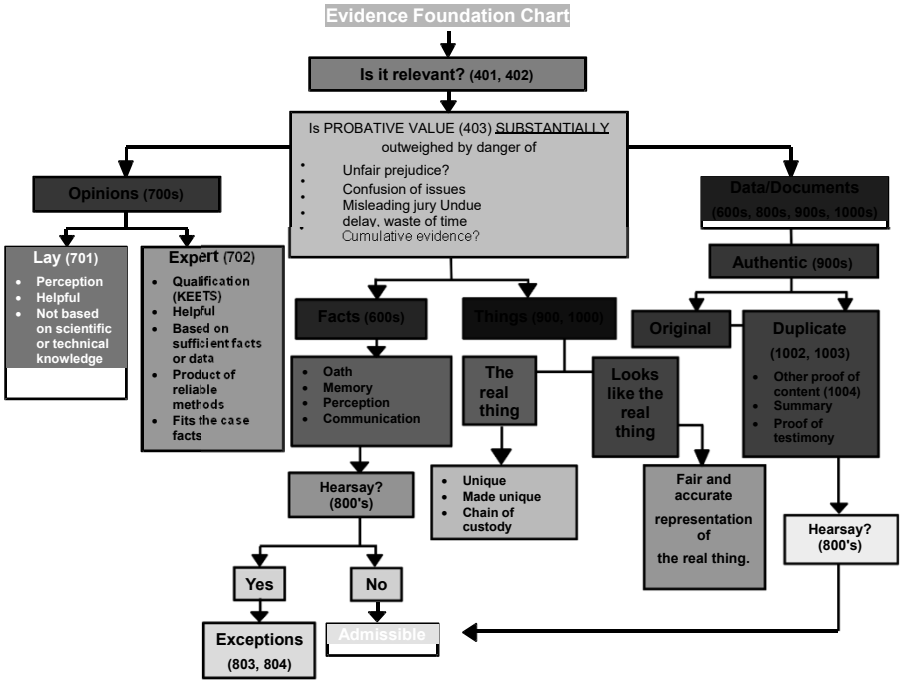
- 800s –
  - 801 (c) – Hearsay definition – an out of court statement that must be true to matter ("not offered for its truth"*)
  - 801(d)(1)(A) – Prior inconsistent statements (cross only, must be sworn) not HS
  - 801(d)(1)(B) – Prior consistent statements not HS
  - 801(d)(2) – Statement of party opponent not HS
- 805 – Hearsay within Hearsay
- 703 – Expert may base opinion on hearsay
  - if experts in field reasonable rely on facts/data
  - May be "disclosed to jury" only if probative value **substantially** outweighs prejudice
- Offered for impeachment only

4

Hearsay Exceptions

- 803/804
  - Present sense impression
  - Excited utterance
  - Then existing condition
  - Statement made for medical diagnosis/treatment
  - Recorded recollection
  - 803(6) Record of regularly conducted activity
    - Contemporaneous
    - Regular conducted activity
    - Regular practice
    - Qualified witness
    - Not untrustworthy
  - Public records
  - Ancient Document (1/1/98)
  - Learned Treatises
  - Former testimony
  - Statement against Interest

5



6

Objections

- Why?
- When?
- What?
- How?

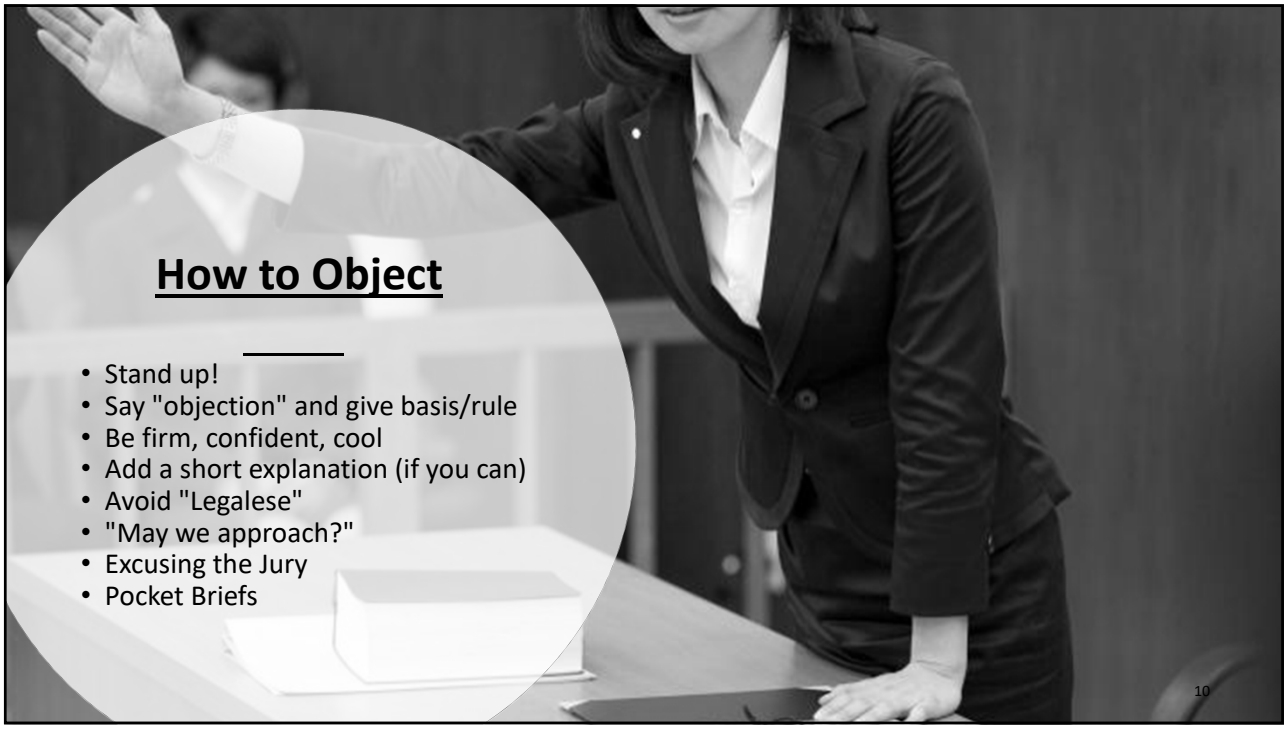
7

8

When to Object ?

- Before if possible
- Motion in Limine
  - Doesn't preserve error unless court makes a "final" ruling
  - Proffers
- After (if you must)
- Curative Instructions
- The Novocain Test

9



How to Object

- Stand up!
- Say "objection" and give basis/rule
- Be firm, confident, cool
- Add a short explanation (if you can)
- Avoid "Legalese"
- "May we approach?"
- Excusing the Jury
- Pocket Briefs

10

How **Not** to Object

- Display bad timing
- Raise butt 2 inches off chair
- Whine
- Speak softly
- Fake apologize
- Be meek
- Think out loud
- Add an **adjective!**
- "Speaking objections"
- Throw a facial tantrum
- "Thank You…" (F*** you…)

11

- Relevance (401)
- **Unfair** prejudice vs. probative value – (403)
- Character Evidence (404)
- Habit/Routine Practice(406)
- Subsequent Remedial Measures (407)
- Witness is Incompetent (600s)
- No Foundation (600s)
- Privilege – (500s)
- Improper Opinion (700)
- Hearsay (800)
- Authenticity (900)
- Best Evidence Rule (1002)
- Matters of substantive state law (OSIs, parole evidence, dead man statute, seat belt rule, accident reports, CDV rules, etc.)

12

Form

Substance

- Leading - Rule 611(c)
- Calls for Narrative (Q)
- Non-responsive (A)
- Cumulative (Q/A)
- Repetitive (Q/A)
- Assumes a fact not in evidence (Q)
- Misstates/misquotes (Q)
- Speculative (F)
- Compound (C)
- Argumentative (C)
- Mischaracterization (C)
- Beyond the scope (611) (C)
- Improper impeachment (607, 609, 613) (C)
- Confusing, vague, unintelligible (?)
- Misleading (C)

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Reflections on Objections

By: Richard H. Willis, Esq.
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(Previously published in SC Lawyers Weekly)

A New Yorker cartoon shows a young lawyer saying to a worried client, sitting together at counsel table, "Oh, I don't object much. As lawyers go, I'm pretty laid back."

Conventional courtroom advice is that jurors don't like objections, because it looks like you are trying to hide something from them.

Like most things conventional, this advice isn't worth much. Jurors form their expectations of what happens in a trial from TV. In courtroom dramas, there are plenty of objections. Why? Because objections involve conflict, and conflict is interesting. Besides, if you are really trying to hide something in trial, an objection standing alone isn't going to help you any more than the fig leaf helped Adam.

Laid back lawyers don't object much, because like other important courtroom skills, it is difficult to do well.

But well-made objections are essential to courtroom success. Objections not made are lost forever. Mistakes go uncorrected. Appellate issues are not preserved. At worst, cases are decided based on things other than the relevant facts and the law.

When the occasion calls for it, you must object. No one else can do it for you. So "screw your courage to the sticking place," as Lady McBeth said, and lay on, McDuff.

When to Object

You already know that you must object before the evidence is shown, blurted out, or slid under the door. Judicial instructions to disregard evidence are usually ignored by jurors and can lend unwanted emphasis. It is like telling you not to think of the word "hippopotamus."

But because evidence happens in “real time,” you must train your ear to hear objectionable questions in advance, as they are being asked.

For example, most leading questions start with some variation of the verb "to be." Are you, do you, and did you questions almost always suggest an answer, yes or no. Hear "are you," and get ready to get on your feet. "Objection, leading."

Most long questions -- more than ten words -- are compound, vague, argumentative, or misstate prior testimony. After ten seconds of lawyer talk, get ready to object. "Objection. Mr. Willis is testifying."

The often-asked question, "What did you do next?" frequently triggers a long story. "Objection, calls for a narrative." Even if the question is a good one, a long answer -- more than ten seconds of witness talk, almost always answers a question that wasn't asked. "Objection, non-responsive."

Every re-direct begins with a shamelessly leading question. Be ready to object.

This is not to suggest you should object to every question asked in an improper form. Knee jerk objections can make you look like, well, a jerk. Sometimes all you accomplish is making your opponent's question better. When you must object, don't act offended. Keep your cool. "Whom the gods would destroy, they first make mad." That's Euripides.

No article or CLE can tell you when to object and when not to. That must be a product of YOUR thought, based on YOUR knowledge of the case, the rules, the temperature of the court and jury, and YOUR assessment of the score. But a good guiding principle is, only object when it enhances the advocacy of your case, and is consistent with your themes, tactics and trial objectives.

Substantive objections, on the other hand -- hearsay, relevance, unfair prejudice that outweighs probative value, lack of foundation, privilege, parole evidence, best evidence, and improper opinions -- must be made, and should be anticipated. If important, they should be the subject of a motion *in limine* before trial. If the issue comes up during trial, have a short "pocket brief" ready if possible. It will show the Court you know the law and are on your toes.

Remember, a motion *in limine*, once denied, does not preserve your objection, unless the Court has specifically stated on the record that its ruling is final. See Parr v. Gaines, 309 S.C. 477, 481, 424 S.E.2d 515, 518 (ct.App.1992). If the motion is granted against you, and your evidence has been excluded, you must still proffer it during trial to preserve the record and give the Court a chance to correct any error. Many an evidentiary issue has been waived by this mistake. Make the objection again on the record. "Your Honor, this is the matter we previously raised. We still object. It is hearsay." (Or briefly re-state your other grounds). The Court may change its mind once it hears the context and sees your point, but not unless you give it the chance.

If a substantive objection has not been anticipated, or if you have held your fire for tactical reasons, now is the time to ask for a side bar conference. "Your Honor, may we approach?" is usually all it takes. If the argument will take more than thirty seconds, ask

that the jury be excused. Some side bars are not on the record. Know how your jurisdiction handles this. Don't leave it up to the Court to preserve your record. That's your job.

Jurors are curious about side bar conferences. Don't act like you lost as you go back to your table or lectern.

How to Object

Stand up. Say in a firm, clear, confident voice, "Objection." This should stop the witness from blurting out inadmissible evidence and get the Court's attention. Then state your grounds in a few words. If you can get away with it, a sentence for the jury, explaining the objection in layman's terms, is smart. "Objection, Your Honor. Hearsay. A witness can't say what someone else said out of court." Or, "Objection, Your Honor. Leading. Counsel is suggesting the answer to the witness." Memorize a few short sentences that explain common objections. Most Courts will let you get away with this. If not, they will let you know.

If you can cite to the rule, all the better, but by itself, a number it is not enough. "Objection, Your Honor. This is unfairly prejudicial and proves very little. Rule 403 should exclude this. May we be heard further?" Almost every objection has a corresponding Rule. Yes, the Court knows the rule, but by citing it, you show the jury and judge that you do too. Your legend will grow.

Another legend, Ted Williams, the greatest hitter that ever lived, knew the strike zone better than the umpires. If Teddy Ballgame didn't swing, it was a ball. The umpires knew this, and as a result, Williams was always among the leaders in walks drawn. Show that you know the rules like Ted Williams knew the strike zone, and you will get the benefit of the umpire's calls.

Speaking of strike zones, my late mentor Dick Bowman would object more frequently early in a trial than later, for several reasons. Like any good pitcher, he wanted to know the boundaries of the judge's strike zone. Does the Court have a predisposition against leading, for example, or is the judge a stickler for authentication or foundations? Bowman knew how to lay foundations for any kind of evidence. Sometimes his opponent did not, and Dick wanted to find out early in the trial who knew their evidence law and who didn't.

Sometime your objections can frustrate your opponent. I am not suggesting frivolous objections only for that purpose. But if your opponent cannot ask a non-leading question (and many lawyers cannot), objections can be "flustrating." Jurors are sometimes entertained when lawyers get flustrated. (I know that "flustrated" is not a word, but it should be.)

Objections During Opening and Closing

Do not fall prey to the unwritten rule that it is somehow uncivil to your opponent or offensive to the jury to object during your opponent's opening or closing. If improper argument is made, and you don't object, you waive it, except when extraordinarily prejudicial – see *Toyota of Florence vs Lynch*, 314 S.C. 257, 442 S.E.2d 611 (1994) (argument characterized as "vicious and inflammatory" was not objected to until after the closing, and the court found that this was not fatal to the appeal.)

Opening statements frequently stray into argument. Many lawyers love long and eloquent opening statements, but most judges don't. I have never run across a judge in my career as a trial lawyer who pulled me aside and said, "Counsel, your opening was too short."

When your opponent starts to argue in opening statement – to go beyond a "non-argumentative preview of what the evidence will show" – don't be reluctant to object. "Pardon me for interrupting, Your Honor, but Mr. Willis is arguing his case in opening." Most judges will look up from whatever else they are doing other than listening to the opening, and say, "Don't argue, counsel."

In Closing, when the argument goes beyond the law or evidence, or is intended to appeal to passion or prejudice rather than common sense, it is not only acceptable to object, it is necessary. See *Branham vs Ford*, 390 S.E.2d 203, 701 SE 2d 5 (2010).

The only caveat to this advice is another unwritten rule, called the goose/gander rule. If you object during my opening or closing, you better be ready for my objection during yours.

How Not to Object

Look like you just woke up from a nap. Shuffle your papers and raise your butt slightly, about three inches off your chair. Mumble or whine in protest. Be insincerely apologetic. If the Judge barks at you, put your tail between your legs and back down. Or, rise, look at the ceiling, and begin to muse out loud about what you don't like about what you just heard.

The ineffectiveness of this method seems obvious, but this is the way many lawyers object. If you object, be strong. "Faint hearts never won fair ladies." That's Gilbert and Sullivan.

Get a Ruling

Judges who don't rule on objections don't get reversed. Sometimes a judge will delay a ruling hoping you will withdraw the question or ask it another way. If you are right, don't

be a wimp. Don't withdraw the question if your opponent's objection is not well taken. "Your Honor, may we have a ruling for the record." It will probably be against you, but you will live, and you may preserve an erroneous ruling that earns you a new trial.

Know When to Stop

Another mentor, the late Steve Morrison (why are so many of my mentors "late?"), gave me a page from his notes from a case we tried together, many years ago. Steve was a big man, but he had tiny handwriting. In his small scrawl he had written, "Willis objects. Judge: sustained. Willis argues. Judge: overruled." I have this in a frame in my office. Lesson learned: when you are winning, sit down.

"The Object of Your Objection"

A thoughtful article on objections by two JAG officers who try cases daily appeared in the Fall 2006 edition of Litigation Magazine. Their point was that trial lawyers should spend some time, prior to trial, thinking about the purpose of their objections. It is about more than keeping out the bad stuff. In the end, the "object of your objections" should be to enhance your advocacy. This means making objections you will lose, and foregoing objections you will win, in loyal service to your case themes. As the JAG officers explained, "in court, advocacy isn't everything, but everything is advocacy."

I wish I'd said that.

(You will, Willis, you will.)

24 TRIAL OBJECTIONS

1-10 are substantive – must be made or are waived – can't be "fixed" by how you frame the question. 11-24 are "form" objections - can be fixed.

Substantive

1. Relevance (Rule 401 – Does this make the existence of a material fact more likely than not?)

2. Prejudice Outweighs Probativeness (Rule 403) –Test – does probative value outweigh potential for unfair prejudice – (must be unfair – all good evidence is prejudicial, right?)

3. Incompetent (Witness is not able to give the foundation – has no personal knowledge; witness must be able to communicate/perceive something; have memory of it)

4. No Foundation (Is "it" what it purports to be? Source of the proof must be witness' personal knowledge. The essential elements of admissibility have not been established.)

5. No Authentication (It is what it purports to be?)
   600 Rules, 900 rules

6. Privileged Communication – 500 Rules – Primarily attorney/client

7. Best Evidence Rule - The original of a document is required unless it is unavailable. Also applies to photos and recordings – Rule 1002. (Note – This doesn't not mean one form of evidence is somehow "better" than another.)

8. Parol Evidence Rule - Proof of prior or contemporaneous communications are not admissible to alter the unambiguous terms of a written contract.

9. Hearsay – 800 rules - An out of court statement offered to prove its truth (plus exceptions)

10. Improper Conclusions/Opinions – 700 Rules – lay and expert opinion must have appropriate foundation

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Form

11. Leading – 611(c) – Question suggests the answer – Can't lead on direct/re-direct (exceptions – uncontroverted, background, hostile, when laying a foundation, etc.)

12. Narrative – Q&A is required - not a speech by witness

13. Repetitive – Asked and answered

14. Assumes Fact Not in Evidence – Mostly applicable to hypothetical questions or efforts to summarize/restate prior testimony as preface to a question

15. Misstates Evidence/Misquotes Witness

16. Confusing/Misleading/Ambiguous/Vague/Unintelligible

17. Speculative – asking for guesswork (personal knowledge requirement in the rules) Rule 602 – also an objection to a response

18. Compound - two or more questions combined as one

19. Argumentative – Test – Is it non-factual? – Note that argumentative questioning on cross is typically allowed for experts, and often backfires on the questioner.

20. Improper Characterization – Does not literally mis-state, but places a spin on the evidence - "Now you heard the 'overly dramatic' rendition of the facts by this witness," etc.

21. Unresponsive/Volunteering – Witness can't answer a question that wasn't asked.

22. Cumulative - Different from repetitive, in that it's not the same question, just proves same point multiple ways, or with multiple witnesses.

23. Beyond the Scope - of cross or redirect – See Rule 611(b) & (d) – scope of cross not really "limited" per se; if subject matter is beyond the scope of direct, the cross examiner can ask but cannot lead. Redirect/re-cross are actually limited by subject matter to what was previously discussed.

24. Improper Impeachment – think "confirm, credit, confront" - Rule 607, 609, 613 – you can't just ask a witness, "didn't you say in deposition that?"

OBJECTIONS

1. Should you object?
   - Will it help or hurt?
   - How will you look to jury?
   - How will it look on the record?
     (three audiences – jury, judge, appellate court)
   - Is it consistent with your trial or witness themes?

2. When should you object?
   - Before trial – motions in limine
   - Before testimony
   - After (as last resort), plus request for curative instruction

3. How should you object?
   - Stand up! Say "objection," then give basis . . .
   - Be firm, confident, cool
   - Avoid speaking objections – give a one or two word "basis" – use simple words if possible – if you get to explain in front of the jury, avoid legalese
   - May we approach? (for all relevance objections) – if not, you invite a "mini-argument" in front of the jury from your opponent.
   - Cite the rule if you can
   - Use of "pocket brief" – Anticipate substantive objections and "mini-brief" them. Your legend will grow.

Getting the Best Out of Witness Examination
&
Ethical Considerations
&
Closing Statements and Final Jury Instructions – Steer the Jury in the Right Direction

Submitted by Brett H. Bayne

A. Direct Examination Techniques

1. Witness Introduction - Establish Credibility and Qualifications in Court

    a. Every witness must be competent to testify. Federal Rule of Evidence (FRE) 601 eliminates the traditional common law limitations on witness testimony. However, some states still retain some competency restrictions, such as barring testimony by young children, persons of unsound mind, and interested parties under dead man's acts. Those state competency rules apply not only to state court cases, but also to civil diversity jurisdiction cases in federal courts.

    b. Every witness must take an oath to tell the truth. FRE 603 requires that every witness swear or affirm to tell the truth, but the oath need not be in the usual form if the witness has personal or religious reasons for refusing to take the usual oath. The important point is to have the witness declare that she will testify truthfully, which then subjects her to the penalties of perjury for testifying falsely.

    c. Every witness (except experts) must have personal knowledge of the event or transaction about which the witness will testify. FRE 602 requires that a witness be shown to have personal knowledge before that witness can testify about the event or transaction.

2. Making the Testimony Clear - Organization and Conversational Manner

    a. The lawyer's direct examination questions must meet certain evidentiary requirements. The lawyer's questions must elicit testimony that is relevant (FRE 401 to 415) and reliable (FRE 801 to 807), and there are rules that control the form and content of direct examination questions. That is, relevant and reliable testimony must be elicited in the right way.

        i. It is commonly said that leading questions should not be used during the direct examination.

        ii. Testimony must be relevant. This involves a two-step analysis. First, under FRE 401 to 402, the testimony must have “any tendency” to make a fact that is “of consequence” to the case “more probable or less probable.” If the testimony proves or disproves something in issue in the case, it is relevant.

    b. Although there is no specific evidence rule, courts will not allow questions that are compound, confusing, or unintelligible; that ask the witness to guess or speculate; or that assume facts not in evidence.

c. An effective direct examination is a directed examination. It must have a structure that is simple, clear, and logical. It should break up the examination into simple chapters that say: this is where we were, this is where we are, this is where we're going. It must be efficient, because juror attention begins to wane after about 20 minutes of listening to anything, including direct examinations. There are two basic ways to structure a direct examination: chronological and impact.

    i. Chronological

        1. Most storytelling is chronological. That's the way life works, and that's the way we're used to hearing stories told. Because most trials involve a sequence of events, it makes sense to tell the story in the order in which the events occurred. That's what jurors expect.

        2. Direct examinations structured chronologically usually divide the examination into several digestible topics:

            a. Introduction

                i. The first minute of any direct examination must make an impression. Whenever a witness walks into the courtroom, takes the oath, and sits in the witness chair, the jurors ask three questions: Who is she? Why is she here? Should I believe her? The first minute has to address these questions.

            b. Background

                i. The third question jurors ask when a witness first takes the stand is: Can I believe him? The most credible witnesses are likeable, knowledgeable, and impartial. Credibility comes from a person's background, demeanor while testifying, and whether the testimony makes sense in light of the other evidence and the jurors' experiences in life.

c. Scene

    i. In a chronological direct examination, a crisp introduction and appropriate witness background are usually followed by a description of the scene. The jurors cannot follow the action unless they have a clear picture of where the action took place. Like a play, the stage must be set before the action can begin.

d. Action

    i. The critical part of the direct examination is the action. Most lawyers have the witness tell the jurors what happened, but effective lawyers do more than that. Effective lawyers have the witness show, not tell, what happened. They have the witness re-create the event, so that the jurors can relive reality through that witness's eyes. They make the testimony visual and visceral, so that it has emotional impact and draws the jurors into the story. They make sure that the testimony supports their theory of the case, themes, and labels.

e. Supporting exhibits

    i. Exhibits are another opportunity to make testimony visual, which always helps jurors to understand, experience, and remember what happened. As discussed earlier, exhibits should be integrated into the direct examination so that they reinforce, rather than distract from, the oral testimony. With key witnesses, many lawyers bring out the testimony about the scene and action first, then introduce exhibits that repeat, highlight, and reinforce the testimony.

f. Aftermath

i. After the action comes the aftermath. Some occurrence witnesses testify only to the action, because they were not involved in what happened after the event on which the trial is based. Key witnesses, such as the plaintiff and investigating police officer in a personal injury case, and the arresting police officer and the defendant in a criminal case, can also testify about what happened after the collision or arrest occurred. In civil cases, such testimony is frequently critical evidence on the issue of damages. In criminal cases, it frequently includes inculpatory statements and conduct by the defendant.

g. Ending

i. Ending strong is just as important as starting strong. The reason is the principles of primacy and recency. We tend to remember better the things we hear first and last. Therefore, the last thing a witness says on direct examination should be important and linger in the courtroom, so that every juror will remember it.

ii. Impact

1. Chronological direct examinations are the most common way to structure direct examinations. There is another way, though: the impact direct examination. The impact direct examination puts the dramatic testimony at the very beginning of the examination, where it will grab and hold the jurors' attention. After the dramatic testimony is revealed, the direct examination then loops back to the other elements of the chronological approach.

2. The impact approach is frequently used with key witnesses to a traumatic event, and with defendants in criminal cases. For plaintiffs, the idea is to jolt the jury and make a lasting impression. For defendants, the idea is to jolt the jurors

away from the plaintiff's version and see it from the defense point of view. Obviously, the witness must be prepared carefully so that the drama unfolds as you intend it to unfold.

3. Making the Testimony Persuasive - Help the Witness Tell the Story and Emphasize the Strong Parts

    a. Direct examination questions can properly elicit lay (non-expert) witness opinion testimony. Under FRE 701, a lay witness can testify in the form of an opinion if the testimony is “rationally based on the witness's perception” and the opinion is “helpful” to the jury in understanding the testimony and resolving factual issues.

4. Style - Relating to Witness and Jury

    a. Whenever a new witness is called to the stand, the jurors' interest heightens. They watch as the courtroom doors open, the witness walks through the spectator section to the front of the courtroom, is sworn in by the clerk or court reporter, and sits down in the witness chair. As they watch, the jurors want to know three things: Who is this person? Why is he here? Can I believe him? Jurors want answers to these questions quickly because they form impressions quickly—in the first minutes of any direct examination.

    b. Most jurors want testimony presented as “people stories” that involve them emotionally and let them become involved in the life of another person. That's the kind of testimony most jurors connect with and remember. The best witnesses are those whose testimony is visceral and triggers emotional responses. They want witnesses to tell their stories in real time, using sensory language, so they can “see” and “feel” what happened and connect emotionally with the witness and the event. It also means that lawyers should use exhibits and visual aids during witness testimony whenever possible, to highlight and make visual the information the jurors are hearing.

    c. Finally, jurors subconsciously test the witness's testimony against the stories they have created in their minds during the opening statements of what really happened. If the witness's testimony is consistent with the jurors' stories, they find the witness credible and accept the testimony. If the testimony is inconsistent, the testimony is either rejected or distorted. In this way, jurors subconsciously reconcile the testimony of witnesses with the stories the jurors have already created mentally.

d. Effective trial lawyers understand that direct examination involves much more than getting a witness to describe what she saw, heard, and did. Persuasive direct examinations meet the jurors' interests, expectations, and needs. They are efficient, organized, and easy to understand. They recreate what happened so that jurors can picture the events in their minds and relive the experience through the witness. They use sensory language, create vivid mind pictures that draw jurors into the story, and use exhibits and visual aids to make testimony visual. Always, they tell a story that is consistent with the jurors' understanding of how real life works.

e. Planning and executing a direct examination that accomplishes all these goals is difficult, as difficult as any aspect of trial work. Nevertheless, direct examinations of well-prepared, persuasive witnesses who connect with the jurors often make the difference in the outcome of a trial.

5. Special Considerations in Direct Examination of Expert Witnesses

a. Structure

i. Direct examinations of experts should be structured in a way that makes the witness's testimony clear and meets the jurors' needs. A typical structure for direct examinations is:

1. Introduction
2. Education, training, and experience
3. What the expert did
4. Expert's opinions
5. Bases for opinions

b. Expert witnesses must comply with the special rules that govern the testimony of experts in Federal Rules of Evidence (FRE) 701 to 706 and Fed. R. Civ. P. 26. Finally, in federal courts and most state courts, they must comply with the case law since 1993 that has substantially altered the admissibility requirements for expert testimony.

c. Is the Subject Appropriate for Expert Testimony?

i. Under FRE 702, an expert witness may testify only if his testimony will “help the trier of fact to understand the evidence or to determine a fact in issue.” If expert testimony is not helpful, it should be excluded. Testimony is not helpful if the expert proposes to testify about something that is already within the common knowledge of the jurors or is just speculative. Such testimony is not helpful and is a waste of time under FRE 403. For example,

some jurisdictions permit experts to testify about factors that affect the accuracy of eyewitness identifications, because such expert testimony will help the jury assess the eyewitness testimony. Other jurisdictions bar such expert testimony on the ground that things that affect the accuracy of eyewitness testimony are already within the common knowledge of jurors.

d. Is the Expert Properly Qualified?

    i. FRE 702 mandates that an expert witness be "qualified as an expert by knowledge, skill, experience, training, or education." The rule is silent on how well qualified the expert must be. In federal courts, the standard has been generous, with most judges willing to accept any expert who has knowledge superior to that of the jurors. In recent years, however, some judges have become more demanding and require that the expert have actual expertise on the specific subject in issue to which the testimony is directed. If the expert is qualified to testify, the issue then becomes one of the appropriate weight to assign to the testimony, which is a question for the jury. For example, in a medical malpractice case, most courts will allow a doctor, retained as an expert, to testify about the applicable standard of care, even though the doctor is not board certified. Courts usually hold that the doctor has enough expertise so that his testimony assists the jury, and that board certification or lack of it goes to the weight the jury should give the doctor's testimony.

e. Is the Expert's Testimony Relevant and Reliable?

    i. For decades, the admissibility of expert testimony, in both federal and state courts, was governed by Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). That changed in 1993, when the Supreme Court decided Daubert v. Merrell Dow Pharmaceunticals, 509 U.S. 579 (1993). Daubert was followed by General Electric v. Joiner 379, 522 U.S. 136 (1997), and Kumbo Tire v. Carmichael, 526 U.S. 137 (1999). The Daubert-Joiner-Kumbo Tire trilogy has significantly changed the way federal courts (and those state courts that follow the federal courts) analyze the admissibility of expert testimony. In 2000, FRE 702 was amended to incorporate the holdings in these cases.

    ii. Whenever there is an issue about the admissibility of expert testimony, you must ask: Is the case in federal or state court? Is the witness a "scientific expert" or a "training and experience" expert?

What admissibility analysis applies to that kind of expert in that jurisdiction?

iii. In federal courts, the judge as "gatekeeper" must determine if the proposed testimony of any expert is relevant and sufficiently reliable for the jury to hear. This gatekeeping function applies to both "scientific experts" (those who base their testimony on scientific tests and methods) and "training and experience experts" (those who base their testimony on personal observation and experience). Under FRE 702, the judge must determine if "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the expert has reliably applied the principles and methods to the facts of the case."

iv. The judge makes this admissibility determination (usually in a pretrial Daubert hearing) by applying the so-called Daubert factors: (1) whether the theory or technique has been tested; (2) whether the theory or technique has been published and peer-reviewed; (3) the known or potential error rate; and (4) whether the theory or technique has been generally accepted by the scientific community. These factors obviously apply to scientific experts. The judge has flexibility in deciding what additional factors apply to scientific experts, and what pertinent factors should be applied to assess the reliability of training and experience experts.

v. Most state courts have adopted Daubert as to scientific experts. A minority continue to follow Frye and its "general acceptance" rule. Under Frye, an expert may testify if the tests or principles underlying the expert's testimony "have gained general acceptance in the particular field in which it belongs." Under Frye, the relevant scientific community, not the judge, controls admissibility.

f. Were Underlying Tests Properly Done?

i. In many cases, the reliability of underlying tests and methods is well established and is not in issue. However, the proponent must still show that the tests done in this case were properly done by competent persons using reliable equipment. For example, in a drunk-driving case, the prosecutor need not show that the Breathalyzer test is reliable, because that is an established fact, but the prosecutor must still show that the results in this case are

reliable because the unit used was reliable, in proper working order, properly calibrated, and operated by a competent technician.

g. Are the Sources of Facts and Data Relied on Proper?

    i. Under FRE 703, the expert may base her testimony on facts or data "the experts has been made aware of or personally observed." "If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted." This means that the expert can give her opinions without the underlying data first being admitted in evidence, as long as experts in this field reasonably rely on that kind of data. For example, a doctor can testify to her diagnosis of the patient without first having admitted in evidence the x-rays and lab tests on which the testimony is based.

h. Sample Expert Qualifications

    i. Introduction of the witness as you would any other witness. Then go to the questions below. Only ask the ones you know are a "yes" or there is information to get.
    ii. Educational Background
        1. College, grad, technical schools, special schools, etc
    iii. Work history
        1. Everything they have done related to the field they are an expert in
    iv. Certificates
        1. Have you received any special certifications or qualifications (i.e. a doctor may be board certified in X medicine)
    v. Published
        1. Have you authored any works that have been published in journals/books/magazines/etc
    vi. Served as an expert before
        1. Ask in what courts and how many times (In mock, this is made up. But it is a reasonable inference from the facts as they are to be qualified, just don't go crazy, 10 times is fine)
    vii. Reviewed this case/formed an opinion
        1. Ask what they have looked at in this case, the depositions, exhibits, reports, etc; then say you don't want the opinion yet, but have you formed an opinion based on your review of the evidence in the case.
    viii. Qualify

1. “Your Honor, at this time we would ask to qualify Dr. _____ as an expert in the field of _____.

6. Redirect Examination

    a. If you have accurately anticipated the cross-examination, there should be little reason to conduct a redirect examination. Confidently standing up and saying: “No redirect, your honor” signals to the jurors that the cross-examination didn't hurt you and there is no reason to redirect. Conversely, conducting a redirect always implies that there is a problem that needs fixing.

    b. Too many lawyers think that they should redirect just to repeat key parts of the direct and get in the last word. This is improper and does not accomplish anything positive in the jurors' eyes. In short, don't do redirect unless there is something important you need to address, and you can address it effectively.

    c. Remember that the rules governing direct examination apply to redirect as well. Questions should be non-leading, although judges customarily permit leading questions on preliminary and introductory matters. The redirect examination also must be “within the scope” of the matters gone into during the cross-examination.

7. Sample Direct Examination

    a. Introduction and Background.

        Q:Ms. Jones, please introduce yourself.

        A:I'm Helen Jones. I'm a schoolteacher at Washington Elementary. I've lived here for the past 10 years.

        This introductory question is becoming common.

        Q:How long have you been teaching at the school?

        A:10 years. I moved here to take the job.

        The usual background includes family, residence, and job.

        Q:Tell us about your family.

A:My husband's Mike, and he's also a teacher at Central High. He teaches algebra and physics and coaches the tennis team. We have a daughter, Shannon, she goes to Washington Elementary. That's very convenient, since I take her to and from school every day.

Q:Where do you live?

A:We have a house in the University Heights neighborhood. We've been there ever since we came here.

Scene. Because the jurors have already heard and seen the intersection in the plaintiff's case, it need not be described again.

Q:Where is your house in relation to your school?

A:My house is north of the school, about three miles away. But it's a convenient commute, since I can take Main Street almost the entire way.

Q:How often do you go through the Main and Elm intersection?

A:Twice a day on school days. On the way home, that's where I take a left turn on Elm to get to my house. It's only about three blocks from that corner.

Action. Notice that defendant is also using the present tense, and describing the action through the defendant's eyes.

Q:Let's turn back in time to June, 1, 2010, at about 5:00 pm. Where are you at that time?

A:I'm driving home from school.

Q:What car are you driving?

A:My 2005 Chevy sedan.

Q:Anyone with you in the car?

A:Yes, Shannon, my daughter, is in the front seat with me.

Q:Are you wearing seat belts?

A:Of course. We always wear them.

Notice that the pace here is deliberate.

Q:Let's talk about the time you reach the intersection of Main and Elm. What's traffic like at that time?

A:It's busy. It's rush hour, and Main is a busy commuter route.

Q:How fast is the traffic moving?

A:That depends. Sometimes it goes the speed limit, sometimes it's stop-and-go, but most of the time it's moving, but under the speed limit.

Q:When you get to the Elm Street intersection, what do you do?

A:The light's green for Main Street, I put on my left turn signal and slow down, then come to a stop in the intersection.

The pace of the testimony is still deliberate.

Q:Why do you stop?

A:There's a steady stream of traffic coming toward me on Main, so I can't make the turn.

Q:What's happening to the traffic behind you?

A:It's backing up, because there's no left turn lane, and my car is keeping the traffic from moving. That's the way it is every day at that corner.

Q:When does the light change?

A:I was there in the intersection for perhaps 10 to 15 seconds, then the light turns yellow.

Q:You can see the light?

A:Sure. I'm partly in the intersection, but I can still see the traffic light in front of me.

Q:When the light turns yellow, what do you do?

A:Nothing. I still can't make the left turn, so I just wait.

Q:Wait for what?

A:For the light to turn red. That's when I usually complete the turn. That's just the way it is during rush hour at that corner.

Now the pace picks up, because things are now happening quickly.

Q:When the light finally turns red, what do you do?

A:I'm watching the light, it turns red, there's no one else in the intersection, and I start to make the left turn.

Notice the sensory questions and answers. The defense needs to show that the accident was just as traumatic for the defendant and her daughter as it was for the plaintiff.

Q:What do you see next?

A:I've started the turn, my car is about halfway through the turn, and I realize that a car, coming down Main toward the corner, is not slowing down at all, and is going into the intersection right toward me.

Q:What's the first thing you do?

A:I remember screaming, because the car is coming right at us. I remember reaching for Shannon, trying to protect her, but it all happens so fast.

Q:And then what happens?

A:That car crashes right into the side of my car. Thank God it didn't hit the front door where Shannon was sitting. It crashes into the rear of my car, right about at the right rear wheel.

Q:What do you hear?

A:There's this huge crash, a big thumping sound, I hear myself screaming.

Q:And what do you feel?

A:The crash spins my car around, so now it's facing north again. The impact throws me toward Shannon, and it throws her against the passenger side door.

Q:And then?

A:Finally everything stops, and it gets quiet.

Q:What do you do?

A:Shannon's started crying, and I'm trying to comfort her, see if she's all right. I'm hugging her, then looking at her, then hugging her again.

Q:Was she all right?

A:I can't see anything wrong, but I don't know for sure.

Q:What about yourself?

A:Other than being scared to death, I'm all right.

Q:What do you do then?

A:For a minute or two, we just sat in the car, trying to calm down. I got my cell phone from my purse and called 911. The police arrived pretty quick, so maybe others called as well.

Q:When the police arrived, did you talk to them?

A:Yes. They wanted to know if we were all right, and they asked me what happened, so I told them.

Q:What happened to your car?

A:The right rear side from the rear door to the rear bumper was all smashed in. The front of the other car looked as if it was stuck in the right rear of my car. It looked awful.

Q:Could you drive your car?

A:No, it was way too damaged for that. The police called a tow truck, and they towed it away.

Q:What happened to the other driver?

A:I'm not sure. He was just sitting in his car. When the ambulance arrived, I could see the attendants talking to him, then he got out of his car, holding his arm, and he walked over to where they had a stretcher. He sat on the

stretcher, they put a seat belt around his waist, and put the stretcher in the back of the ambulance and drove off.

Q:How did you get home?

A:After the tow truck hauled our car away. Shannon and I walked home, since it was just three blocks away.

Exhibit and Ending.

Q:Ms. Jones, I'm showing you Defendant's Exhibit No. 1, a diagram of the intersection. It's already in evidence. Does that diagram accurately show where your car was when you first started to make your left turn?

A:Yes.

This is the crux of the defendant's liability case, so the defense wants to end on the most important facts from the defense perspective.

Q:Does it accurately show where the plaintiff's car was when you first started to make your turn?

A:Yes.

Q:Ms. Jones, when the cars were in those locations, and you started to make your left turn, what color was the light for Main Street?

A:It already turned red.

Q:Are you sure?

A:I'm positive.

Q:What color was the light when the plaintiff's car entered the intersection?

A:It was red.

Q:Are you sure?

A:I'm positive.

Q:And what color was the light when the plaintiff's car ran into your car?

A:It was red.

8. Sample Exhibit Entry

    a. Show to Opposing Counsel – "I am showing opposing counsel what has been marked for identification purposes as State's/Defense Exhibit #_____"
    b. Ask for Permission to Approach the Witness
    c. Show exhibit to Witness – "I have handed you what has been previously marked as State's/Defense Exhibit #_____"
    d. Have Witness ID Document:
        i. "Do you recognize this document"
        ii. "What is that document"
        iii. Any relevant authentication questions (chain of custody, who produced this document, where did you get this documents, etc; infinite questions depending on document)
        iv. "Is this a fair and accurate depiction?; Is this a true and accurate copy?; Is this the actual document?" (just depends, obviously)
    e. "Your Honor, at this time the State/Defense offers State's/Defense Exhibit #____ into evidence."
    f. **Court will ask for any objections** You should have a good idea ahead of time in prep whether there is likely to be an objection and what your response will be.
    g. Court will admit or exclude document.
        i. If admitted, can elicit testimony directly from/about document
        ii. If excluded, move on in your questioning or try to lay more foundation or find another way to admit it.

B. Cross-Examination Methods

1. How to Prepare for Witnesses' Testimony and Potential Objections

    a. Should you cross-examine a particular witness? Always ask: Can the witness help you? If the witness hurt you, can you hurt the witness? Unless you can answer yes to one of these questions, there's little point in cross-examining. An ineffective cross-examination—ineffective because it has no clear purpose—merely reinforces the direct, enhances the witness's credibility, and annoys the jurors when they realize you have nothing useful to add and are wasting their time.

    b. Cross-examination can accomplish three things:

        i. (1) bring out facts helpful to your side
        ii. (2) attack parts of the witness's testimony, and

iii. (3) attack the witness himself.

c. Cross-examination should usually proceed in that order. Start by bringing out helpful information, either by emphasizing facts the witness has already testified about on direct, or by bringing out new facts the witness knows but did not disclose on direct. Because bringing out helpful information is not an attack on the witness, this can usually be done in a neutral, non-confrontational way. The witness will be more willing to testify to the new information if your attitude is pleasant.

d. After that, consider attacking specific parts of the witness's testimony. This includes exposing weaknesses in the witness's perception, memory, and ability to recount the events. It involves bringing out important prior inconsistent statements that contradict what the witness said on direct, and showing that the witness's testimony is at odds with other evidence. Is the witness confused, mistaken, or forgetful? Or is the witness intentionally changing or fabricating her testimony? Your attitude should reflect the reasons for the changed testimony.

e. Finally, consider attacking the witness himself. Does the witness have a bias, interest, or motive to testify a certain way? Does the witness have an admissible prior conviction? Has the witness committed a prior bad act probative of truthfulness? Because these matters attack the witness's credibility, your attitude should reflect the attitude you want the jurors to adopt about the witness.

f. Next, keep your cross-examination structure simple and realistic. Cross-examination is largely the art of hitting singles and doubles; attempting to hit home runs usually leads to strikeouts.

    i. Pick the two to four best important points you can safely raise during the cross-examination. Too many points overload the jurors with information and dilute the impact of your best points. A good test is: Will I be talking about this point during my closing argument? If not, it usually means that it is not important enough to develop during cross-examination.

g. After that, arrange your points for maximum impact. <u>The two best points should be at the beginning and the end of the cross-examination</u>. This reflects the principles of primacy and recency. People remember best what they hear first and last.

h. Start big. Jurors will only give you one or two minutes to establish something important before they conclude that nothing significant will

come out of the cross-examination and stop paying attention. Jurors are always asking: Why should I listen? Why should I make the effort? Cross-examination has to give jurors something good quickly to demonstrate that cross-examination will be worth it. Too many lawyers start weak. For example, saying: “I just have a few questions to ask on cross-examination,” or “There are some things you said on direct that I didn't understand,” merely tells the jurors not to expect much, or suggests that cross will simply be a rehash of the direct. Instead, start with something that grabs attention and tells the jurors that cross-examination will be interesting, informative, even exciting.

i. For example, asking: “You didn't see the crash until after it happened, did you?” establishes something important immediately. Asking: “You're a convicted felon, aren't you?” grabs attention immediately.

i. Your cross-examination must also end big. The last thing you bring out during cross-examination will have staying power, so it must be something important. Let the jurors know that you are ending, and let your tone of voice and attitude signal that this is your last important point. For example, questions such as: “You never saw a gun, knife, or weapon of any kind in Mr. Johnson's hands that evening, did you?,” “All of this happened in one or two seconds, right?,” “And you were over 200 feet away when it happened, isn't that right?,” establish important points.

j. Cross-examination is about creating impressions and conveying emotions. Jurors may forget the details of the cross-examination, but they will remember the impressions formed during the cross: about the testimony, about the witness, and about the lawyer.

2. Organization

a. Use topical organization

i. The goal is not to tell the witness’s story but rather to establish your story through a small number of additional or discrediting facts.

ii. It is fine to divide your cross into distinct sections with a simple transition in between. There does not have to be complete continuity throughout.

iii. Organizing in blocks of questions in the same area allow you to move them around during the cross in the event the witness gets into an area you planned to ask about later.

b. Give the details first

i. If you are asking about specific events, especially while discrediting a witness, always set up the discredit with the pertinent details surrounding the event. If you have walked a witness through all of the details before going into why what they said was wrong, it will be much harder for them to deny or disagree with what you are saying.

c. Ask only leading questions

i. Do not seek interpretation of the facts. The large majority of these questions will be yes/no. If the answer is not a yes/no, you probably should not ask it on cross-examination.

1. Ex: You were twenty feet away when you applied the brakes, correct?

2. Bad Ex: How far were you when you applied the brakes?

a. Unless you know the answer and it is an impeachment setup.

ii. Functionally you are telling the jury and the witness what happened and simply looking for confirmation from the witness.

d. Get in and get out.

i. Brevity is key. Try to limit your cross-examination to several key points that are important to your case. You do not need to cover every single detail.

e. Ask only questions to which you already know the answer.

i. Simple to say, hard to practice.

ii. Do not go on a fishing expedition; resist every temptation to ask "how" or "why" in response to an answer.

iii. If you don't already know the explanation, cross is not the time to find out.
iv. If the answer you are expecting to a "how" or "why" question can be inferred from other evidence, save it for your closing and just answer the question yourself. Don't let the witness answer it.

v. Resist as well if a witness asks if he can explain to you. A judge may allow it but nothing good ever comes from a witness volunteering information.

f. Do not invite objections.

i. Cross-examination is about tempo and flow. Asking questions that are objectionable breaks up your tempo, flow, and control of the witness.

ii. Avoid compound questions. Ask short, quick, one subject questions.

iii. Ask fair questions. If it is a question that an answer is not provided for in the case materials, you probably shouldn't ask it as it will require the witness to make up an answer (and then they have free reign to say whatever they want.)

g. Do not ask the ultimate question.

i. Probably the hardest part of good cross is resisting the urge to ask one question too many/go for the kill.

1. Ex: "So you just ignored the fire truck didn't you?"

ii. A good cross will have already established that fact. The witness is unlikely to admit to the fact. Use your closing to answer that question for yourself.

h. Insist on a responsive answer.

i. The witness is required to answer your questions. Some witnesses will try to not answer a question by just launching into a discussion without ever giving an answer. Always get your answer.

ii. You can repeat the question.

1. "Thank you for that answer, but my question was _____"

iii. You can also eventually go to the judge for help and an instruction to answer the question.

1. "Your Honor, can you please instruct the witness to answer my question?"

3. Framing the Questions and Limiting the Response

a. There are several topics you should always consider when you plan any cross-examination. There should be a checklist for every witness. (The topic of impeachment is discussed in the next section.)

i. Favorable facts from direct
ii. Favorable facts not yet mentioned
iii. What witness must admit
iv. What witness should admit
v. Attacks on the witness's perception
vi. Attacks on the witness's memory
vii. Attacks on the witness's ability to communicate
viii. Attacks on the witness's conduct
ix. The "no ammunition" cross

b. Cross-examination involves more than learning to ask simple, clear, leading questions. It involves more than learning the technical impeachment requirements and skills. Effective cross-examination also requires a methodology for developing, organizing, and executing a cross-examination for every witness in every case. How do you do that?

c. Always begin with the jurors' perspective. What do they expect and want cross-examination to be? They want it to be interesting and informative. They want it to grab their interest immediately, in the first minute, or else they will stop listening. They want it to be organized, so that they can easily follow and understand the points made. They want it to provide new information that will change their impressions about the witness, the facts, and the case as a whole.

d. A sound methodology is to ask a progressive series of questions:

i. What is my theory of the case?
ii. What are my themes and labels?
iii. What are my closing argument points about this witness?

iv. What facts exist to support those points?
v. What order should I bring out those facts on cross?
vi. What tone and attitude should I use during cross?
vii. What questioning style should I use during cross?

e. Always start with your theory of the case. There's little point in cross-examining a witness unless that cross-examination supports your theory of the case. Next, remember your themes, the words and short phrases that summarize your theory of the case. Remember your labels, the words and short phrases that characterize the parties, events, and other important things in the case. Incorporate those themes and labels into the cross-examinations. Third, ask yourself: During closing arguments, what will I say to the jurors about this witness? If you're not going to mention it during closing arguments, it's probably not worth mentioning during cross-examination.

f. Next, ask: What facts exist, that you can bring out during the cross-examination of this witness, that will support your closing argument? The essence of cross-examination is getting witnesses to admit facts that will support your closing argument points. After that, focus on the order in which you will bring out these facts. The two strongest points should be brought out first and last during the cross-examination. Save other items for the middle, remembering that too many points only dilute the stronger points.

g. After that, decide on the tone and attitude you will display during the cross-examination, the attitude that you want the jurors to adopt about this witness. Always ask: Why is this witness testifying the way he is? Is the witness mistaken, confused, or forgetful? Is the witness slanting his testimony to help or hurt one side? Is the witness intentionally fabricating his testimony? Your attitude during the cross-examination must be consistent with your later explanation, during closing arguments, for why the witness said what he did.

h. Finally, remember your questioning style during cross-examination. Make your questions short, simple, and leading. Make sure your questions raise only one fact at a time. Make sure you use strong nouns and verbs. Avoid “quibble words,” those adjectives and adverbs that characterize the testimony; and conclusions, the “one question too many” that summarizes the testimony. These characterizations and conclusions are better saved for closing argument.

4. Prior Inconsistent Statements - the What-fors and the How-tos

    a. Impeachment discredits the witness. It is a direct attack on a witness's testimony or the witness himself. The FRE and case law generally recognize seven impeachment categories:

        i. Bias, interest, and motive (no rule; case law)
        ii. Prior inconsistent statements (FRE 613)
        iii. Contradictory facts (no rule; case law)
        iv. Prior convictions (FRE 609)
        v. Prior bad acts (FRE 608(b))
        vi. Character for untruthfulness (FRE 608(a))
        vii. Treatises (FRE 803(18))

    b. Impeachment attacks the witness's testimony or the witness directly, but it is effective only if the jurors attach significance to it when it happens and remember it when they deliberate. For impeachment to be effective, lawyers must employ proper techniques and display appropriate attitudes. In addition, the impeachment must also be significant. Minor facts or inconsistencies have no impact or, worse, suggest that you have nothing significant to expose during your cross-examination. Impeach only if the jurors will perceive the impeachment as important.

    c. Use of prior inconsistent statements is the most common impeachment method. Whenever a witness testifies about something during the trial, and the witness said something different (or failed to say anything) at an earlier time, the inconsistency detracts from the witness's credibility. Witnesses frequently make oral statements to police or other investigators. They make written and signed statements. They prepare reports and forms. They testify at depositions, hearings, and other proceedings. They fail to say something under circumstances in which they would be expected to say something. These are all potential areas for impeachment at trial. If the inconsistency is significant, bring it out.

    d. Effective impeachment with a prior inconsistent statement requires two things: an effective technique and an appropriate attitude. Effective technique is necessary because impeachment must be simple and clear. It must create an impact now. The enemy of effective impeachment is complexity and confusion.

    e. Think of impeachment with a prior inconsistent statement as holding up before the jurors two flash cards, one white, the other black. The white card contains what the witness said today; the black card contains what the witness said at an earlier time. If the flash cards are simple, the contrast is

stark and clear. If the flash cards are complicated and muddled, they turn grey, and the contrast disappears. Effective technique is based on the 3 Cs, accompanied with an appropriate attitude. The 3 Cs are:

i. Commit
ii. Credit
iii. Confront

f. First, commit. Commit the witness to the fact she said during the direct examination that you now want to impeach. Make it as specific, focused, and short as possible. Use the witness's actual words. Committing the witness is important because it reminds the jurors what the witness said on direct, and lets the jurors know that something important and interesting is about to happen.

g. Do you need to do this second C—credit—every time you impeach a witness with a prior inconsistent statement? No. Do it once, so that the jurors understand how a statement is made to a police officer or how a deposition transcript is created. After that, jurors will know why a statement to a police officer or a deposition question and answer is reliable. You can then abbreviate or even drop the "credit" step, and go immediately from committing the witness to what he said during direct examination and bring out the prior inconsistent statement. This makes the contrast cleaner and more immediate.

h. Third, confront. Bring out the prior inconsistent statement and ask the witness to admit making it.

5. Sample Cross Impeachment

When a witness makes a statement on cross examination (or on direct, you can still impeach that on cross) that is inconsistent with the statement given in the affidavit/deposition/etc, you have to impeach the witness with their prior statement.

1. Mr. X, you just stated _____. (You have to clarify the statement to give them a chance to correct their answer).

2. Do you remember giving a statement/deposition/etc in this case?

3. And that statement/deposition/etc was a true and correct version of the facts as you understood them to be?

4. **If it's a deposition in a civil case** And I was there? Correct? And your attorney was there? Correct?

5. And you had a chance to review that statement/deposition/etc?

6. And when you were done giving and reviewing that statement/deposition/etc, you signed the document?

Show opposing counsel and then hand them a copy of the statement and return to your spot, have a copy with you as well to read from

7. What I have just handed you is a copy of your sworn statement, correct?

8. And on the back page, that is your signature, right?

Direct them to page and line number in the statement/deposition/etc

9. On Page/line _____, you stated _____, correct? (always read it for them)

Go take the statement/deposition/etc away from them and return it to the table, then to your spot

10. So when I asked you _____, the correct answer was actually __(whatever is in the statement/deposition/etc___.

6. Sample Cross Exam (Short)

    a. You awoke at 7AM on the morning of the accident, right?
    b. You had to be downtown later that morning, correct?
    c. Because you were meeting an important new client?
    d. And you wanted that client's business, didn't you?
    e. Because you stood to make a lot of money, right?
    f. And the meeting was scheduled for 830 AM, correct?
    g. You lived 16 miles from the office, didn't you?
    h. You rented a parking spot two blocks from your office?
    i. And you left your home at 755 AM, right?
    j. The accident occurred at an intersection 7 miles from downtown?
    k. And it happened at 820 AM, didn't it?

C. Ethical Consideration

1. Talking to Witnesses Before They Testify

    a. You as the lawyer must prepare the witness. How this should be done depends, in part, on who the witness is and what you will be using to

prepare. Your confidential conversations with your client are privileged and protected from disclosure, so you can freely discuss anything with the client.

i. In contrast, your conversations with other witnesses are not privileged. Talk to non-client witnesses as though the jurors were present and listening, because your conversations with these witnesses may be brought out during cross-examination.

ii. In addition, no witness is obligated to work with you before trial to prepare for testifying at trial. Although cooperative witnesses will want your help, neutral and hostile witnesses can and often do refuse. With such witnesses, your only right is to subpoena them and examine them at trial.

b. Witness preparation also involves having the witness review documents, records, and other written matter. Be careful about what you show witnesses—your client as well as any other witness. Under FRE 612, if a witness before trial uses any writing to refresh memory for the purpose of testifying, that writing, in the court's discretion, may be ordered turned over to the other side, which can then use it to cross-examine the witness and introduce relevant portions in evidence.

i. The disclosure requirement of the rule usually trumps claims of work product and may even trump claims of privilege. If you show it to any witness to prepare for testifying at trial, it may end up in the other side's hands. Therefore, show witnesses only those documents, records, deposition transcripts, exhibits, and visual aids the other side has already obtained during discovery and pretrial disclosures, or that you don't mind the other side getting.

c. Explain to the witness what your purpose is during a preparation session. Many witnesses don't understand that it is perfectly proper for a lawyer to talk with a witness for the purpose of preparing to testify at trial. In fact, jurors are often given a jury instruction to that effect.

d. Explain to the witness that you need to learn what the witness can say at trial; show how her testimony is an important part of your proof; and help the witness be a knowledgeable, impartial, and dynamic witness.

e. Only the witness knows what facts she can testify about.

f. Only you know what parts of the witness's personal knowledge are important to the presentation of your case.

g. Your job on direct examination is to bring out the important facts so they are clearly and credibly presented to the jurors.

h. Find out the witness's goals and concerns. For example, an employee for a corporation may be concerned about how her testimony will be assessed by her supervisors. Some witnesses may be concerned about a particular part of their testimony. Direct examinations will be more successful if you keep in mind that witnesses also have needs that should be addressed.

i. Witnesses are persuasive because of what they say (content) and how they say it (delivery). The key to effective testimony is to make sure the content comes from the witness, not the lawyer. Develop the testimony through the witness's own natural vocabulary and plain English.

    i. Ask sensory (e.g., "What did you see, hear, smell, taste, and feel?"), not conclusory, questions (e.g., "What happened?").

    ii. Above all, don't suggest words that the witness might use, because they will be your words, not those of the witness, and they won't sound genuine in the courtroom. Instead, prod the witness's natural sensory language out of him.

D. CLOSING STATEMENTS/JURY

1. Goals

    a. Closing argument is your opportunity to tell the story of the case in its entirety free and clear of most formalities of the rest of the trial.

    b. It is pure "advocacy"

    c. It allows you to use your skills to persuade the jury.

    d. It is a time to tie in the mental images set out in the Opening and used throughout the trial.

    e. Use theory and theme; Argue; But Don't make impermissible arguments.

        i. Essential to tie in your theory and theme of the case.

    f. A simple recitation of facts is not sufficient, you must tie everything together in a manner that makes the verdict you are asking for make sense.

g. Make sure to use exact phrasings used in the opening statement and throughout the directs and crosses.

h. Argue for a verdict.

    i. Make inferences and conclusions – you are free to draw and urge inferences reasonably supported by the evidence.

    ii. Your argument must support the inferences if you want them to be believed.

    iii. Group together the points that support your arguments

    iv. Use analogies, allusions, and stories

    v. You can use fables, simple analogies, and stories in the form of hypothetical narratives or anecdotes. You can even use personal experience if it fits the situation.

        1. However, be careful with stories. They can easily come across as very disingenuous.

i. Emphasize undisputed facts

    i. Anything that is agreed upon or not disputed should be hammered home in the light that best proves your point.

    ii. The opposition's decision not to produce contradictory evidence greatly enhances the value of an undisputed fact.

    iii. Warning: Never comment on a criminal defendant's silence as the reason a fact is undisputed.

j. Refute opposing witness testimony

    i. Now is the time that you have heard testimony to explain to the jury why what was said was wrong, a lie, impossible, etc.

k. Tie up your Cross

    i. Remember that the "one question too many" in cross is to be tied up in closing. Use the inference of that last question you wanted to ask and answer it now in front of the jury.

ii. Use closing to explain to the jury why a witness said what he did (instead of asking the witness "why?")

l. Argue credibility and motive

i. If a witness has a reason to lie, now is the time to really drive it home.

m. Assert the weight of evidence

i. You are free to argue that one piece of evidence or one piece of testimony should be given more weight than another piece of evidence or testimony.

n. Confront your weaknesses

i. Address the weakness of your case and explain why the weakness is not fatal to your arguments.

o. Comment on broken/kept promises

i. If you promised something in opening (or asked a question), point that out and explain how you kept it (or answered it).

ii. If opposing promised something in opening and failed to prove it, point that out as well.

p. Apply the Law

i. Use the law contained in the jury instructions to inform the jury how the law applies to this case and what facts support a finding under the law.

2. Organize the Discussion to Focus on Issues, Not People

a. Use topical organization whenever possible

i. You can organize by issue, element, or jury instruction.

1. Issue

a. Simple and effective; divide the case into a series of discrete factual or legal issues; allows you to

address credibility and motive in light of issues rather than in a chronological way

2. Elements

    a. You can organize a closing in the order of the elements that must be shown; for example in a negligence case you can address proof of duty, breach of the duty, the proximate cause, and then damages. With each element you present the facts that support your case and that element.

3. Use chronological and witness by witness organization sparingly.

    a. It's monotonous and boring.

ii. Start strong and end strong.

1. Remind them of your theme and start with a strong open; end with a strong closing paragraph that asks for the verdict.

iii. Argue your affirmative case first.

1. Build up your case before you tear down the opponents.

iv. Tie up your Cross

1. Use the aforementioned inferences to answer unanswered cross questions.

v. Embrace the Burden of Proof

1. If you carry the burden, embrace it, and explain why you have met the burden.

2. If you do not carry the burden, displace it and explain why the other side has not met their burden. Make sure to point out that you don't have the burden and "they" have to prove it to you.

vi. Address credibility throughout

1. Every chance you get to destroy opposing credibility, do it.

vii. Address problems

1. Acknowledge issues and use facts to lessen their impact.

viii. Use Jury Instructions

1. Do not just read them off.

2. Rather, use bits and pieces that lay out the elements or burden to explain to the jury the law and how the facts as you have presented them fit into the law in this case.

b. Ethics

i. Do not misstate the law.
ii. Do not misuse evidence.
iii. Do not misstate evidence.
iv. Do not make appeals to personal interest (Golden Rule).
1. The plaintiff in this case lost his right arm. If you lose your right arm, how much would you want? If someone offered you 1,000,000 for your right arm, would you take it?

v. Do not comment on privilege

1. Mostly with criminal trials where Defendant doesn't testify.

Legal Ethics

Submitted by Constance A. Anastopoulo

Advanced Trial Tactics
LEGAL ETHICS

Prof. Constance Anastopoulo

Ethics and the issues surrounding ethical conduct by attorneys is being modified continuously by changes in the rules, by judicial decisions, by attorney general opinions, and through others pressures that require a practicing attorney to stay up to day and vigilant about the Rules of Professional Conduct. Some of the most thorny and troubling issues concern the relationship between the attorney and the client, and particularly those involving money. While common sense is a good rule of thumb, it is important for practitioners to stay abreast of specific applications of the rules. Below are some of the areas of concern and thoughts about best practices for practitioners as well as some multiple-choice questions for consideration.

A. Attorney Fees and Engagement Agreements

The rules addressing how a fee is determined and collected are a myriad of overlapping provisions. Lawyers must be diligent in consistently reviewing the rules of professional conduct addressing this area so as to ensure they are in compliance. Perhaps no other area of an attorney's practice is more susceptible to client complaint than that of determining and collecting fees. It is important to understand the language associated with attorney's fees and engagement letters. "Attorney's fees" are defined as the charge to a client for services performed for the client, and are generally categorized as the following; 1) an hourly fee, 2) a flat fee, 3) or a contingent fee.

An hourly fee is defined as a fee paid per hour based on the attorney's set rate per hour. A flat fee is defined as where the client enters into a "à la carte service agreement" with the attorney who accepts a flat fee rather than a percentage of the judgment or an hourly rate. A contingent fee is defined as a fee charged for a lawyer's services only if the lawsuit is successful or is favorably settled out of court. Contingent fees are usually calculated as a percentage of the client's net recovery. Expenses may be deducted as well, but clear communication with the client regarding the treatment of expenses is required.

The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing. Some specifics of the issues regarding fees are discussed further below:

1. Determining Fees:

A lawyer may not charge a fee larger than is **reasonable** in the circumstances or that is prohibited by law.[1] How does a lawyer determine what is reasonable? Rule 1.5 of the Model Rules gives guidance in this area and states the following regarding the reasonableness of a fee;

> A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.

The South Carolina Rules state that several factors may be considered in determining the reasonableness of a fee and include the following: time and labor required, skill requisite to perform legal services properly, customary fee, time limitations, novelty and difficulty of question(s), preclusion of other employment, and amount involved and results obtained.[2]

Additionally, the Rules provide that the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall be communicated to the client, preferably in writing.[3]

Similarly, the Restatement 3d also addresses the fee contract between an attorney and the client and specifically when the attorney has previously represented that client on the same basis stating that before or within a reasonable time after beginning to represent a client in a matter, a lawyer must communicate to the client, in writing when applicable rules so provide, the basis or rate of the fee, unless the communication is unnecessary for the client because the lawyer has previously represented that client on the same basis or at the same rate.[4]

Additionally, the Restatement conditions that unless a contract construed in the circumstances indicates otherwise:

> (a) a lawyer may not charge separately for the lawyer's general office and overhead expenses;
>
> (b) payments that the law requires an opposing party or that party's lawyer to pay as attorney-fee awards or sanctions are credited to the client, not the client's lawyer, absent a contrary statute or court order; and
>
> (c) when a lawyer requests and receives a fee payment that is not for services already rendered, that payment is to be credited against whatever fee the lawyer is entitled to collect.[5]

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[1] Restat 3d of the Law Governing Lawyers, § 34

[2] Rule 407, Rule 1.5(a), SCACR

[3] Rule 407, Rule 1.5(b), SCACR

[4] Restat 3d of the Law Governing Lawyers, § 38

[5] Id.

Furthermore, South Carolina Rules specifically address the contingent fee arrangement. The rules provide that a fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by a subsequent paragraph or other law.[6] A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses the client will be expected to pay.[7] Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.[8]

Certain limitations exist regarding contingent fee agreements. A lawyer **shall not** enter into an arrangement for, charge, or collect:

> (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof, provided that a lawyer may charge a contingency fee in collection of past due alimony or child support; or
>
> (2) a contingent fee for representing a defendant in a criminal case.[9]

2. Collecting Fees

Once the attorney enters the contract with the client and services are rendered, the attorney's next challenge is to collect the fee. In seeking compensation claimed from a client or former client, a lawyer may not employ collection methods forbidden by law, use confidential information when not permitted under §65, or harass the client.[10]

A fee dispute between a lawyer and a client may be adjudicated in any appropriate proceeding, including a suit by the lawyer to recover an unpaid fee, a suit for a refund by a client, an arbitration to which both parties consent unless applicable law renders the lawyer's consent unnecessary, or in the court's discretion a proceeding ancillary to a pending suit in which the lawyer performed the services in question.[11] In any such proceeding the lawyer has the burden of persuading the trier of fact, when relevant, of the existence and terms of any fee contract, the making of any disclosures to the client required to render a contract enforceable, and the extent and value of the lawyer's services.[12] However, lawyers should take extreme caution so as not to violate the prior rule regarding harassment of the client when adjudicating fee disputes.

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[6] Rule 1.5(c) SCARC

[7] Id.

[8] Id.

[9] Rule 1.5(d) SCARC

[10] Restat 3d of the Law Governing Lawyers, § 41

[11] Id. at § 42

[12] Id.

Therefore, an attorney should be informed and diligent in ensuring that he or she is in compliance with the rules regarding determining and collecting fees. Clear communication with regard to the type of fee, what may be included in the fee, and any method of collection at the time the parties enter the contract will help the lawyer avoid potential complaints from the client.

These are just a few of the issues, which should be considered when contemplating Attorney's fees and engagement letters. It is important to consult the rules further when questions arise.

B. Preventing Conflicts of Interest

Conflicts of interest are inevitable particularly in insurance litigation. A conflict of interest will usually arise in the insurance context when a practitioner finds himself representing more than one individual or entity, and his representation of one is impacted by his representation of the other.[13] Indeed, the insurance defense lawyer will, at one point or another during his career, unavoidably find himself asking whether he represents the insurer (who pays the bills and to whom he owes a duty) or the insured (to whom he is beholden as the insured's fiduciary) in the tripartite relationship.[14] Below are some of the more common issues that arise, particularly in insurance litigation.

1. Multiple Representation

Below represents a non-exhaustive list of common situations where the attorney's representation of multiple individuals and/or entities raises ethical dilemmas and will be discussed in greater detail the text that follows:

(A) In coverage disputes, especially if the facts establishing lack of coverage come to the attorney in confidence and may not be known to the insurer;

(B) Where the plaintiff seeks damages that exceed the policy limits, but offers to settle within the policy limits;

(C) If the insured is indifferent to the cost of litigation and, therefore, wants to fight through litigation;

(D) Where insurance companies litigation guidelines and audits require attorneys to provide information to independent auditors;

(E) In the context of uninsured or underinsured motorist claims, such as where the same insurance company may be defending the insured and the opposing party;

(F) Where the insured has a counter-claim against the opposing party, the insurer has no interest in paying for an attorney to obtain recovery on behalf of the insured;

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[13] *See generally* Douglas R. Richmond, *Emerging Conflicts of Interest in Insurance Defense Practice*, 32 TORT & INS. L. J. 69 (1996); Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255 (1995); Charles Silver, *Does Insurance Counsel Represent the Company or the Insured?*, 72 TEX. L. REV. 1583 (1994).

[14] *See generally*, Richard L. Neumeier, *Serving Two Masters: Problems Facing Insurance Defense Counsel and Some Proposed Solutions*, 77 MASS. L. REV. 66 (1992).

(G) When the plaintiff is a friend or relative, the insured may have an interest in conceding liability; and
(H) Where insured may have conflicting interests if their degrees of fault or amount of coverage differ.

In consideration of these elements, it is helpful to consider these in three sections that are intended to guide the practitioner in the minefield that comprises legal ethics within the context of insurance litigation: (I) Preserving the Attorney-Client Privilege; (II) Determining and Collecting Attorneys' Fees; and (III) Avoiding Conflicts of Interest in Multiple Representation.

I. Preserving the Attorney-Client Privilege – Who is the client?

As all lawyers know, attorneys are bound to fulfill the duty of confidentiality and to preserve the attorney-client privilege. Rule 1.6(a) of the Model Rules of Professional Conduct requires that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . . ."[15] Despite whether the lawyer represents just the policyholder or both the insured and insurer, the lawyer always must maintain the insured's confidentiality. The following situations often prompt considerations of confidentiality and the attorney-client privilege: (A) in coverage disputes, especially if the facts establishing lack of coverage come to the attorney in confidence and may not be known to the insurer; and (B) where insurance companies use claims adjusters in attempt to elicit confidential information from the attorney.

(A) In Coverage Disputes

The attorney may find himself in a difficult situation when he is chosen by the insurer to represent the insured, there is a dispute as to coverage, such as in the context of a reservation-of-rights letter, and the client, in confidence, reveals information unknown to the insurer. Often times, information revealed by the insured could potentially serve as the basis to deny the insured coverage. As stated by one court in the third party context,

In the usual tripartite insurer-attorney-insured relationship, the insurer has a duty to defend the insured, and hires counsel to provide the defense. So long as the interests of the insurer and the insured coincide, they are both the clients of the defense attorney and the defense attorney's fiduciary duty runs to both the insurer and the insured. [. . .] The insurance defense attorney is placed in a position of conflict, however, when issues of coverage are asserted by the insurer through a reservation of rights.[16]

One court has addressed the problem by requiring the insurance company to pay for independent counsel for its insured where a conflict of interest issue is raised because

[15] MODEL RULES OF PROF'L CONDUCT R. 1.6.
[16] Shaffery v. Wilson, Elser, Moskowitz, Edelman & Dicker, 82 Cal.App.4th 768, 98 Cal.Rptr.2d 419 (Cal. App. 2 Dist. 2000).

the insurer reserved its rights to deny coverage under an insurance policy.[17] The court required "complete independence of counsel" for the insured, as "it is almost unavoidable that, in the course of investigating and preparing the insured's defense to the third party's action, the insured's attorney will come across information relevant to a coverage or similar issue, it is quite difficult for an attorney beholden to the insurer to represent the insured where the insurer is reserving its rights regarding coverage."[18]

Harsh consequences result when an insurance company uses the confidential information between the attorney and a client to get information upon which the insurer may deny coverage. "When an attorney is an insurance company's agent uses the confidential relationship between an attorney and a client to gather information so as to deny the insured coverage under the policy . . . such conduct constitutes a waiver of any policy defense, and is so contrary to public policy that the insurance company is estopped as a matter of law from disclaiming liability under an exclusionary clause in the policy."[19]

(B) When the Insurance Company Uses Claims Adjusters

When claims adjusters are involved, there may arise situations that raise conflicts of interest in light of the attorney-client privilege. Given this unavoidable fact of the industry, practitioners must be wary when answering questions posed by the adjuster. For instance, adjusters, who, we must keep in mind, are employed by the insurance company and therefore have interests fundamentally adverse to the insured, often ask the insured's counsel some or all of the following questions:

1. Is the insured liable?
2. How likely is it that a jury will find the insured liable? What about affirmative defense?
3. Can the insured prevail on one or more counterclaims?
4. Are any of the other defendants liable? How likely is it that the jury will find other defendants liable? How likely is it that the insured will succeed in his cross-action (or third party claim) for contribution and/or indemnity?
5. How likely is it that a court of appeals will affirm a judgment? How likely is it that relevant courts of appeals will affirm judgment against the insured?
6. What is the case worth?
7. What is the settlement value of the case?
8. Who should we hire as a mediator?
9. Are there subrogation possibilities?[20]

[17] Credit Union v. Cumis Ins. Society, Inc., 162 Cal.App.3d 358, 208 Cal.Rptr. 494 (1984).
[18] Kroll & Tract v. Paris & Paris
[19] Parsons v. Cont'l Nat'l Am. Group. 133 Ariz. 223, 550 P.2d 94, 99 (1976).
[20] Michael Quinn, *Do (Or, May) Insurance Defense Lawyers Also Represent the Defending Insureds*, 797 PLI/Lit 85, 98 (2009).

While it is true that the lawyer is, indeed, paid by the insurance company, commenting on the client's case by answering these questions is not only unadvisable it could possibly result in the revelation of confidential information to a party with interests adverse to the client. Thus, while the attorney has a duty to provide the insurance company with information related to the representation—indeed, it is the insurance company who will be paying the bills—breaching the duty of confidentiality may well result in a subsequent malpractice claim if, for example, the insurance company later uses the information to deny coverage to the insured.

II. Avoiding Conflicts of Interest in Multiple Representation.

When the practitioner represents both the insured and the insurer, conflicts of interest inevitably arise. The ABA Code of Professional Responsibility has adopted a dual representation standard, as ABA Formal Opinion 282 accepted "unequivocally that a lawyer may ethically undertake the dual representation of the insurer and the insured in the defense of a third party action against the insured." Nevertheless, the attorney owes a duty of loyalty to each, as Disciplinary Rule 5-105(C) provides that;

> [A] lawyer may represent multiple clients if it is obvious that the attorney can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of the attorney's independent professional judgment.

Similarly, Ethical Consideration 5-15 provides that a "lawyer should never represent in litigation multiple clients with different situations." Finally, Rule 1.7 of the Model Rules of Professional Conduct provides that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest[, which] exists if (1) the presentation 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."[21]

As a practical matter, the interests of the insured and the insurer often will diverge at some point. The following is intended to assist the practitioner in identifying potential conflicts of interest by briefly discussing a number of common situations where the interests of the two parties will diverge, giving rise to ethical considerations: (A) policy limits and settlement; (B) the insured wants to fight through litigation; (C) the insurer's use of litigation guidelines and auditing procedures; (D) in the UM/UIM context, where the same insurer represents both parties to the action; (E) counter-claims; (F) the insured is related to the plaintiff and wishes to concede liability; and (G) where insured may have conflicting interests if their degrees of fault or amount of coverage differ.

C. Protecting Confidentiality

[21] MODEL RULES OF PROF'L. CONDUCT 1.7(a)(1)-(2).

Recognizing that confidentiality is a fundamental element of any client-attorney relationship, the Rules of Professional Conduct generally prohibit disclosure of any information relating to the representation, unless permitted by a specific exception within the rules. The most problematic area regarding confidentiality in UM/UIM litigation arises when the lawyer is engaged in the tripartite relationship described above. A lawyer who fails to inquire into whether there are existing conflicts of interest between potential clients and who fails to keep his clients adequately informed is subject to liability for negligence and breach of fiduciary duty.[22] Insurance defense counsel owes a duty to the insured to investigate whether the insured has excess coverage.[23]

D. Effective and Ethical Client Communication

a. Consultation and Consent

Pursuant to Rule 407 of the South Carolina Appellate Court Rules, "consult" or "consultation" is defined as a communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.[24] The duty to communicate with the client pursuant to Rule 1.4, extends beyond simply a duty to keep the client informed as to the progress of a matter. In *In Re Cole*, the lawyer was disciplined for failing to update the client adequately and failing to consult with the client on matters requiring the client's consent.[25] The Rules provide that a lawyer must reasonably consult with a client about the means to be used to carry out the client's objectives.[26] Additionally, a lawyer should inform the client of any settlement offer received.[27] Likewise, a lawyer may not settle or offer to settle a matter without consulting the client and obtaining the client's consent.[28] Furthermore, the lawyer can be held liable for negligent advice regarding settlement of a matter.[29]

2. Conflicts with Former Clients

a. Substantially Related matters

Rule 1.9, Duties to Former Clients, of the South Carolina Code of Professional Conduct addresses the duty a lawyer who formerly represented a client in a matter owes when he/she undertakes representation of another person in the same or a substantially related matter in which that person' interests are materially adverse to the interests of the

[22] *Smith v. Hastie*, 367 S.C. 410, 626 S.E.2d 13 (Ct. App. 2005).
[23] See John Freeman, *Heads Up, Defense Lawyers*, S.C. Law, Mar.-Apr. 2007, at 12 (citing *Shaya V. Pacific, LLC v. Wilson, Elser Msokwits, Edelman & Dicker, LLP,* 827 N.Y. Supp.2 231 (App. Div. 2006).
[24] Rule 407, Rule 1.0, SCACR.
[25] *In Re Cole*, 286 S.C. 548, 335 S.E.2d 364 (1985).
[26] Rule 407, Rule 1.4, SCACR.
[27] Id., Rule 1.4 cmt. 2. See *In Re Warder*, 316 S.C. 249, 449 S.E.2d 489 (1994).
[28] Rule 407, Rule 1.2(a), SCARC.
[29] See; *Crowley v. Harvey & Battey*, 327 S.C. 68, 488 S.E.2d 334 (1997).

former client unless the former client give informed consent, confirmed in writing.[30] The rule goes on to state that 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 client give informed consent, confirmed in writing.[31] Subsection (c) goes on to state that 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.[32]

Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. However, information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two presentations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such representation. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

This issue often arises when lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the Rule should not be so broadly case as to preclude other person from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in forms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity

[30] Rule 407, Rule 1.9, SCARC.

[31] Id., Rule 1.9(b)

[32] Id., Rule 1.9(c).

of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even thought the interests of the two clients conflict.

Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.

Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented.[33]

Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

E. Practical Scenarios: What Would You Do?

Below are several multiple choice questions along with the best answer for consideration. Try to challenge yourself to not only choose the best answer, but also to understand the reasoning behind the answer in compliance with the Rules.

1. Attorney Angela lives in the state of Charlestown, which is often hit by tropical storms and hurricanes. Attorney Angela was formerly employed by Insurance Company as a lawyer solely to handle flood insurance claims. While so employed, she investigated a flood loss claim of Casey Claimant against Insurance Company. Attorney Angela is now in private practice. The claim has not been settled and Casey Claimant consults Attorney Angela and asks her to represent Casey or refer Casey to another lawyer for suit on the claim.

Which of the following would be proper for Attorney Angela to do?

I. Refuse to discuss the matter with Casey Claimant.

[33] See Rule 1.6 and 1.9(c).

II. Represent Casey Claimant.

III. Refer Casey Claimant to an associate in her law firm, provided Attorney Angela does not share in any fee.

IV. Refer Casey Claimant to the Charlestown Bar Association website which includes a list of lawyers who are in good standing to practice law in the state and specialize in insurance claims.

a. I only.
b. I and II, but not III or IV.
c. I and III, but not II or IV.
d. I and IV, but not II or III.
e. III only

2. Attorney Able has served as outside counsel to All-Tech Corp. About a year into his service as outside counsel for the company, All-Tech Corp. changed its management. Shortly after this change in management, Attorney Able discovered what he reasonably believed to be a material misstatement in a document he had drafted that he was about to file on All-Tech's behalf with a government agency. Attorney Able advised All-Tech's Board of Directors that filing the document was probably criminal. However, the Board disagreed that there was any material misstatement and directed Attorney Able to proceed with the filing. When Attorney Able indicated his intention to resign, All-Tech argued that a resignation at this time would send a signal that there was a problem with the filing. All-Tech urged Attorney Able to continue the representation, but offered to use in-house counsel to complete the work on the filing. Although he does not know for certain that filing the document is illegal, Attorney Able reasonably believes that it is. In any event, Attorney Able is personally uncomfortable with the representation and wants to withdraw.

May Attorney Able withdraw from his representation of All-Tech Corp.?

a. No, if All-Tech Corp. is correct that withdrawal would breach confidentiality by sending a signal that the filing is problematic.
b. No, because All-Tech Corp. does not wish to find new counsel.
c. Yes, because withdrawal is permitted but not required when a client insists on conduct, which the lawyer reasonably believes, but does not know, will be criminal.
d. Yes, because withdrawal is required when a client insists on conduct, which the lawyer reasonably believes, but does not know, will be criminal.
e. None of the above

3. Attorney Andy represented Brandy Buyer in a real estate transaction. Due to Attorney Andy's negligence in drafting the purchase agreement, Buyer was required to pay for a survey that should have been paid by Sarah Seller, the other party to the transaction. Attorney Andy fully disclosed this negligence to Brandy Buyer, and Buyer suggested that she would be satisfied if Attorney Andy simply reimbursed her for the entire cost of the survey.

   Although Buyer might have recovered additional damages if a malpractice action were filed, Attorney Andy reasonably believed that the proposed settlement was fair to Buyer. Accordingly, in order to forestall a malpractice action, Attorney Andy readily agreed to make the reimbursement. Attorney Andy drafted a settlement agreement and it was executed by both Attorney Andy and Brandy Buyer.

   Was Attorney Andy's conduct proper?

   a. Yes, because Attorney Andy reasonably believed that the proposed settlement was fair and reasonable to Brandy Buyer.
   b. Yes, if Attorney Andy advised Brandy Buyer in writing that she should seek independent representation before deciding to enter into the settlement agreement and gave her reasonable time to seek the advice of independent legal counsel.
   c. No, because Attorney Andy settled a case involving liability for malpractice while the matter was still ongoing.
   d. No, unless Brandy Buyer was separately represented in negotiating and finalizing the settlement agreement.
   e. No, because Attorney Andy cannot knowingly enter into a business transaction with a client.

4. Attorney Andrea represented Patricia Plaintiff in a breach of contract lawsuit that has just settled. Attorney Andrea received a check from David Defendant payable to Attorney Andrea in the sum of $15,000 in settlement of Plaintiff's claim against Defendant. Patricia Plaintiff previously paid Attorney Andrea a fee so no part of the $15,000 was owed to Attorney Andrea.

   Which of the following would be proper?

   I. Notify Patricia Plaintiff of the check, endorse the check and send it to Patricia Plaintiff.

   II. Deposit the check in Attorney Andrea's personal bank account, and send Attorney's personal check for $15,000 to Patricia Plaintiff.

   III. Deposit the check in a Client's Trust Account, advise Patricia Plaintiff and forward a check drawn on that account to Plaintiff.

   a. I and III, but not II.

b. I only.
c. III only
d. I, II, and III.
e. None of the above

5. Weiss & Sanchez is a large law firm with 150 partners, 500 associates, and branch offices in seven major cities. Carlos Sanchez is the partner in charge of the firm's Houston branch office. Thirteen months ago, Sanchez was retained by Horizon Oil Company to prepare some of Horizon's executives to testify before a Senate Committee in opposition to proposed antitrust legislation that would require all integrated oil companies to divest the companies of their retail service stations. As part of this work, Sanchez received numerous confidential documents from Horizon concerning competition in the retail end of the oil industry. Sanchez did not share this confidential information with anyone in the Miami branch office. In fact, Sanchez did not even discuss the matter with anyone in the Miami office and no one in the Miami office was aware that Sanchez was working on the matter.

   Seven months after the matter concluded, the Independent Service Station Attendants of America asked the firm's Miami office to represent it as plaintiff in an antitrust action against five major oil companies, including Horizon.

   May the Miami Office accept the case without Horizon's consent?

   a. Yes, if Sanchez is timely screened from any participation in the manner, Sanchez does not receive any fees earned in the case, and written notice is promptly given to Horizon.
   b. No, because the case is substantially related to the work Sanchez did for Horizon.
   c. No, because the representation of one client will be directly adverse to another client.
   d. Yes, because the Miami office never received any of Horizon's confidential information from Sanchez.
   e. None of the above.

6. Gold & Pierre is a large law firm that employs over 600 attorneys. Attorney Albert is a newly admitted attorney recently hired as an associate at Gold & Pierre. Albert was working late one night when he received a telephone call from his cousin, Chantel. Chantel was calling from the police station where she had just been charged with possession of marijuana with intent to distribute. She was permitted to make only one phone call and Albert was the only attorney she knew. Albert responded that he had no criminal law experience and that Gold & Pierre did not handle criminal matters. Nonetheless, Chantel pleaded with Albert to come to the station to try to get her out on bail. Albert said that he'd see what he could do.

Attorney Albert went to the police station and, using what information he recalled from his criminal law and procedure courses, attempted to get Chantel out on bail. As a result of his inexperience, however, Albert was unable to secure Chantel's release that night. The next morning, Albert found an experienced criminal defense attorney for Chantel, who obtained her release within one hour.

Was Attorney Albert's conduct proper?

a. No, because Attorney Albert had no special training or experience in criminal matters.
b. Yes, because neither referral nor consultation was practical under the circumstances.
c. Yes, because Attorney Albert was a close relative of Chantel.
d. No, because Attorney Albert did not have the requisite level of competence to accept representation in the case.
e. None of the above.

7. Denise Driver was driving her sports car to a friend's house while her boyfriend, Miles Mason, was a passenger in the front of the car. Unfortunately, on the way, Denise had an automobile accident, and Miles, who was riding without his seatbelt fastened, was injured. Denise contacted Attorney Allison Adelman to discuss her possible legal liability to the other driver involved in the accident as well as any possible legal liability to Miles. After verifying that Miles had not yet hired an attorney, Allison went to visit him to discern whether Miles planned to sue Denise, whether he was severely injured, and whether (and what) he recalled concerning the events surrounding the accident.

As soon as Allison arrived to speak with Miles, she advised Miles that she was hired by Denise to represent her in matters relating to the car accident. During Allison's conversation with Miles, Miles asked Allison, "Do you think I have a viable claim against Denise?" Allison responded honestly, "Look, litigation can be lengthy and expensive. It's also not clear at this time whether Denise was the sole or primary cause of the accident and any resulting injuries. Hey, you were not wearing your seatbelt. It also looks like you're fully covered by health insurance. You should really consider whether it's worth suing your girlfriend. Think about contacting an attorney to consider your options."

Is Attorney Allison subject to discipline?

a. No, because she advised Miles to secure legal counsel.
b. Yes, even though Allison gave her honest opinion about possible litigation related to the car accident.
c. No, because Allison reasonably knew that Miles' interests were consistent with Denise's interests since Miles and Allison are in a close, dating relationship.

d. Yes, because Allison did not make reasonable efforts to correct the misunderstanding regarding her legal role relating to the car accident.
e. None of the above

8. On June 1, Sally Smith, hired Lawyer Larry Larson, to sue her former employer for Retaliation. Sally was fired after she contacted authorities to report possible employer fraud she witnessed while employed. Sally and Larry know that the complaint against the former employer must be filed on or before September 1st to fall within the statute of limitations.

Lawyer Larry is a solo practitioner and is extremely busy with other cases. Beginning at the end of June, Sally began to call Larry twice a week to obtain information regarding the status of her retaliation matter. Lawyer Larry repeatedly assured Sally that he was investigating the facts of her case and had prepared drafts of the complaint. In fact, however, Larry had not had time to start on Sally's case at all.

At the end of July, Sally learned from Larry's executive assistant that Larry simply, and only, obtained numbers of potential investigators to work on her case. As a result, Sally fired Larry and hired another Lawyer, Laura Landers, who was able to complete and file a complaint before September 1st. Larry did not charge Sally any fee. Nevertheless, after the events that transpired, Sally reported the matter to the state bar.

Is Lawyer Larry subject to discipline?

a. Yes, because Larry lied to Sally about the status of the matter.
b. No, because Sally was not damaged as a result of Larry's delay.
c. Yes, because Larry failed to keep Sally reasonably informed about the matter.
d. No, because Larry did not charge Sally a fee.
e. A and C.

9. Attorney Alex Smith entered into a written retainer agreement with a defendant in a criminal case. The defendant agreed in writing to transfer title to the defendant's automobile to Smith if Smith successfully prevented him from going to prison. Later, the charges against the defendant were dismissed.

I**s Smith subject to discipline for entering into this retainer agreement?**

a. Yes, because Smith agreed to a fee contingent on the outcome in a criminal case.
b. Yes, because Smith may not acquire a proprietary interest in a client's property.
c. No, because the charges against the defendant were dismissed.
d. No, because the retainer agreement was in writing.
e. None of the above.

10. In which of the following situations below would the information received by the attorney be covered by both the attorney-client privilege and the ethical duty of confidentiality?

I. Lawyer represents Client Sam in a criminal case for armed robbery of a gas station. During the course of Lawyer's investigation, Lawyer talks to the Sam's friend, Bobby, and Bobby tells Lawyer that he remembers that during the evening in question, he and Sam danced at a club down the street from the gas station that was robbed.

II. Lawyer Liza represents Client Debra (Tenant) in a Landlord-Tenant dispute. During the initial consultation in Liza's office discussing whether or not Debra has a claim against the Landlord, Debra tells Lawyer Liza that she has been without heat on and off for the last month and that she has taken pictures of problems in her unit.

III. Lawyer Julie represents Client Johnny in a breach of contract action. As Lawyer Julie prepares for summary judgment argument, Lawyer located an old newspaper clipping stating that Client Johnny was convicted of a DWI misdemeanor in another state ten years ago.

a. I only
b. II only
c. I and II
d. II and III
e. None of the above

ANSWERS TO MULTI-CHOICE QUESTIONS ABOVE:

1. *D is correct.*

2. *C is correct. A lawyer may withdraw from representing a client if "the client persists in a course of action involving the lawyer's services that the lawyer*

reasonably believes is criminal or fraudulent." M.R. 1.16(b)(2). Here, since the attorney is unsure but reasonably believes there is a material misstatement in the document, he may withdraw.

3. *B is correct because in settling a claim or potential claim for malpractice, a lawyer must advise an unrepresented client in writing of the desirability of seeking independent legal counsel. M.R. 1.8(h)(2).*

4. *B is the correct answer. Because the answer recognizes the three basic principles a lawyer must observe when dealing with client funds: (1) client funds must always be kept separate from the lawyer's funds in a designated clients' escrow account; (2) as soon as the client's interest in the funds is fixed, the client's money must be delivered to the client; and (3)…*

5. *C is the correct answer.*

6. *B is correct because although the attorney does not have the "requisite knowledge and skill" to competently represent his cousin and knows he doesn't, this scenario would fall under the "emergency" situation discussed in M.R. 1.1 Comment (3). When his cousin called, it would have been impractical for the attorney to refer his cousin to another lawyer or to consult with another lawyer, so he gave reasonably necessary assistance to get his cousin out on bail. However, for any additional work, the attorney would have to become competent or find another lawyer to take on the matter, which the attorney did in this case.*

7. *D is the correct answer.*

8. *C – Rule 3.3(d) and comment 14. Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an expert proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and the lawyer reasonably believes are necessary to an informed decision*

9. *A is the correct answer. An attorney cannot charge a contingent fee for representing a defendant in a criminal case. M.R. 1.5(d)(2). This is an example of a question where careful reading of the facts is very important.*

10. *B is the correct answer.*

Trust Account and IOLTA Issues:

In 2016, the S.C. Bar Association notified all South Carolina lawyers of efforts to access law firm business and trust accounts, notably real estate closing accounts. Attempts at misdirecting funds included changing account number instructions, sending emails from similar email addresses, sending false invoices and sending allegedly "new" wire transfer instructions. These schemes have grown increasingly sophisticated and successful.

The S.C. Bar went on to caution all lawyers to verify all instructions and to not rely solely on electronic correspondence. The S.C. Bar also offered several suggestions including encouraging all firms to establish a firm website domain instead of using free web-based email and creating and using unique passwords and changing the passwords regularly. Additionally, it noted that firms should avoid using unsecure wi-fi networks. Specifically the S.C. Bar encouraged firms to establish a policy on wire transfers, including necessary verifications of all last-minute changes and that prior to sending a wire, the lawyer should call the receiver to verify that all instructions are accurate. Further, lawyers should ensure that all staff members understand that they have "permission to pause" before they proceed. Lastly, the Bar noted that lawyers should be suspicious of all relevant email and to check email addresses when necessary and to question all requests where money is to be sent to an "unconnected" jurisdiction or to an account that is not in the seller name.

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