THE FLORIDA BAR TRIAL LAWYERS SECTION

The Advocate

www.flatls.org Vol. XL, No. 4 Summer 2011

MESSAGE FROM THE CHAIR:

Recognizing Champions of Judicial Independence

Clifford C. Higby

At the time I wrote my last Chair's Message, it was clear to any lawyer or Bar leader who was following the situation that the 2011 Legislative year was going to be more challenging for the judiciary and legal profession than any in recent memory. I do not think even the most pessimistic of lawyers anticipated the kind of radical plans the House of Representatives had in store for the Florida court system and the Third Branch of Government.

Bills were offered by House leaders to split the Supreme Court in two, remove all sitting members of the JNCs, take the Florida Bar out of the JNC process, require a 60 percent voter approval for Judicial Merit Retention, strip the Supreme Court of ruling making authority, and even tie judicial pay to case dispositions. The Supreme Court would be split into two divisions and the Governor would get to appoint three new justices.

The proposals created a well deserved backlash. Bar leaders, former Supreme Court Justices, former Governors, and most importantly members of this Section spoke out and called the "reform" efforts what they were – court packing and an encroachment on the judiciary by the

continued, next page

In Opening Argument, Tell Your Client's Story

By John Buckley and Alice Hector

Imagine you are a parent. You hold the car keys. Your teenage daughter wants to go out with her friends and needs your wheels to accomplish her desire. She has explained her plans, promised to be home by midnight, sworn off alcoholic intake for the night (actually, she denies ever doing that anyway). You are unimpressed with the presentation. She cajoles, begs, pleads, and then cries. This does not sway you either. In tears, she blurts out the defining words any advocate needs to hear: "I wish you could see it from my point of view." "Eureka!" you exclaim. "Does that mean I get the keys?" your daughter asks. "No," you respond, "But you have just helped me structure my next opening argument!"

Get the listener to see the story from your side. That is the objective of any persuasive opening argument. Several steps can help you do the trick. First, tell a story from your client's perspective. Second, keep the jury's attention, enhance its retention, and draw the jurors into the case with well-used educational and trial techniques. Finally, empower the jury to make a decision, and ask it for a verdict in your client's favor.

continued, page 9

In This Issue:

CHAIR'S MESSAGE

from page 1

legislature and the Executive Branch. Not a single major newspaper endorsed the proposals, and nearly every major newspaper spoke out against.

The "reform" proposals amounted to a brazen power grab that had nothing to do with needed "reform". These "reforms" would not have been offered if Alex Sink were Governor. Additionally, not a single objective study supported the claim that "reforms" were needed to improve court efficiency.

To add salt to the wound, the House Speaker openly tied court funding (something the legislature is constitutionally required to provide anyway) to the initiatives. Attempts were made to solicit support from the Bar in exchange for "guaranteed" court funding. It did not work, and the leadership of this Section made sure the independence of our judiciary was not bargained away for illusory "court funding".

Due to the courage of several senators, both Democrat and Republican, as well as the extra ordinary efforts of a small group of lawyers (all members of this Section) who lobbied and made sure Senators understood what was at stake, the bills on most of these issues died in the Senate.

Senator David Simmons of Maitland recently said it best "The Senate stood tall against an unwarranted interference in our judiciary. … Martin Luther King said its always the right time to do the right thing. The Florida Senate did the right thing at the right time for the people of Florida".[1]

The Trial Lawyers Section and all lawyers owe a special debt of gratitude to the following legislators, who put policy and principle over politics, and helped fight back this attempt to pack the Supreme Court and further politicize judicial selection and retention:

Republican Senators:

Lizbeth Benacquisto – Wellington
Charles Dean – Inverness
Nancy Detert – Venice
Miguel Diaz de la Portilla – Miami
Paula Dockery – Lakeland
Greg Evers – Pensacola
Mike Fasano – New Port Richey
Dennis Jones – Seminole
Jack Latvala – St. Petersberg
Steve Oelrich – Gainesville
David Simmons – Altamonte Springs
Ronda Storms – Brandon

Democratic Senators:

Oscar Braynon – Miami Gardens
Tony Hill – Jacksonville
Arthenia Joyner – Tampa
Gwen Margolis – Miami
Bill Montford – Tallahassee
Nan Rich – Sunrise
Jeremy Ring – Margate
Maria Sachs – Delray
Gary Siplin – Orlando
Chris Smith – Oakland Park
Eleanor Sobel – Hollywood

State Representative:

Richard Steinberg (D) – Miami Beach

Special thanks is also due to a group of Trial Lawyers who worked in conjunction with this Section's lobbyist, Bob Harris, and former Lieutenant Governor, now turned Lobbyist, Jeff Kottkamp. Section members and FLABOTA leaders, Bob Cole (Jacksonville), Jeff Garvin (Ft. Myers), Howard Hunter (Tampa) and former Bar President, Howard Coker, all worked the trenches in Tallahassee and truly made a difference. Without their hard work and vigilance, we would be looking at a split Supreme Court, no Bar involvement in judicial selection, and a court system stripped of its independent, co-equal status.

This is my last "Chair's Message". I want to thank all of the members of the Trial Lawyers Section, and especially the members of the Executive Council for this past year's hard work and dedication to the profession. The gavel of leadership is being passed to Craig Gibbs of Jacksonville. Craig will need the support of everyone in this organization, because the battles over access to courts, court funding, and an independent judiciary are going to continue. We look forward to working with incoming Bar President Scott Hawkins and his leadership team with the Florida Bar on the challenges ahead. I know the Champions of Judicial Independence will continue to answer the call.

Clifford C. Higby, Chair
Trial Lawyers Section

Endnote:

1 Simmons, David. "My Word: Policy wins over politics". Orlando Sentinel. May 22, 2011.

Employee Privacy and the Use of Social Media

By Marc Sanchez

The days of discretion are gone. Disgruntled employees who once griped to one another now turn to Twitter, Facebook, YouTube, and personal blogs to complain about their jobs. This shift brings new legal risks to employers. Among them, according to the Association of Corporate Counsel, are hostile work environment and discrimination claims, defamation claims, improper disclosure of confidential information, and damages to an employer's reputation. Meanwhile, risks identified under new Federal Trade Commission Guidelines include liability for employees endorsing their employer's services or products through social networks without disclosing the employment relationship. Liability may result, even if the employer did not authorize the comments.

The prevalence of social media in the workplace raises a thorny question: how can an employer monitor the use of social media? And more importantly: when can an employer use that information to take disciplinary action against an employee? The answers depend on when, and often where, the employee uses social media tools.

An Employee's Right to Privacy on Company Electronic Resources

Public employees should not hold an expectation of privacy in the use of company electronic resources. The United States Supreme Court made that point clear last summer in *Ontario v. Quon*, 529 F.3d 892 (2010). In *Quon*, a city police officer exceeded the monthly text allowance on a city pager. The text messages were personal, often lewd, and made both on and off duty. The Court held that Quon maintained a reasonable expectation of privacy in the messages and that the reading of the messages by city investigators was a search under the Fourth Amendment. The Court, however, further found that the scope of the search—reading of the text messages—was reasonable. The Court grounded its ruling in part in the city's advance warning that text messages were subject to audit.

Private employees may find privacy protection in state and federal law. Under the common law, if employees can allege intentional intrusion of privacy, then they may have a cause of action for intrusion into their seclusion or solitude. An employer may defend by establishing the employees did not have a reasonable expectation of privacy. The Federal Wiretap Act (1968) and the Electronic Communications Privacy Act (ECPA) of 1986 prohibit intentional interception of electronic communications but make a number of exceptions. It remains unclear how the ECPA applies to e-mail and company e-mail networks. The dearth of case law on any aspect of social media makes practicing in this area challenging.

Meanwhile, the Stored Communications Act (SCA) offers pro-employer case law. The SCA, part of the ECPA, is aimed at preventing public service providers like Yahoo! or Gmail from disclosing the content of private messages. Courts have held that company-owned-and-operated e-mail networks, however, are not subject to the SCA. Courts have distinguished between public and private service provides, holding that the SCA serves as a layer of consumer protection for public service providers only. Thus, the SCA coupled with an express technology-use policy stating e-mails are stored for screening provides a strong case for employer review of company e-mail. Protection of activities outside of company e-mail remains less clear.

State and federal protections of privacy are tempered by Quon. The framework in Quon, finding an audit of text messages reasonable where there is advance warning, remains smart policy for civilian employees. Policies which make it clear that messages on company cell phones, laptops, and computers are not private offer employers the greatest protection.

Advanced warning in a technology-use policy in the employee handbook can go as far as eliminating the attorney-client privilege. A recent California appellate court case illustrates this point. In *Holmes v. Petrovich Development Co.* (Superior Ct. No. 05AS04356), the Plaintiff, Gina Holmes, claimed she was the victim of sexual harassment and retaliation arising out of her employer's reaction to her pregnancy. Holmes e-mailed an attorney from work seeking a referral for a lawyer specializing in employment law. In the e-mail she explained the events that unfolded, which formed the basis of her sexual harassment, retaliation, and ultimately constructive discharge claims. When Holmes sued her employer, Petrovich located the e-mails on its computer system and used the e-mails as part of its defense.

> How can an employer monitor employee social media?

The court found Holmes's e-mails were not privileged under the rules of evidence. The court based its holding on the company's computer-use policy. The policy stated that employee use of company computers was limited to company business, was monitored,

continued, next page

and expressly disclaimed any right to privacy the employee may claim in personal messages. Based on this policy, the court held Holmes's e-mails to her attorney were not privileged because she used a company computer with knowledge of her employer's computer-monitoring policy. Simply put, there was no reasonable expectation to privacy. The court analogized the e-mail to "consulting her lawyer in her employer's conference room, in a loud voice, with the door open. . . ." The case stands for an important lesson—a well-written policy can destroy all expectation of privacy in personal messages, even the attorney-client privilege.

The Internet does provide a cloak of anonymity… be careful what you say!

An Employee's Right to Privacy Off Duty

Employees' off-the-clock activities are subject to a number of legal considerations. The National Labor Relations Act (NLRA), whistleblower statutes, lawful conduct laws, and communications related to political activities and affiliations are among the hurdles to disciplining employees for off-duty social network communications.

Some states, such as California and Wisconsin, have lawful-conduct laws that protect an employee's legal off-duty activities. Thus, an employer may not like what it sees on employees' profiles and blogs but cannot discipline an employee for engaging in lawful activities.

The NLRA is a consideration often overlooked by employers. The NLRA affords employees even nonunionized ones, the right to engage in "concerted activity," including the right to discuss, and even criticize, the conditions of their employment with coworkers and outsiders. Thus, an employer must first assess whether the employee engaged in "concerted activity" when they took to Twitter or Facebook to complain before taking any disciplinary action.

Employees may also be protected by whistleblower statutes and by the right to freedom of political speech. Federal and state law affords protection to employees who complain about company conditions affecting public health, safety, and Sarbanes-Oxley violations. Many states also prohibit private employers from regulating the political activities, including communication, of employees. The myriad legal considerations require employers to react slowly to what they discover online. Hasty action could lead to more trouble.

Checking Social Media Before Hiring

Using social media to gather information on applicants opens a Pandora's box of issues. Accessing social media in the public domain is not per se illegal so long as it does not run afoul of state or federal discrimination laws. Often the problem is in avoiding the appearance of discriminatory use of social-media screening. For example, an employer may inadvertently become aware of a candidate's protected characteristics such as marital status, sexual orientation, application for bankruptcy, or political activities during a search of social networks. If the applicant is not hired, the employer could face a lawsuit. There is a wide range of protected information an employer should be careful of learning when screening social media networks.

The law of social media is just emerging, and its application in certain areas remains unclear. For example, the role of social-media screening in a negligent-hiring case has yet to be tested. Employers potentially face a risk of liability for negligent hiring based on employing social-media screening. The principal issue in a negligent-hiring case is whether the employer owed a duty of reasonable care in its hiring and retention of employees. Where such a duty exists, the question becomes whether the employer conducted a reasonable investigation. While the case law has yet to include the screening of social-media sites as part of a reasonable investigation, it may become part of the standard. Until then, it is unclear how a court would react if an employer using social-media screening overlooked or ignored indicia of unfitness.

Employers should develop clear procedures for using social media to screen job applicants. These procedures should avoid the nasty scenario where a manager pretends to be someone else to circumvent an applicant's privacy settings. It could also be beneficial to have someone who is removed from the decision-making process conduct the search and provide a filtered version of the information collected for the decision-maker to review. A structured process provides better awareness of the risks

The Advocate is prepared and published by the Trial Lawyers Section of The Florida Bar.

Clifford C. Higby, Panama City ..... Chair
Craig A. Gibbs, Jacksonville ..... Chair-elect
Wayne L. Helsby, Winter Park ..... Secretary
Robert E. Mansbach, Jr., Orlando ..... Immediate Past Chair
Michael Flynn, Ft. Lauderdale ..... Editor
Paige Graham, Tallahassee ..... Program Administrator
Lynn Brady, Tallahassee ..... Graphic Design/Layout

Statement or expressions of opinion are those of the editor and contributors and not of The Florida Bar or the Section.

and threats of using social-media screening.

Policies and Common Sense

There are two basic pieces of advice I give clients about social media: I tell employers to develop clear social-media policies, and I tell employees to exercise common sense when using social-media networks.

Employers should develop clear policies on the use of social media both in and out of the workplace. A social-media policy will vary from business to business; some rely on employees creating social-media profiles, while others merely need a policy akin to a technology-use policy. At a minimum, a social-media policy should state the level of privacy an employee can expect when accessing social-network sites at work, define anti-harassment and appropriate-conduct rules for online interactions in the employee handbook, and create procedures to protect confidential information. These policies should touch on the gamut of communications—from employees' messages to friends and other outside parties, to messages among co-workers, to company communications with business partners, vendors, and customers.

A good policy also informs employees of the potential risks of posting to blogs and social networks. This would include reminders that discriminatory, harassing, or defamatory posts, e-mails, or texts are not tolerated. Some studies cite that as many as 70 percent of employees believe it is illegal for their employer to look at their blog or postings on social-networking pages like Facebook. In this environment, it is better not to assume that employees are aware of the rights and risks in using social media. The policy should also state the employer's expectations for online activities while at work.

Companies that rely more heavily on social media may require more detailed policies. Increasingly, companies are asking employees to maintain a social-media presence—Twitter accounts and Facebook pages, most commonly—as part of their jobs. If the employee adapts his personal page for company use, then a disclaimer on personal posts offers clarity to company clients and customers. The disclaimer can be as simple as, "The following is my personal opinion." Separate profiles may offer added, and easier, protection. As with other areas in this field, the gap in the case law leads to an overkill approach to protect employers. Given the ease of creating a company profile or implementing a social—media policy, the overkill approach should not be overlooked.

The best advice for employees is to exercise common sense. Reminding employees that what is said online in e-mail, Twitter "tweets," or status updates is public and permanent can help suppress the urge to say something regrettable. Employees often mistakenly believe use of the Internet provides a cloak of anonymity. It is also important for employees to verify their privacy settings to ensure the public at large cannot view their tweets and status updates. Employees must remember there is a proper time and place for their comments. Judicious use of social media can help them avoid conflicts and possibly litigation.

Beware of Waiving Policies

It is important to remind employers to abide by their social-media policies. In Quon, the Court noted that the "operational reality" of the workplace led employees to believe that if they paid their overages, their text messages would not be audited—thus creating a reasonable expectation of privacy that destroyed the effect of any notice to the contrary. This is why the Court ruled that the scope was appropriate, not that there was no reasonable expectation of privacy. The actual experience at work increased Quon's expectation of privacy, despite an express audit policy. This is a "policy-plus" approach used by several appeals courts. For an employer to preserve the protections afforded by a social-media policy, it must be implemented and fully utilized.

Social-media technology offers many benefits to reach consumers and is changing how many companies do business. It should still be seen as a useful tool, but the risks should not be forgotten. Clear policies and common sense will help to ensure the risks are contained while affording employees freedom and privacy.

Marc Sanchez *provides both contract attorney services and representation for small- and medium-sized businesses. He can be reached at www.sanchezmarc.com This article is reprinted with permission from the Washington State Bar News (April, 2011).*

2011 Calendar of Events

June 22 - 25, 2011
The Florida Bar Annual Meeting
Gaylord Palms, Orlando

June 24, 2011
Executive Council Meeting
Gaylord Palms, Orlando

Cross Examination: A Primer

By Bill Hoppe

To the lay person, trial cross examination is the pinnacle of advocacy. Who does not marvel at the way Jack McCoy bleeds the truth out of a devious witness on Law and Order.

Most trial lawyers wrongfully believe cross examination is their finest skill; when in truth most of us are ineffectual at best. At one end of the spectrum is the cross which is only an opportunity for the witness to repeat his or her direct testimony. On the other end is the disjointed bullying cross which causes the jury to dislike the lawyer and identify with the examinee.

Your plan needs to include whether you are going to cross on the witnesses' qualifications, bias, or the scientific soundness of the opinion. Do not try all three.

The best way to learn how to cross examine is to watch others and practice under the eye of an experienced lawyer. The purpose of this article is to raise some ideas, and hopefully some questions about the purpose of the cross, the form of the leading question, and the use of impeachment materials.

I. Purpose of the Cross Examination

The first question you need to ask is what is the goal of my cross examination? What am I trying to accomplish? How will my questions reinforce the theme I stated in my opening statement? Will accomplishing this goal advance my client's claim or defense? If you cannot give a satisfactory answer to these questions, do not attempt a cross. Hopefully, there are other witnesses to prove your side of the case. To start a cross hoping you will get lucky and the witness will make a mistake, is like hoping to draw that last card for an inside straight. It hardly ever happens and the results are usually bad. Fold your cards at the poker table, and announce "no questions" in the courtroom.

The second question to ask is whom am I cross-examining? The jury assumes that since you are the lawyer, you should win. They have seen the same television shows you have. If the witness is an innocent looking individual such as the elderly lady who looks like everyone's grandmother, you had better be easy and not look the bully. Perhaps the witness is an experienced orthopedic surgeon, medical examiner or "expert witness." These folks have testified in more trials than you have ever seen. They can make you look like a fool, to the jury's delight. Either sit down or make a quick point and sit down.

Cross examining the expert witness is a topic by itself. While the plan may be adjusted after the direct, the plan again must mesh with the theme of your case. Going toe to toe with an expert just to show your cross examination skills is useless to your client and not persuasive to the jury.

Usually, it is best to get six to eight agreeable yes answers and sit down. Do this in a friendly voice like the expert is your witness who has helped explain this complicated field of knowledge to everyone in the courtroom.

The above strategy will only work in certain situations. When you do need to confront an expert, I recommend that you first obtain those same agreement "yes answers." Just do it with a stronger tone of voice.

Your plan needs to include whether you are going to cross on the witnesses' qualifications, bias, or the scientific soundness of the opinion. Do not try all three. In fact, it is best to pick your best shot and leave the rest in your trial notebook.

If your focus is on the opinion, your only goal it to convince the jury that the expert is wrong. Too many cross exams seem only to exhibit how knowledgeable the examiner is of the subject. I have seen occasions where the attorney has completely destroyed the expert's opinion, but the only two people who know this are the attorney and the expert. You are going to have to make your points understandable to the jury without looking as though you are "talking down" to them. There is a balance somewhere in the middle where the jury does not perceive you as showing off, but as someone who has learned about the witnesses' subject so you can be a better advocate for your client and a guide to their decision.

II. Form of the Question

Remember that the most effective cross is when you can get a "yes" or "no" from the witness to eight or ten questions. The first rule to accomplish this goal is to know the answer the witness must give to every question you ask. The second rule is to avoid opening the door to the witness explaining his answer. Generally, if the answer is "yes, but . . .", everything after the "but" is bad for you. I have never had a judge not allow a witness to explain an answer. Be ready to object if the witness goes on to other areas to bolster the direct. Generally, do not start picking at the words of explanation. This usually ends up with an objection that you are arguing or bullying the witness, and leaves the jury wondering what was that all about.

For example, let us assume the often heard parental question "Who ate the ice cream?" Let us also assume that at the time of trial, the witness/defendant has already confessed in a deposition or been exposed by DNA

testing. There are at least three ways to ask the first cross-examination question:

1. *Who ate the ice cream?*
2. *Did you eat the ice cream?*
3. *You ate the ice cream, didn't you?*

Question one will evoke the longest answer with the admission that it was the witness buried somewhere between two-thirds and three-fourths of the way through. It may be dramatic admission to the jury, but only if you had not told the jury in opening statement who you would prove the witness had eaten the ice cream.

Question number two calls for that "yes, but" answer we want to avoid. Question three gives you the best chance for a simple yes. The more close-ended the question the more likely you are to get a one syllable agreement. Now you can ask a series of questions which in truth are just statements for which you ask agreement.

- *No one* told you to eat the ice cream.
- In fact, you were told *not* to eat the ice cream.
- Your *mother* told you not eat the ice cream.
- You *disobeyed* her.
- *You* decided to eat the ice cream.
- It was *your decision* alone.
- *Your* responsibility.
- *No one* else could have the ice cream that you had already eaten.

These questions should be prepared in advance. They will give you the aura you wish without being interrupted with the objection of "repetitive" or "asked and answered."

My second example is the case of Who Killed Cock Robin. You are the prosecutor. You should assume that the defendant has testified in his own behalf that he went to visit Cock Robin, that Cock Robin pulled a gun on the defendant and that he pulled out his gun and shot in self defense. In cross examining the defendant, you do not want him merely repeating his direct. Your first attack, and the one that will obtain agreement from the defendant, should go something like this:

- You own a gun?
- You took the gun with you?
- It was loaded? (*from now on the premise is always "loaded gun."*)
- Do you always carry a loaded gun with you?

There is no good answer to this question. If the answer is "yes" the next question would be: *Is that because you go to the homes of others knowing you have to "defend" yourself?* Assuming the answer is "no" the following is suggested:

- But you took a loaded gun to visit Cock Robin? (do not ask why)
- Your intention was to go to his home carrying a loaded gun?
- You made that decision?
- You felt you needed a loaded gun to visit Cock Robin?
- You believed you might have to use it?
- You were prepared to use it if necessary?

Like any experienced prosecutor, you have just reinforced your themes of motive and opportunity. By advanced preparation of the above line of questioning you will avoid the witness taking control and retelling his story.

Avoid questions where yes and no could both be considered the correct answer. For example: "You didn't mind your mother, correct?" or "Is it true, you didn't mind your mother?" or even worse, "Is it not true that you did not mind your mother?" Back to the ice cream, "You claim you did not eat the ice cream, correct." Look out for statements which are only questions by your tone of voice. For example, "He did not follow your direction? He wasn't following the rules?" As the Cock Robin prosecutor, do not ask the first on the scene rookie patrolman "Would it be fair to say that homicide investigation is not your duty?" When my client was being deposed and the opposing attorney was asking questions in this manner, I could sit back and relax knowing that nothing in the transcript could be effectively used against my client in trial. The best way of breaking this habit is to carefully examine the transcripts of your own questions. Get rid of developing bad habits before your next trial.

The more close-ended the question the more likely you are to get a one syllable agreement. Now you can ask a series of questions which in truth are just statements for which you ask agreement.

If you cannot suppress your enthusiasm for alliterative negative questions, keep them short. Avoid the conjunctive. Avoid the compound complex sentence.

You did not go to class?

You did not read the textbook?

You did not read the notes?

You did not study?

You were not ready for the test?

Speaking of the alliterative phase, many motivational speakers and preachers will tell you that what works best is a set of three "Hell, fire and damnation," "faith, hope and charity," or :lie, cheat and steal." In cross, you need not be so restrictive. My rule is not less than three or more than five.

III. Use of Impeachment materials

The use of documents in cross examination has caused embarrassment or loss of credibility to the attorney/cross examiner. Is the document already in evidence? If not, are you sure you can get it into evidence through this adverse witness? Have

continued, next page

you prepared all the predicate questions to admissibility? Read the evidence rule, use the same words, and have the rule available for the Court. Once into evidence, do you have a plan for its viewing by the jury during your cross examination?

The second issue is does the witness knows the document is coming. If yes, the witness or opposing attorney will have prepared a response that may bury you. Whether the exhibit is known or a surprise, your questions need to be tight enough that the witness identifies the exhibit rather than commenting on it. For example, "Is this a photo of the scene?", not "What is this?", which will evoke "a poor photo", "taken from the wrong angle", "fails to show...", "taken before (after) ..."

Good Example:

Is this a page of the hospital record?

Is that your handwriting?

Is that on the day she died?

Did you write there "take out the tube at 11:00 a.m."

Bad example:

What is a hospital chart?

Why do you write in it?

Read to us what you wrote?

Why did you write it?

The bad example allows too much room for comment or argument. Remember, if you are "arguing" with the witness, you are losing. If there is something you want read to a jury, you read it with your emphasis and only ask the witness if that is what it says. If the witness reads the exhibit, he or she will comment on what they want the jury to believe it says or means.

Let me say a few words about the use of Learned Treatises under Federal Evidence Rule 803(18). The test for their use is whether it is "established as a reliable authority." The decision is made by the judge, not the adverse witness. The evidence of being authorative can be presented to the Court by your witness, an independent witness, through judicial notice, or by the adverse witness. Using the adverse witness to meet the Court's test should be your last alternative. Your best question should begin as follows: "The Court has found that Smith on Dermatology is a Learned Treatise in your profession, are you aware that Dr. Smith wrote on page 242 the following must be avoided . . .?" The expert or defendant may want to argue that he does not follow Smith or the text is outdated or the quote is out of context, but he will have to wait for redirect and his will be an uphill battle once the Court has found it a learned treatise.

IV. Conclusion

To accomplish a successful cross examination, you will need pretrial preparation and the ability to adapt to the witnesses' answers. Neither by itself is sufficient. Being quick on your feet can not take the place of a plan; nor can a prior plan overcome the unexpected. You still need to make your point or points and sit down. Good luck.

Bring Your Story to the Jury

First, tell a story-- your client's story from his or her perspective, in a manner that draws the jurors into the story. A number of techniques can be used to entice them in. Use the present tense. Take them back in time to 1990, when the injury occurred. Tell the story as if you and the jurors are witnessing it as it happens. If you represent the plaintiff, rather than telling them that Frank went to see Dr. Brown and Dr. Brown brushed him off, put it in the present tense. "Frank gets up in the morning, and he feels like he is losing control. The depression is overwhelming. He goes to see Dr. Brown in a last ditch effort to get help for himself. He sees Dr. Brown, tells Dr. Brown he is thinking about taking his own life. What does Dr. Brown do? He ushers Frank out to an office assistant who hands Frank a sheet of paper and shows him the door. Just like that." Help jurors experience what Frank experienced and your opening will be much more memorable.

> Tell the story in the present tense as if you and the jury are experiencing what happened as it happens

If you are representing the defendant, refocus the case and present your client's view of the facts. "This is not a case about medical malpractice. It is a case about a patient who goes back on his word to call the referral hotline, a word he gave to his doctor, a doctor who has known him for 20 years." Then tell the story from Dr. Brown's perspective, about a patient who demonstrates he can follow instructions by coming in that day for a follow-up, not an emergency visit, but a routine follow-up; who makes an off-hand comment indicating he is despondent and may as well just end it all; whom you refer to specialized care, and who promises you he will get the help he needs. Who then goes out, decides he cannot return home as promised after driving all the way there, goes to the drugstore, decides to buy razor blades, then goes to a favorite spot and thinks for a while before slashing his wrists. Tell and sell the perspective that this case is about personal responsibility, not medical malpractice.

Keep Their Attention

Second, use proven educational devices to keep juror attention. People learn primarily in three ways: aural (hearing), visual (seeing), and kinesthetic (touching or feeling). The aural learner hears things better than he sees them. So tell him how to get there, rather than showing him a map. The visual learner learns better by watching or seeing. She sees your point, literally. Give her a map or, better yet, drive her there once, and she will find her way from then on. Kinesthetic learners are the rarest and most difficult to teach. They learn how to do something by doing it themselves. Thus, you must be more creative to reach them through their primary learning mode at trial. Sometimes you cannot, but it is important to recognize these primary learning methods and to play to as many of them as you can during the trial.

> Create suspense and anticipation for the jurors by mentioning what is to come and then let the jurors wait in anticipation for it to happen

These primary modes of learning are opportunities to get the jury to hear your view or see your point. Fortunately, very few of us are primarily kinesthetic learners, but it is a cardinal sin to open without using exhibits to reach the visual learners in their primary mode as well as the aural learners among us.

Draw the jurors in by forcing them to reach your conclusions by *inference* rather than by your telling them what to think. This is a little indirect, but it conditions the jurors to think for themselves. When they do so, the conclusion becomes theirs to keep, not yours. It is much more difficult to dislodge their own view in the deliberation room than it is to dislodge your view. Rather than claim the plaintiff was speeding at the time of the crash, tell the jury that the plaintiff was going at least 55, that the posted speed limit is 25, and let them make the conclusion themselves.

Use suspense to involve jurors in the dispute-solving aspects of the case. "Wait for me to ask the plaintiff what is spilled on the Member Assistance Program form, and you will know he had the time and ability to think about his actions before he decided to cut himself." Members of the jury will try to figure out the answer, some competing against each other, and all will think "Aha!" when the answer is finally revealed in testimony during trial. They will be sure to pay attention when the plaintiff takes the stand because they know the mystery will be solved once and for all.

Empower the Jury to Decide

Empower jurors to make a decision. They are expectedly nervous and uncomfortable in their new role as jurors. Show them that they can use their everyday skills to decide the case by evaluating the witnesses and analyzing the respective contentions against their everyday experience. Common sense is the benchmark against which to evaluate the respective positions of the parties.

continued, next page

Jurors are like everyone else. We have all used our common sense and skill to evaluate people and positions every day of our lives since we were about five years old, the age at which we discovered that people don't always tell the truth. We compare their statements and version of the events to our common everyday experience to see if what they say is reasonable, credible, and provable. We look at demeanor, consistency, and reliability. We assess these factors and make judgments. Everyday. Being a juror is just doing these same things to decide for someone else instead of for ourselves.

Let the jurors know they are capable and that you will show them the facts to help them decide in your favor. Spell out the facts they can and will find, sprinkled with a little suspense, and you will hold them in their seats waiting for, you guessed it, your evidence. They are now seeing and hearing the evidence from your client's perspective. Just as you wanted.

Remember, you hold the keys, figuratively and literally. If your daughter knew how to do this, she would have *your* keys by now.

John Buckley *is a partner in the Chicago, Illinois, office of Ungaretti & Harris, LLP, whose practice includes representing policyholders in insurance coverage litigation, defending mass tort and class actions, and general commercial litigation. He can be reached at jpbuckley@uhlaw.com*

Alice Hector, *a shareholder in the Miami, Florida, office of Akerman Senterfitt, represents a wide range of clients in complex commercial and trust and estate litigation. Hector has also taught trial practice and litigation skills for 30 years. She can be reached at hector@ackerman.com*

Reprinted with permission of the authors.

THE FLORIDA BAR CLE

The Florida Bar Trial Lawyers Section presents

Newly Reorganized Jury Instructions and Other Hot Jury Instruction Topics

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Audio CD Only

Recorded January 15, 2011 at the Trial Lawyers Section Annual Summit

Course No. 1269C

AUDIO CD ORDER FORM

8:30 a.m. – 10:00 a.m.

The Newly Reorganized Jury Instructions and Other Hot Jury Instruction Topics

CLE CREDITS
CLER PROGRAM (Max. Credit: 1.5 hours) General: 1.5 hours Ethics: 1.5 hours

TO ORDER AUDIO CD BY MAIL, SEND THIS FORM TO The Florida Bar, Order Entry Department: 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831.

Name _____ Florida Bar # _____

Address _____

City/State/Zip _____ Phone # _____

Email Address _____

WPG: Course No. 1269C

METHOD OF PAYMENT (CHECK ONE):

❑ Check enclosed made payable to The Florida Bar

❑ Credit Card (Advance registration only. Fax to 850/561-5816.)

☐ MASTERCARD ☐ VISA ☐ DISCOVER ☐ AMEX Exp. Date: ____/____ (MO./YR.)

Signature: _____

Name on Card: _____ Billing Zip Code: _____

Card No. _____

TO ORDER AUDIO CD, fill out the order form above, including a street address for delivery. **Please add sales tax. Tax exempt entities must pay the non-section member price.**

Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida. If this order is to be purchased by a tax-exempt organization, the audio CD must be mailed to that organization and not to a person. Include tax-exempt number beside organization's name on the order form.

❑ **AUDIO CD (1269C)**

$95 plus tax (section member)

$145 plus tax (non-section member)

TOTAL $ _____

The Florida Bar Trial Lawyers Section presents

Medical Malpractice in Florida: Addressing Current Issues

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Audio CD Only

Recorded January 15, 2011 at the Trial Lawyers Section Annual Summit

Course No. 1270C

AUDIO CD ORDER FORM

10:30 a.m. – 11:15 a.m.
Recent Issues Developing in Medical Malpractice Case Law and Practice
Thomas D. Masterson, St. Petersburg
Mark McLaughlin, Tampa

11:15 a.m. – 12:00 p.m.
Causes of Action, Initial Claims, Defenses and Presuit
Howard Hunter, III, Tampa
Stuart N. Ratzan, Miami

CLE CREDITS

CLER PROGRAM
(Max. Credit: 2.0 hours)
General: 2.0 hours Ethics: 0.0 hours

CERTIFICATION PROGRAM
(Max. Credit: 1.5 hours)
Civil Trial: 1.5 hours Health Law: 1.5 hours

TO ORDER AUDIO CD BY MAIL, SEND THIS FORM TO The Florida Bar, Order Entry Department: 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831.

Name _____ Florida Bar # _____

Address _____

City/State/Zip _____ Phone # _____

Email Address _____

WPG: Course No. 1270C

METHOD OF PAYMENT (CHECK ONE):

❑ Check enclosed made payable to The Florida Bar

❑ Credit Card (Advance registration only. Fax to 850/561-5816.)

☐ MASTERCARD ☐ VISA ☐ DISCOVER ☐ AMEX Exp. Date: ____/____ (MO./YR.)

Signature: _____

Name on Card: _____ Billing Zip Code: _____

Card No. _____

TO ORDER AUDIO CD, fill out the order form above, including a street address for delivery. **Please add sales tax. Tax exempt entities must pay the non-section member price.**

Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida. If this order is to be purchased by a tax-exempt organization, the audio CD must be mailed to that organization and not to a person. Include tax-exempt number beside organization's name on the order form.

❑ **AUDIO CD (1270C)**

$95 plus tax (section member)

$145 plus tax (non-section member)

TOTAL $ _____

The Florida Bar Continuing Legal Education Committee and the Trial Lawyers Section present

Civil Trial Certification Review 2011

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Recorded January 13-14, 2011

Omni Orlando at ChampionsGate •Orlando, FL

18 Hours of Business Litigation or Civil Trial now available on audio CD!

Course 1158

AUDIO CD/DVD ORDER FORM

JANUARY 13, 2011

8:50 a.m. – 9:00 a.m.
Opening Remarks
Edward K. Cheffy, Naples

9:00 a.m. – 10:45 a.m.
Civil Procedure
Bruce J. Berman, Miami

10:45 a.m. – 11:00 a.m. **Break**

11:00 a.m. – 12:00 noon
Trial Skills: Opening and Closing
F. Gregory Barnhart, West Palm Beach

12:00 noon – 1:15 p.m.
Lunch (included in registration fee)
Remarks about the Certification Exam
Susan J. Cole, Coral Gables
Civil Trial Certification Committee

1:15 p.m. – 2:45 p.m.
Trial Skills: Preserving the Record for Appeal
Jack J. Aiello, West Palm Beach

2:45 p.m. – 3:00 p.m. **Break**

3:00 p.m. – 4:00 p.m.
Recent Developments in Business Litigation
Dennis P. Waggoner, Tampa

4:00 p.m. – 5:00 p.m.
Trial Skills: Voir Dire
Robert C. Palmer, III, Pensacola

JANUARY 14, 2011

9:00 a.m. – 10:45 a.m.
Ethics
Edward K. Cheffy, Naples

10:45 a.m. – 11:00 a.m. **Break**

11:00 a.m. – 12:00 noon
Recent Developments in Personal Injury and Wrongful Death
Raymond T. (Tom) Elligett, Jr., Tampa

12:00 noon – 1:30 p.m. **Lunch**

1:30 p.m. – 2:30 p.m.
Trial Skills: Examination of Witnesses (including Experts, Frye Motions and Motions in Limine)
Honorable Margaret O. Steinbeck, Fort Myers

2:30 p.m. – 2:45 p.m. **Break**

2:45 p.m. – 5:00 p.m.
Evidence
Professor Charles Ehrhardt, Tallahassee

ELECTRONIC MATERIALS: Effective July 1, 2010, every CLE course will feature an electronic course book in lieu of a printed book for all live presentations, live webcasts, webinars, teleseminars, audio CDs and video DVDs. This searchable, downloadable, printable material will be available via e-mail several days in advance of the live course presentation or thereafter for purchased products. We strongly encourage you to purchase the book separately if you prefer your material printed but do not want to print it yourself.

CLER PROGRAM
(Max. Credit: 18.0 hours)
General:18.0 hours Ethics: 2.0 hours

CERTIFICATION PROGRAM
(Max. Credit: 18.0 hours)
Business Litigation: 18.0 hours Civil Trial: 18.0 hours

TO ORDER AUDIO CD, DVD OR COURSE MATERIALS BY MAIL, SEND THIS FORM TO The Florida Bar, Order Entry Department: 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar **or credit card information filled in below**. If you have questions, call 850/561-5831.

Name_____Florida Bar # _____

Address _____

City/State/Zip_____

Phone #_____

Email Address _____

WPG: Course No. 1158C

E-mail address is required to receive electronic course material and will only be used for this order.

METHOD OF PAYMENT (CHECK ONE):

❑ Check enclosed made payable to The Florida Bar

❑ Credit Card (Advance registration only. Fax to 850/561-5816.)
☐ MASTERCARD ☐ VISA ☐ DISCOVER ☐ AMEX

Signature: _____

Exp. Date: ____/____ (MO./YR.)

Name on Card: _____

Billing Zip Code: _____

Card No. _____

TO ORDER AUDIO CD OR COURSE MATERIAL, fill out this order form, including a street address for delivery. **Please add sales tax to the price of audio CD. Tax exempt entities must pay the non-section member price.**

Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida. If this order is to be purchased by a tax-exempt organization, the audio CD must be mailed to that organization and not to a person. Include tax-exempt number beside organization's name on the order form.

❑ **COURSE MATERIAL – (1158M)**
$70 plus tax
Certification/CLER credit is not awarded for the purchase of the course material only.) **TOTAL $** _____

❑ **AUDIO CD – (1158C)**
$410 plus tax (section member)
$460 plus tax (non-section member)
(includes electronic course material) **TOTAL $** _____

❑ **DVD – (1158D)**
$500 plus tax (section member)
$550 plus tax (non-section member)
(includes electronic course material) **TOTAL $** _____

FedEx

Florida Bar Members Save With FedEx

Florida Bar members can enjoy savings of up to 26% off select FedEx® and FedEx Office® services.* Start enjoying your special savings on FedEx services to help put your business a few steps ahead of the competition. Sign up now — it's free. To set up a new FedEx account, or to transfer your existing FedEx account:

Call 1-800-MEMBERS
(1.800.636.2377) M-F, 8 a.m.–6 p.m. EST

PROTECTING RIGHTS • PURSUING JUSTICE • PROMOTING PROFESSIONALISM

THE FLORIDA BAR

*Shipping discounts are exclusive of any FedEx surcharges, premiums or special handling fees and are not available to package consolidators. Eligibility for discounts subject to FedEx credit approval. FedEx First Overnight®, FedEx SameDay®, FedEx® International Next Flight, FedEx International First®, FedEx International Priority DirectDistribution®, FedEx® 10kg Box, FedEx® 25kg Box and FedEx International MailService® not included. Eligible services subject to change. Base discounts on FedEx Express® are 15%-21%. An additional 5% discount is available for eligible FedEx Express shipments when you create shipping labels online at **fedex.com**. For details on the FedEx Money-Back Guarantee, see Our Services at **fedex.com**. Discounts are subject to change. The FedEx Ground money-back guarantee applies to deliveries within the U.S. and to brokerage-inclusive shipments to Canada. Restrictions apply. For details, see the FedEx Ground Tariff. ©2011 FedEx.

To claim your discounts, you must present your FedEx Office account card at a FedEx Office® Print and Ship Center location at the time of purchase. Discount does not apply to outsourced products or services, office supplies, shipping services, inkjet cartridges, videoconferencing services, equipment rental, conference-room rental, high-speed wireless access, Sony® PictureStation™ purchase, gift certificates, custom calendars, holiday promotion greeting cards or postage. This discount cannot be used in combination with volume pricing, custom-bid orders, sale items, coupons or other discount offers. Discounts and availability are subject to change. Not valid for services provided at FedEx Office Print and Ship Center locations in hotels, convention centers and other nonretail locations. Products, services and hours vary by location.

The Florida Bar Foundation
Leadership and Funding for Justice in Florida
P.O. Box 1553 • Orlando, Fl 32802-1553
407-843-0045 • 800-541-2195 • Fax: 407-839-0287
www.flabarfndn.org

The Florida Bar Foundation: A Cause We Can Share

I hope lawyers in Florida will join me in supporting a common cause: The Florida Bar Foundation.

The Foundation, a 501(c)(3) public charity, is a means through which lawyers can support a commonly held belief that everyone should have access to legal representation – regardless of his or her ability to pay.

The Florida Bar Foundation's mission to provide greater access to justice is accomplished through funding of programs that expand and improve representation and advocacy for the poor in civil legal matters; improve the fair and effective administration of justice; and make public service an integral component of the law school experience.

In 1981, financial support for the Foundation increased significantly when the Florida Supreme Court adopted the nation's first Interest on Trust Accounts (IOTA) program. Over the past 29 years, the Florida IOTA program has distributed more than $350 million to help hundreds of thousands of Florida's poor receive critically needed free civil legal assistance and to improve Florida's justice system. More than 30 percent of the total funding for legal aid organizations in Florida comes from The Florida Bar Foundation.

Domestic violence, predatory lending and foreclosure, and access to public benefits are among the types of cases flooding legal aid offices throughout the state. For the sake of those throughout Florida with nowhere else to turn for legal help but to Legal Aid, your support of The Florida Bar Foundation is vital.

Gifts to the Foundation provide added value to your local legal aid organization because of Foundation initiatives such as salary supplementation and loan repayment programs to help retain legal aid attorneys, a Summer Fellows program that places law students at legal aid organizations for 11 weeks each summer, new technological efficiencies such as a statewide case management system, and training opportunities for legal aid staff attorneys.

The Foundation is unique as a funder in providing leadership, along with its financial support, by working with its grantees to improve Florida's legal services delivery system and identifying and addressing the legal needs of particularly vulnerable client groups. You can learn more about the Foundation at www.floridabarfoundation.org.

I hope you will come to consider The Florida Bar Foundation one of your charities. It's truly an organization in which all of us, as Florida attorneys, can take tremendous pride.

John A. Noland, President
The Florida Bar Foundation

The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300

PRSRT-STD
U.S. POSTAGE
PAID
TALLAHASSEE, FL
Permit No. 43

You're Invited!

2nd Annual Trial Lawyers Section Summit

January 25-28, 2012
JW Marriott Orlando

The Trial Lawyers' Section is pleased to announce its 2nd Annual Trial Lawyers' Section Summit. The Summit will offer CLE's and social activities. Don't miss the opportunity to attend the Civil Trial Certification Review seminar, enjoy time with colleagues and friends, and dance to live music at the Friday Night Social.

PLEASE SAVE THE DATE & DON'T MISS THIS EVENT!

A detailed brochure will be available in the coming months.