

Effective Management of Civil Cases

Presented to:
Managing Civil Trials
May 9, 2007
University of North Carolina
Chapel Hill

So, you are a new judge?

Be careful what you wish for...



First Step...

Establish Your Judicial Philosophy

“I am what I am”

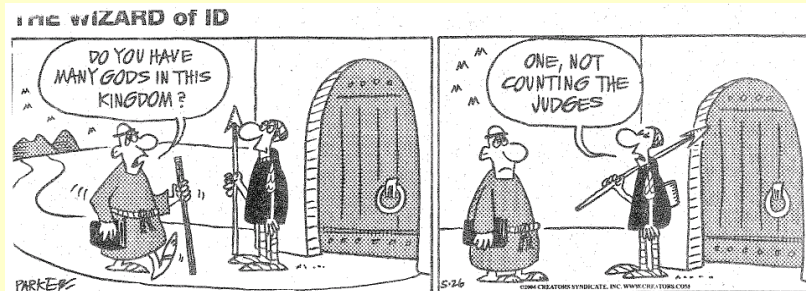
-Popeye



“Know thyself”

-Socrates





“Lawyers are 100% in favor of progress, but 1000% against change.”

-Chief Justice William O’Neil
Ohio Supreme Court

Importance of Introspection

- Reflect on what you do and why you do it.
- Revisit all underlying assumptions.
- Justify your approach with valid reasons.
- Resist a one size, fits all approach.



Phase One: Pretrial Stage

- The importance of a first scheduling conference.
- Use personally styled “pretrial minutes/order” for each civil case.

IN THE COMMON PLEAS COURT OF HANCOCK COUNTY, OHIO

Richard Detmers,

Plaintiff, Case No. 2006-CV-568

v.

PRETRIAL MINUTES & ORDER

Hampton Inn, et al.,

Defendants.

On March 8, 2007, this matter came on for a pretrial in this re-filed case with Jeffrey Hawkins participating by telephone on behalf of the Plaintiff and Peter Lavalette appearing on behalf of the Defendants.

After Court and counsel discussed the status of the case, Mr. Hawkins was just engaged to represent the Plaintiff, however the parties did agree to the following scheduling order:

1. Disclosure of experts for the Plaintiff to be completed on or before July 31, 2007.
2. Defendants to disclose all expert witnesses on or before September 30, 2007. Defendants reserve the right to have the Plaintiff submit to an independent medical examination. If an IME is conducted, counsel for the Defendants shall supply counsel for the Plaintiff a copy of said report.

3. Motions for Summary Judgment to be filed on or before November 2, 2007; responses to be filed by November 16, 2007; replies to be filed by November 27, 2007.

4. Oral argument on the summary judgment is waived. In the event a Motion for Summary Judgment is filed prior to that date, the responding party shall have twenty-one days from the date of the filing to respond and the moving party shall have seven days from the date of the response to file a reply.

5. Final pretrial scheduled for February 21, 2008 at 11:00 a.m. with all counsel, parties and representatives required to be in attendance to resolve all pending evidentiary and procedural matters and discuss possible settlement.

6. Jury trial set for March 3, 2008 at 9:00 a.m.

All until further order of the Court.

Reginald J. Routson, Judge

- Involve counsel in the selection of all dates.
- Flush out basic facts and anticipated legal issues.
- Never too early to point out strengths and weaknesses of case “based on facts known at the time.”
- Make sure that you are prepared by having read the file, including all pleadings prior to the conference. By letting counsel know that you understand the issues at hand, that will go along way to setting the proper tone.
- Consider telephone pretrial conferences.

Discovery Disputes

- Written discovery.
- Depositions.
- Motions to Compel.
- Serial violators.

Hypothetical:

- You have been supervising a rather contentious case and have previously granted a motion to compel the production of documents. The date for production has passed. What do you do?
- You are in your office working on a complicated decision involving summary judgment when you receive a call from counsel. A deposition is taking place in an attorney's office and counsel for the defendant has instructed his client not to respond to a question posed by counsel for the plaintiff. As the parties are at an impasse, they have called for a ruling. What should you do?

- Don't encourage them.
- Resist, ignore, don't return phone calls. (Just kidding)
- Get involved only when absolutely necessary.
- If you become involved, do not equivocate, make it clear you are prepared to impose sanctions.
- Ask if counsel have their checkbooks handy.

Dealing with Pro Se Litigants.

- Pro se litigants present substantial ethical dilemma- "bend- don't break the rules."
- When all possible, put all proceedings with pro se litigants on the record.
- Never meet with pro se litigants in chambers, even with other counsel present.
- Possible Use of Orientation Materials for Pro Se Litigants.

What Happens in Court:

1. Generally, the Court has at least one pretrial before a hearing is held. You must come to court each time something is scheduled. The Judge or Magistrate cannot talk about the details of the case with you, the other party, or any attorney involved except when the other party or attorney is present. It would not be fair for the one deciding the case to get information from only one side without giving the other a chance to hear what was said.

2. The Judge or Magistrate is in charge of the procedure that is followed in court and decides what evidence can be legally used by the court to decide the case. You have to follow those rules.

3. When you are in the courtroom, the hearings are recorded. That means that you need to speak clearly and always use words to answer questions. It also means that we have to take turns talking so the record is understandable if we have to play it back or have it typed up to read.

4. The Judge or Magistrate can only hear about and decide the problems that have been legally brought to the court's attention. For example, if the only motion that was filed with the Clerk of Courts said that your ex-spouse wanted more child support, the Court could not decide that you should get more parenting time with the children or that you owed money on a credit card.

5. If you and the other party CANNOT AGREE on how to resolve the case, the hearing or trial begins:

a. *Opening Statements:* Both sides can outline what they think the evidence will prove.

b. *Evidence:* The party who filed the motion or the complaint presents his or her evidence first. If you filed, you have the "burden of proof" – that is, you have to prove that it is more likely that you are right than that the other person is right and you must bring documents with you to prove your case. The other party then produces his or her evidence. The first party gets another chance



in what we call "rebuttal." During this part of the hearing, you can ask questions of any witnesses who are called to testify. The Judge or Magistrate has to consider all the evidence based on legal standards.

c. *Closing Arguments:* Now each side gets to argue why, based on the evidence the Judge or Magistrate has heard, that party should get what they want.

d. *Decision:* The Judge may give the decision in court or in writing. If a Magistrate hears your case instead of the Judge, you will get a written decision with a recommendation. If there is a jury trial, the jury will announce its decision in court.

6. If you and the other party AGREE, you will go into the courtroom and tell the Judge or Magistrate what the agreement is. That will then be written up as a court order, and you will each get a copy.

EVEN THOUGH YOU HAVE NO ATTORNEY, YOU ARE REQUIRED TO FOLLOW THE LEGAL RULES.

INFORMATION FOR THOSE WHO DECIDE TO REPRESENT THEMSELVES IN CIVIL CASES

YOU HAVE A RIGHT TO AN ATTORNEY, AND YOU SHOULD CONSULT WITH AN ATTORNEY IF YOU HAVE ANY QUESTIONS REGARDING YOUR RIGHTS OR WHAT YOU SHOULD DO. THE COURT WILL GIVE YOU TIME TO FIND AN ATTORNEY IF YOU WANT TO TALK TO ONE.



Provided by:
**HANCOCK COUNTY
COMMON PLEAS COURT
Hancock County Courthouse
300 South Main St., Findlay, OH 45840
www.co.hancock.oh.us/commonpleas**

Representing Yourself:

If you choose not to have an attorney (what we call "pro se," which means "for yourself"), you need to understand some basic rules for being in court. This handout is written to help you understand the legal process a little better. We cannot possibly cover all the legal rules that attorneys spend years learning, but we can give you a basic explanation of what to expect in court.

Basic Rules for Court Setting:

A courtroom is a formal setting, so:

1. All cell phones, pagers, palm pilots, etc. that may make noise while you are in a hearing **MUST BE TURNED OFF.**



2. Dress appropriately – no shorts, t-shirts, pajamas, or similar casual wear. Hats should be removed. Sometimes you may have to come to court directly from your job, and we understand that situation.

3. This is not the time for snacks or drinks or chewing gum. If you need to have water or certain foods because of a medical condition, please tell the Judicial Assistant of the Judge assigned.

4. Children should be left at home unless they are supposed to talk to the Judge or Magistrate in a domestic relations matter. They should not be made part of your disputes.

5. You need to use words that show respect for the Magistrate, the Judge, court personnel, and the other party or attorney.

You should not use words that someone might find offensive.

6. No matter how much you disagree with others, be polite. You will get a chance to say what you want if it relates to what the court has to decide.

Getting Information from Staff:

The people who work at the courthouse cannot give you legal advice (that is, tell you what you should do). They can give you information so you make decisions for yourself.



They can give you forms or reference materials and tell you what procedure is used by the court or Clerk of Courts.

They cannot tell you what you should file or what to say on your papers or to the Judge or Magistrate. They cannot let you talk to the Judge or Magistrate outside of court, and they cannot give their opinions about what the Judge or Magistrate will do.

You are responsible for making your own decisions about what you do and how you use information.

Some Words You Might See or Hear:

Court: This is sometimes used to refer to the Judge or Magistrate or generally to the Hancock County Common Pleas Court. We also sometimes use it to refer to the courtroom itself, for example, "We are going into court now."

Magistrate: This is the person appointed to hear some types of cases for the Judge. The Magistrates hear evidence, issue some types of orders, and recommend what orders the Judges should make.

Motion: This is a written or verbal request for the court to do something, for example, change the date of a hearing or reduce child support. Most motions have to be written and served on the other party.

Pretrial or Pretrial Conference: This is a meeting to see if we can agree on some things and to decide what we need to do next. You may meet with the other attorney and the Magistrate or Judge. Witnesses do not come to these meetings.

Hearing or Trial: Whether a motion hearing or a final hearing on your complaint or petition, this is when you have to have evidence to show the Court why you should get what you want. You may testify, you may bring other witnesses, and you may use documents to prove your case. You must bring your evidence or documents to Court. A "trial" is the final hearing and may be with a jury or just the Judge or Magistrate deciding your case. The word "hearing" is used more broadly to refer to anything being "heard" by the Judge or Magistrate.

Party: These are the people named in the case. Attorneys are not parties.

Service/Serve: This refers to sending to the other party a copy of papers that are filed with the court. Sometimes the Sheriff serves papers and sometimes the Clerk of Courts or you serve them.

Judicial Role in Facilitating Settlement.

- Form the limits of your involvement before participating.
- Think very carefully before you agree to meet with litigants without the presence of counsel/choose your words very carefully.
- Talking numbers \$\$\$\$

Hypothetical:

- During final pretrial, counsel asks you if you are willing to talk to the plaintiff in an effort to encourage settlement. A substantial offer has been made in this case and both counsel believe it is a fair and reasonable resolution of the case. Should you do it?

Phase Two: Trial Management Issues.

- Managing juries, litigants, lawyers and the media.
- “Jury Innovations.”
 - Note taking.
 - Questions.
 - Timing of instructions.

Keeping Deadlines/Limiting Continuances.

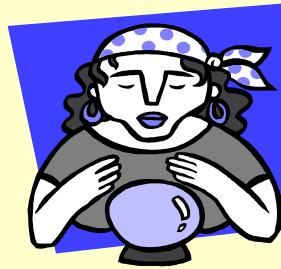
- My goodness, Judge _____ you sure have forgotten what it is like to be an attorney.
- Tough balance between understanding and flexibility.
- Do not apply a one size fits all approach, you know the procrastinators.
- A firm stance on continuances will settle cases.
- But, who loses?

“Continuance or Consequence”

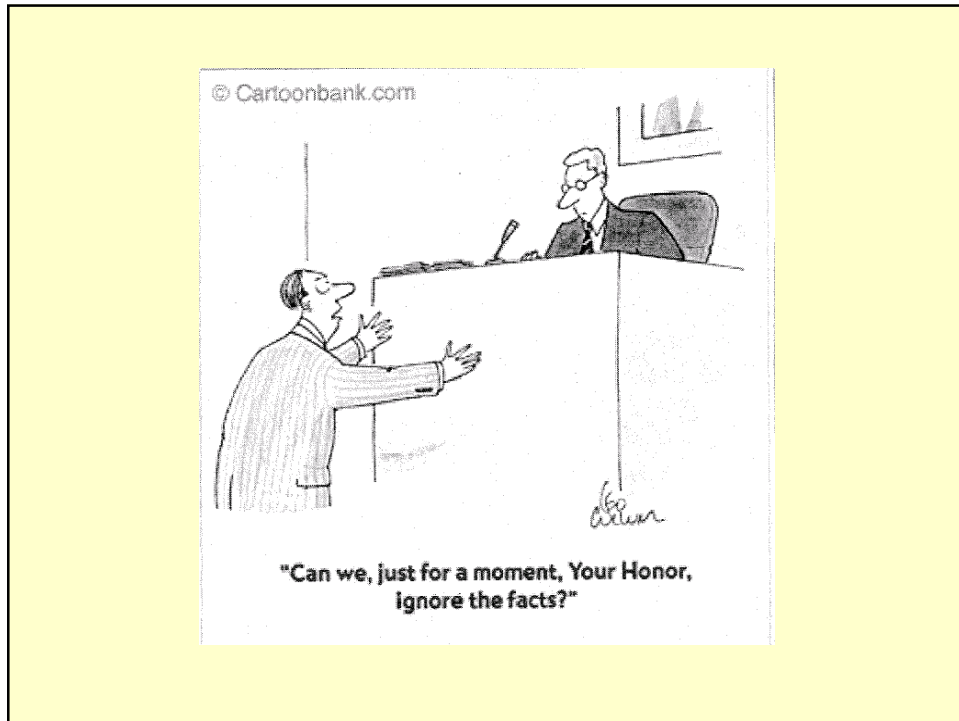
- Judge, I need a continuance because _____.
- Judge, I need a continuance because _____.
- Judge, I need a continuance because _____.
- Judge, I need a continuance because _____.

Judicial Preparedness





- Reading depositions.
- Requiring trial briefs and jury instructions.
- Substantive final pretrial conference.
- Motions to exclude evidence.



Is the trial an educational experience for jurors?

If so, what should we do to help them learn?

Would you sign up for this course?

- You will not be allowed to discuss the materials with anyone.
- You will receive no written information.
- You will be given an exam but I can't tell you what it will be on until the end of the course.
- You will be given instructions on the important points at the end of the course.

- You know nothing about the subject and I can't tell you much.
- It will be in English, for the most part.
- It will take about 10 days, but it could be shorter or longer.
- There will be 2 to 20 instructors, who will not agree a good bit of the time.
- You will not be allowed to take notes.
- You may not ask questions.

- There will be many important instructions which will be read to you in a monotone voice and may contain many complex and technical terms.
- You cannot have a copy of the instructions.
- Your answers must all go on a single piece of paper which I will give you.
- You must all agree on the answers.
- You will be locked up in a small room for the exam.

ARE YOU INTERESTED?

Chinese proverb:

“I hear and I forget, I see and I remember, I do and I understand”

Front-End Loading the Jury Trial.

- The use of jury orientation materials.
- Providing a full set of preliminary jury instructions.
- Allow counsel to make “mini-opening” to entire panel.
- Why do we always try cases backwards?

Substantial controversy over these changes.





Note-Taking - Pros and Cons.

Pros:

- Aids concentration.
- Promotes involvement and engagement.
- Increases memory (especially for older jurors).

Cons:

- Distraction.
- Potential to fail to make appropriate observations of witnesses.
- Undue influence of note takers during deliberations.
- Added administrative burden.

Jury Questions - Pros and Cons.

Pros:

- Clears up factual ambiguities.
- Enhances concentration.
- Makes jurors feel like part of the process.

Cons:

- Questions may be improper or irrelevant.
- Jurors may become advocates.
- Jurors may be frustrated if questions are not asked.
- Disrupt counsel's strategy.
- Added administrative burden.

Hypotheticals:

Juror Question #1:

Where did the offense occur?

Juror Question #2:

Was there insurance coverage here?

Juror Question #3:

Was the defendant cited by the officer?

Giving the Jurors Context.

- Taking a test.

Timing of Instructions - Pros and Cons.

Pros:

- Closing arguments will be more meaningful.
- Jury instructions provide a context.
- Attorneys will know the exact wording of the instructions.
- Jurors will do a better job evaluating evidence according to legal guidelines.

Cons:

- Jurors will focus on judge and instructions instead of closing arguments.
- Jurors will view the trial from the judge's perspective.
- Jurors may not be open to creative closing arguments.
- Added administrative burden.

Other innovations include:

- Mini statements to prospective jury panel.
- Early deliberations.
- Written jury instructions.
- Jury orientation materials including: mailings, internet, and local cable company productions.

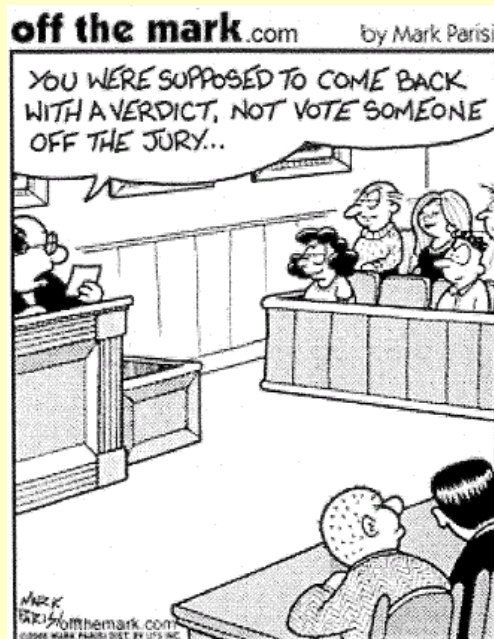


Providing jurors with some do's and don'ts.

- Do arrive on time and Do return promptly after breaks and lunch. The trial cannot proceed until all jurors are present.
- Do pay close attention. If you cannot hear what is being said, raise your hand and let the judge know.
- Do keep an open mind all through the trial.
- Do listen carefully to the instructions read by the judge. Remember, it is your duty to accept what the judge says about the law to be applied to the case.

- Don't try to guess what the judge thinks about the case. Remember that rulings from the bench do not reflect the judge's personal views.
- Don't talk about the case, or issues raised by the case with anyone—including other jurors—while the trial is going on, and Don't let others talk about the case in your presence, even family members. If someone insists on talking to you or another juror about the case, please report the matter to a court employee. These rules are designed to help you keep an open mind during the trial.
- Don't talk to the lawyers, parties, or witnesses about anything. This will avoid the impression that something unfair is going on.

- Don't try to uncover evidence on your own. Never, for example, go to the scene of an event that was part of the case you are hearing. You must decide the case only on the basis of evidence admitted in court.
- Don't let yourself get information about the case from the news media or any other outside source. Even if news reports are accurate and complete, they cannot substitute for your own impressions about the case. If you accidentally hear outside information about the case during trial, tell a member of the court staff in private.



Handling Communications with Jurors During Trial.

- Clearly establish lines of communication.
- Dealing with requests for testimony.
- Juror personal problems.
- Claims of misconduct.

Hypothetical:

During the fifth day of a medical malpractice trial, the bailiff knocks on your chambers door to inform you that a member of the jury checked the court's own website the evening before and discovered that the defendant doctor had been sued twice before in this court, she also shared this information with the other jurors. What should you do?

- Nothing.
- Contact counsel and discuss options.
- Declare a mistrial.
- Interrogate jurors.

Hypothetical:

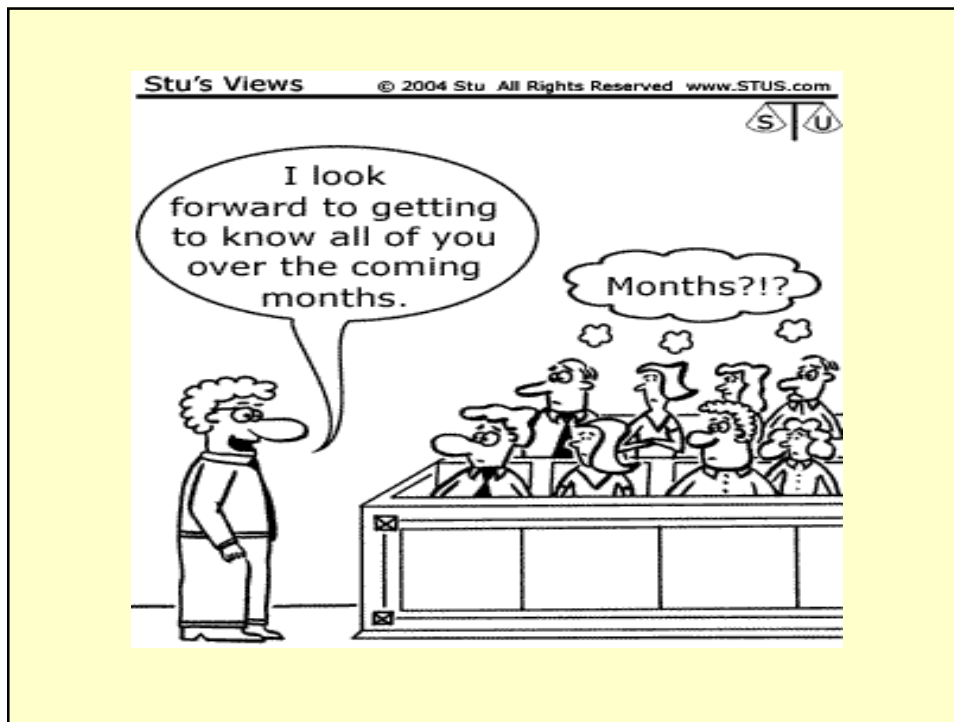
At the end of the trial, the jury foreman relates to you that the bailiff knocked on the door during deliberations and while looking at her watch asked if the jury had reached a verdict yet.

Hypothetical:

Juror in a capital murder case went to the local news media to report that when bailiff entered the room to check on the needs of the jury, the bailiff participated in a prayer circle with the jurors to ask God for guidance.

Establishing Time Limits.





At which points in the trial can you set standards?

- Voir dire?
- Opening statements?
- Substantive evidence presentations?
- Closing Arguments?
- A delicate balance, try to achieve consensus.

Handling Difficult Litigants and Lawyers.



Objections and Side Bar Conferences.

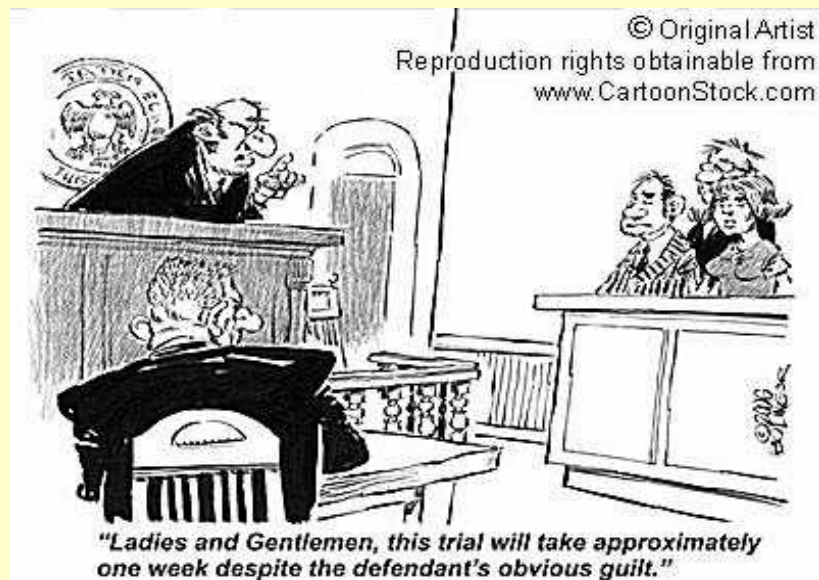
- Instruct counsel not to make a speech as part of the objection, but simply state a one or two word basis.
- If possible, rule immediately without the necessity of a side bar conference.
- If side bar conference is requested, ask if it is to be on the record.
- Be emphatic about limiting side bar conferences – jurors don't like them.



- Hypothetical: At the beginning of the third day of trial, once again counsel for the Plaintiff is tardy. At the conclusion of the second day you informed counsel to be ready to proceed promptly at 9:00 a.m. It is now 9:15 a.m. What do you do?
- Make use of your audience if necessary.
- Don't delay your rulings or equivocate.

Judicial Involvement in Development of Evidence.

- Interrogation of witnesses by court.
- The thin line between inquiry and advocacy.



Making Sense of Expert Testimony.

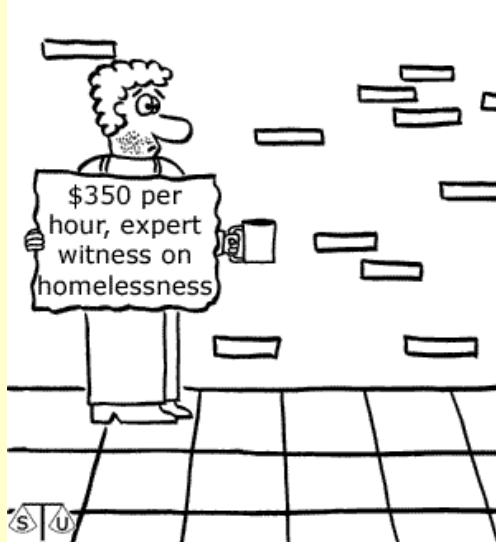


Trying Cases “On The Cheap”

- Relaxation of rules of evidence.
- “Universal Expert.”
- Little, if any, discovery.
- Lack of witness preparation.



"Testifying against another doctor would violate my ethics, so I'll have to charge double."



- Glossary of important terms.
- Translating doctor speak into plain English.
- Forbidding acronyms.

Phase Three: The Road to Deliberations.

- What to put in final instructions besides substantive matters?
- Should you make suggestions to aid in deliberations?

Polling of the Jury.



A SUGGESTED GUIDE FOR JURY DELIBERATIONS

Suggestions from the Judge

After you have been instructed on the law, you will begin your deliberations. Before you begin, please take time to read through this guide for some tips on how to organize yourselves, how to consider the evidence, and how to reach a verdict. **Please understand you are free to deliberate in any way you wish.** These are suggestions to help you proceed with the deliberations in a smooth and timely way.

Before you begin, it would be useful to think about the following guidelines:

- Respect each others' opinions and value the different viewpoints you each bring to this case.
- Be fair and give everyone a chance to speak in the deliberations.
- It is okay to change your mind.
- Listen carefully to one another and do not let yourself be bullied into changing your opinion, and do not bully anyone else.
- Do not rush into a verdict to save time. The parties in this case deserve your complete attention and thoughtful deliberation.
- Follow the instructions of law, and you will do a good job.

Getting Started

Q. How do we start?

A. *At first, you might want to:*

- Take some time to get to know one another.
- Talk about your feelings and what you think about the case.

- Talk about how you want to go ahead with the deliberations and lay out some rules to guide you.
- Talk about how to handle voting.

Selecting the Foreperson

Q. What qualities should we consider when choosing the foreperson of the jury?

A. *Suggestions include someone who:*

- Is a good discussion leader.
- Is fair.
- Is a good listener.
- Is a good speaker.
- Is organized.

Q. What are the responsibilities of the foreperson?

A. *The foreperson should:*

- Encourage discussion that include all jurors.
- Keep the deliberations focused on the evidence and the law.
- Let the court know when there are any questions or problems.
- Notify the court when a verdict has been reached.

Q. Does that mean the foreperson's opinion is more important than mine?

A. *The opinion of each juror counts equally.*

Getting Organized

Q. Are there any rules to tell us how to deliberate?

A. *No. You could:*

- Go around the table, one by one, to talk about the case.
- Have jurors speak up anytime, when they have something to say.
- Try to get everyone to talk by saying something like, "Does anyone else have anything to add?"
- Show respect to the other jurors by looking at the person speaking.
- Do not be afraid to speak up and express your views.
- Have someone take notes or make notes on an easel or blackboard so that you do not forget the important points.
- Write down key points so that everyone can see them.

Discussing the Evidence and the Law

Q. What do we do now?

A. *First, review the judge's instructions on the line because the instructions tell you what to do.*

Q. Is there a set way to examine and weigh the evidence and to apply the law?

A. *The judge's instructions will tell you if there are special rules or a set process you should follow. Otherwise, you are free to conduct your deliberations in whatever way is helpful.*

Here are several suggestions:

- Look at the judge's instructions that define each charge or claim and list each separate element that makes up that charge or claim.
- For each of these elements, review the evidence, both the exhibits and witness testimony, to see if each element has been established by the evidence.

- If there is a lot of evidence, try listing each piece of it next to the elements it applies to.
- Discuss each charge or claim, one at a time.
- Vote on each charge or claim.
- Fill out the verdict form(s) given to you by the judge.

Q. What if someone is not following the instructions, refuses to deliberate or relies on other information outside of the evidence?

A. *This is a violation of a juror's oath and the judge should be told.*

Voting

Q. When should we take the first vote?

A. *There is no best time. But, if you spend a reasonable amount of time considering the evidence and the law and listening to each other's opinions, you will probably feel more confident and satisfied with your eventual verdict than if you rush things.*

Q. Is there any correct way to take the vote?

A. *No, anyway is okay. You might vote by raising your hands, by a written ballot, or by voice ballot. Eventually, a final vote in the jury room will have to be taken with each of you expressing your opinion on the verdict to be returned by the jury.*

Q. What is we can not reach a verdict after trying many times to do so?

A. *Ask the judge for advice on how to proceed.*

Getting Assistance from the Court

Q. What if we don't understand or are confused by something in the judge's instructions, such as a legal principal or definition?

A. *Ask the judge because you must understand the instruction in order to do a good job.*

Q. Is there any type of information we can not ask for from the judge?

A. *Yes. Some examples of information you can not ask for include:*

- Police reports, doctors' reports, etc., that were referred to during the trial, but were not received in evidence as an exhibit.
- A reading back of the testimony of witnesses. You will be required to rely upon your collective recollections and notes for the testimony of the witnesses.
- Reports and other information that were not referred to during the trial, but which you assume might or should be available.
- There may be some other information you ask for that the judge is not permitted to give you.

Q. Are there items or other things that we might ask for that would assist us in our review and understanding of the evidence?

A. *Yes: You may ask for a calculator, VCR for playing tapes that were admitted into evidence, tape player, easel and paper, blackboard, chalk and items of that nature.*

The Verdict

Q. After we have reached a verdict and signed the verdict form(s), how do we turn our verdict over to the court?

A. *The following steps are usually followed:*

- The foreperson knocks on the jury room door and waits for the bailiff. When the bailiff answers the door, the foreperson tells the bailiff that a verdict has been reached.
- The judge calls everyone and informs them a verdict has been reached. It sometimes takes time to assemble all necessary persons, so please be patient.
- When all the necessary individuals are present, the bailiff will return you to the courtroom.
- The judge will ask the foreperson if a verdict has been reached. If a verdict has been reached, the judge will ask the foreperson to give the verdict form(s) to the bailiff.
- The judge will examine the verdict form(s) to ensure they have been properly completed.

Q. Who reads the verdict?

A. *The verdict will be read into the record by the bailiff, or the judge. The judge may ask the attorney for one of the parties if the attorney would like the jury polled? If the jury is polled, the bailiff or judge will ask "Juror number, is this your verdict?" You need only answer "yes" or "no" to the question asked by the bailiff or judge.*

Once Jury Duty is Over

Q. Now that the case is over, may we speak with the attorneys or others about the case and the deliberations?

A. *The judge will talk to you after the verdict is returned and will inform you whether you talk to anyone about the case is entirely up to you.*

Q. How do we know we have done the right thing?

A. *If you have thoroughly examined the evidence and discussed the evidence with each other, and otherwise done your best, you have done the right thing. Making decisions as jurors about lives, events and facts in a trial is always difficult. Regardless of the outcome of the case, you have performed an invaluable service for the parties in this case and for the system of justice in our community. As the judge presiding over this case, I thank you for your time and thoughtful deliberations. I sincerely hope that you found your service as a juror enlightening and rewarding.*

- Do you invite questions?
 - “If you are in doubt about a portion of these instructions you will each have a copy of these instructions to review in the jury room. If any questions arise in the course of your deliberations, you must write them down and notify the bailiff. To secure the bailiff’s attention ring the buzzer in the jury room. The Court will respond to your question, if possible, in a manner permitted by law. Continue your deliberations if possible until you receive my response.”
- Disclosure of deliberations in question.
- Method of Response.
 - Written response.
 - Judge entering jury room with court reporter.
 - Returning jurors to courtroom.
- Consultation with counsel?

Questions from the Jury During Deliberations



- Can we have a dictionary?
- What is the definition of "is"?
- What is the definition of "retain"?
- We would like to see those diagrams used during closing argument.
- We would like to hear the testimony of Officer Smith again.
- We can't agree, what should we do?

Contact with Jurors During Deliberation.

- The importance of training staff.
- Continue consultation with counsel throughout the process.
- Must litigants be present?

The Verdict

- Reviewing the verdict forms and interrogatories for problems and inconsistencies.
- Hypothetical:
 - Ladies and Gentlemen of the jury, I have reviewed the verdict forms and note that only five of you signed the verdict form in favor of the plaintiff. What do you do?

The Care and Feeding of Jurors.

- Jury amenities.
- What do you provide?

Debriefing jurors after the trial.

- What can you say?
- Use of exit survey.

JUDGE ROYSON

Sorry for the result. We didn't
have much to work with.