

**LITIGATION PRACTICE**  
**SYLLABUS FALL SEMESTER, 2008**

PROFESSORS:        Mark J. Karon                    Lee Daly  
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Large Group:        Tuesday, 2:00-3:50 p.m. - Moot Courtroom

SMALL GROUPS:

- I.     Mark Gruesner, 612-577-7777, Wed., 12-1:50 p.m.- Dean's Conference Room
- II.    Nancy McLean, 612-348-6755, Wed., 6-7:50 p.m. - room 221E
- III.   Hon. Richard G. Spicer, 651-438-8086, and Hon. Kathleen Gearin, 651-266-9178 Wed., 6-7:50 p.m. - Room 303
- IV.    Hon. Timothy Blakely, 651-267-4836, Thurs, 5-6:50 p.m. - Room 301
- V.     James C. Erickson, 651-223-4999, Thurs., 5-6:50 p.m. - Room 303
- VI.    Hon. Charles Porter, 612-348-8150, and Hon. Joanne Smith, 651-266-9190, Thurs., 5-6:50 p.m. - Dean's Conference Room

LAWYERING SKILLS OFFICE: Vickie Jauert, 651-523-2140 - Law 212W

REQUIRED MATERIALS

- 1.     Trial Techniques, Seventh Edition, Thomas Mauet, (Aspen Publishers, 2007)
- 2.     Pretrial, Seventh Edition, Thomas A. Mauet (Aspen Publishers, 2008)
- 3.     NITA Case files, Brown v. Byrd (2001) and NITA Case file, State v. Wyatt, (1995)
- 4.     VHS videotape - **1 tape (1 tape per trial team)for trial**

## TOPICAL OUTLINE

Lg. Group-August 26 <u>Week 1</u> Sm. Group-Aug. 27/28	Civility, Investigation, Pleadings, Trial Ethics
Lg. Group-September 2 <u>Week 2</u> Sm. Group-Sept. 3/4	Discovery-including Depositions, Interrogatories, Requests for Admissions, Etc.
Lg. Group-September 9 <u>Week 3</u> Sm. Group-Sept. 10/11	Motion Practice, Pre-Trial and Trial, Civil and Criminal
Lg. Group-September 16 <u>Week 4</u> Group-Sept. 17/18	Jury Selection, Voir Dire in State and Federal Courts
Lg. Group-September 23 <u>Week 5</u> Sm. Group-Sept. 24/25	Opening Statements, Central Theme, Trial Notebook, Goals, Sponsorship Theory
Lg. Group-September 30 <u>Week 6</u> Sm. Group-Oct. 1/2	Evidentiary Objections; Litany of Introducing Evidence; Use of Visuals in Introducing Exhibits and Impeaching.
Lg. Group-October 7 <u>Week 7</u> Sm. Group-Oct. 8/9	Case Evaluation and Settlement (with a focus on negotiation); Alternative Dispute Resolution (Rule 114, Minn. Rules Dist. Ct.)
Lg. Group-October 14 <u>Week 8</u> Sm. Group-Oct. 15/16	Training in Courtroom Technology - by Vickie Jauert. A Closer Look at the Equipment in the Moot Courtroom. <b>Mid-term Break - No SMALL GROUP CLASS</b>
Lg. Group-October 21 <u>Week 9</u> Sm. Group-Oct. 22/23	Direct Examination and Demonstrative Evidence Experts: Direct, Cross, Exhibits
Lg. Group-October 28 <u>Week 10</u> Sm. Group-Oct. 29/30	Cross Exam
Lg. Group-November 4 <u>Week 11</u> Sm. Group-Nov. 5/6	Closing
Lg. Group-November 11 <u>Week 12</u> Sm. Group-Nov. 12/13	Jury Instructions, Verdict, Entry of Judgment, Post Trial Motions & Appeal
Lg. Group-November 17-21 <u>Week 13</u>	Motions
November 24, 25, and December 1-4 <u>Week 14 &amp; 15</u>	TRIALS

## Performance Evaluation

10% large group participation & various written assignments  
40% small group participation  
10% motions  
10% trial notebook  
30% trial (to be evaluated by professor, a small group instructor and/or guest judge)  
less any sanctions for incivility, failure to meet deadlines or other violations of the Code of Conduct.

## Class Attendance

Both large group and small group class attendance required. If you miss a total of four classes, you will be asked to drop out of the class. See "Attendance Policy" of Student Handbook

## Trial Motions

Originals of all motions and pleadings must be filed with the Clerk of Court. Besides filing your motions before the Clerk of Court, you must also argue your motions.

## Litigation Practice Civility Standards Apply

Student lawyers are expected and required to act in a civil, courteous, respectful manner towards all course participants, including small group instructors, judges, student lawyers, court clerks, staff. This is so important that you may be sanctioned for incivility by lowering your grade.

## Time Limits

If an assignment is due on a day certain and/or time certain, it is due!! **If you are late, your grade will be lowered by ½ grade each time. Dates and time limits act as Statutes of Limitations.**

## Technology Policy

You may use laptop computers or other electronic devices in class to take notes and access course related materials. You should not use your laptop or electronic devices for other purposes.

In addition to the usual courtesies due to your classmates, refrain from text-messaging and email, using cell phones, pagers, or any other communication device. Refrain also from displaying wallpaper, screen savers, or other material on your computer screen that can reasonably be expected to distract your classmates.

## **PURPOSE AND OBJECTIVES**

The investigation, preparation and presentation of a civil or criminal case requires a great deal of time and effort. The knowledge and skills of the trial attorney are largely due to hard work and practice. The trial attorney's task begins when the client first comes into the office. It is at that point that the attorney begins the investigation and preparation for trial.

Cases are won and lost long before the attorney enters the courtroom. In order to assure a successful outcome, prompt and efficient investigation, followed by thorough discovery procedures, are absolutely necessary. The final product presented in the courtroom will not rise above the degree of preparation employed by the lawyer.

This is a practical course. The large group through discussion and demonstration will illustrate various methods that may be employed in the trying of a case. The large group classes will typically deal with both theory and practice. The small group classes will apply the theory by practice of the skill. It is intended to be both practical and theoretical. While each class will have a focus, it is not intended to be nor can it be exclusive.

This course is intended to educate and train students in the trial advocacy theories and skills necessary to conduct and present civil and criminal cases either before the court or a jury. Through your observation, participation and experiences in both the large and small groups you will be provided with the knowledge, theories, skills, strategies, and techniques enabling you to become a successful trial attorney. Participation, presence and preparation are essential and required.

Procrastination is the "Achilles Heal" of some lawyers. The trial of a case is like a marathon. You must keep going at a pace which always allows you to do a competent and honorable job for your client and for your profession. More lawyers find themselves in trouble for procrastination than for any other failing.

### **ASSIGNMENTS**

Each week the large and small groups will focus on different subject material. The syllabus makes reference to the objectives for the week, the reading, performance and written assignments. In this class you learn by observing and then doing. It is important to do your own work and complete all assignments. Because the small group performance assignments require complete participation, it is essential that you attend and prepare for all small group assignments.

Each Small Group will have a maximum of 8 students. Each student will be assigned a number from 1-8. These numbers (except for a few occasions) will be used to determine the roles and your responsibility for the various small group exercises. Caveat: Small Groups with less than 8 will adjust accordingly.

Large Group will delve into the theory, will demonstrate the "how to" and will have a few students participate now and again. The class will also discuss "how not to". Small Group will apply the theory through skillful application. The primary focus of Small Group is skills.

In Large Group you will typically "listen and observe". In Small Group you will typically "do".

Week 1  
August 26, 2008  
Large Group

Subject: Civility, Investigation, Pleadings, Trial Ethics

Objective: Understand the procedures, strategies, tactics, techniques and methods employed in the investigation and preparation of civil and criminal cases. Knowledge, awareness and use of proper lawyer and trial ethics. Preparation of civil pleadings in either state or federal courts.

Reading Assignment: Chapters 1 & 2 of Pretrial, and Chapter 1 of Trial Techniques.

Other Sources: Federal Procedure Forms; Am. Jur. Pleading and Practice; West's Federal Forms; West's Legal Forms; Minnesota Practice; Causes of Action; Minnesota Causes of Action Manual (MTLA). Go to the Library and find these sources in the stacks. Peruse them at your convenience. You will find these very helpful in the course for drafting your pleadings, preparing interrogatories, etc.

NOTE: When we say "go to the Library" we mean it. It is a required part of your preparation and learning. Beyond "required", it makes sense to be familiar with the "tools of the trade". Best of all it will make your work as a lawyer much easier, and help relieve the stress of "paperwork."

WRITTEN ASSIGNMENT FOR SMALL GROUP: Prepare a Minnesota District Court Summons and Complaint and Answer using the facts laid out in the Brown v. Byrd case file. You must use the proper Minnesota format and the proper Minnesota law. Be imaginative and creative as you approach this assignment. Prepare a formal written criminal complaint in State v. Wyatt. Use appropriate forms found in Minnesota Rules of Court, Rules of Criminal Procedure.

FIRST DAY EXERCISES(for Small Group): A quick overview of necessary trial skills using everyday situations.

First Day Exercises  
©Judge Charles Porter

Hamline University School of Law

1. Deposition - Find out about a fellow student's work experience.

2. Jury Selection - Interview a classmate as a prospective juror.
3. Opening Statement - Trial will involve the last holiday family dinner - set the scene and introduce the guests. Your theory is family holiday dinners should be few and far between.
4. Direct - Describe the day of a fellow student by questioning the student in a non-leading fashion.
5. Cross - Cross examine a fellow student on what s/he is wearing. Your theory is to show her/his clothing fashion leaves a lot to be desired!
6. Diagram - Draw a diagram during direct examination to get fellow students to the bookstore from the student's home.
7. Expert - Qualify the instructor as an expert in the psychology of being an adult student.
8. Closing - Convince class from what you know about the course so far that students should/should not drop the class.
9. Exhibits - get a one-dollar coin or bill introduced as an exhibit.

Week 1  
August 27/28  
Small Group

Subject: Pleadings; Pre-trial Investigation

Objectives: Learning to commence litigation through the preparation of a civil complaint in both State and Federal Courts. Proper methods of responding to a complaint in both State and Federal Courts. Understand Rule 11 of the Rules of Civil Procedure; verification and acknowledgment of pleadings. How the Federal system differs from the State. Learning how to properly investigate a civil or criminal case. Preliminary investigation, police reports, the scene, witnesses, Freedom of Information Act. Knowledge and awareness of all documentation necessary in order to commence an action. Chose trial partner and discuss choice of case: criminal or civil.

Reading Assignment: "Minnesota Rules of Court", (on reserve) Minnesota Rules of Civil Procedure, Rules 3,4,7,8,9,10,11,12,13 and 17. Forms 1-17 and 22 and 23; Pretrial, Chapter 3 & 5.

Assignment: Prepare a Summons and Complaint and an Answer based on Brown v. Byrd case file. The complaint and answer need not be typed but should be in proper Minnesota format and use Minnesota law. Prepare a formal written criminal complaint in State v. Wyatt. Use appropriate forms found in Minnesota Rules of Court, Rules of Criminal Procedure. **After you go over it in the small group make all changes you deem necessary and turn into the Lawyering Skills office by Monday of the following week before 2:00 p.m..**

FUTURE ASSIGNMENT: Depositions/Interviews will be conducted in small group next week. Students number 1-4 will read and prepare to role play the following deponents: number 1, (the first on the class roster for the small group) will read and take the part of Kenneth Brown, pg. 3-6 of Brown case file; Student number 2 will read and role play the part of Officer David Pierce, pgs. 11-12 of Brown case file; student number 3 will read the testimony of and take the part of Officer Paul Burns, Wyatt case file, pp. 11-12 (and all applicable material); and student 4 will read and prepare to role play Fran Leving, p. 53-55. Only these four students should read the respective interviews, depositions and reports. NOTE: When we assign a reserve reading it is vital you do it. Otherwise you will have a hard time during the assignment.

LARGE GROUP  
Week 2  
September 2, 2008

Subject: Discovery - including Interviews, Depositions, Interrogatories, Requests for Admissions, Etc. Discovery Techniques, civil and criminal cases. Rules of Civil Procedure, Rules 26-37. Rules of Criminal Procedure, Rules 7, 9, 20.02, 20.03, and 21.

Objective: Knowledge of rules of discovery in criminal and civil cases, what methods and strategies are available and when should they be employed. Skillful drafting of discovery documentation and proper responses. Depositions of parties and witnesses, and the various forms of depositions, e.g. written, video tape, phone, and recorded. How and when to make objections to discovery, and properly preparing your client. Sanctions for non-compliance.

Reading Assignment: Pre-Trial, Chapter 6 pp. 185-269; Minnesota Rules of Court, Rules 26-37 of the Rules of Civil Procedure; Rules 7, 9, 20.02, 20.03, and 21 of the Rules of Criminal Procedure.

Written Assignment: Prepare a **Notice of Taking Deposition**, of any of the witnesses in Brown v. Byrd; & State v. Wyatt need not be typed but should be in proper format. Turn into Lawyering Skills office with deposition questions which you will prepare for small group assignment this week. Turn in by Monday September 8, 2008 to Clerk of Court's Office by 2:00 p.m. **REMEMBER ALL TIME LIMITS ARE STATUTES OF LIMITATIONS. DO NOT BE LATE. YOUR GRADE DEPENDS ON IT.** Why are we doing this? To get you used to statutes of limitations and the reality of time pressures on law practice. We don't want to be reading about lawyer malpractice in the newspaper and law journals. Your client deserves your attention to such important details.

SMALL GROUP  
Week 2  
September 3/4

Subject: Formal Discovery-civil litigation and criminal litigation

Objective: Knowledge and understanding of the purpose of discovery; the tools of discovery, and discovery objectives. What is appropriate and permissible and what would be considered abusive. Properly preparing your client for deposition and raising appropriate objections. The performance exercise is intended to expose the student to the formal practice and procedures of taking a deposition. Deposing lay witnesses and experts. In the simulated depositions students will rotate roles of the witness, and attorney's for the respective parties.

Reading Assignment: Pre-trial, Chapter 6 pp. 269-328. Also Minnesota Rules of Court, Rules of Criminal Procedure, Rule 21.

Performance Assignment: Depositions will be taken of various witnesses in the Brown v. Byrd and State v. Wyatt case. Defendant's attorneys will depose Kenneth Brown; Plaintiff's attorneys will depose Office David Pierce. Defense attorneys will depose Office Paul Burns; Prosecution attorneys will depose Fran Leving. This is a role playing exercise and students should make their responses in accordance. If facts are not provided you can make them up as long as they are consistent with those in the case file. Remember only students 1-4 should read the respective witness statements in the case files. (See "Future Assignment" page 7 of syllabus)

Written Assignment: Prepare an outline of questions you will ask of the witness you will depose. Turn in the outline along with the notice of taking deposition to Clerk of Court's office by **Monday, September 8, 2008 by 2:00 p.m.** Statute of Limitations apply for all time deadlines.

Performance Exercises	Witness	Examiners	Deponent's lawyer
Kenneth Brown	#1	#5 and #4	#7
Officer David Pierce	#2	#6 and #7	#8
Officer Paul Burns	#3	#8 and #2	#5
Fran Leving	#4	#1 and #3	#6

LARGE GROUP  
Week 3  
September 9, 2008

Subject: Motion Practice, pre-trial and trial, civil and criminal objectives

Objectives: Knowledge and understanding of what types of motions are available, when appropriately made, and the remedies they provide. How to prepare, present and argue the motion. Recognizing the procedures employed in the Federal and State systems, and the block and special term methods. How and under what circumstances you can remove a judge. Placing the matter on for hearing, Readiness for Trial. Dispositive and non-dispositive motions and the uniform rules effective January 1, 1996 in Minnesota. Chose a partner, a case and your opposition by next week.

Reading Assignment: Pretrial, Reread pp. 320-330; Chapter 7 pp. 331-356. Minnesota Rules of Court, Rules of Civil Procedure; Rules 6.04, 7.02, 11, 12, 12.03, 12.05-12.08, 16.02, 26.03, 30.04, 37, 50, 56, 59, 62.01., also read Minnesota Rules of Court, General Rules of Practice for District Courts, Rule 115 and 116.

Performance Assignment for Small Group:

The small group sections will be divided in half, half arguing a civil motion, and the other half arguing a criminal motion. Students 1 and 2 will represent the plaintiff in the civil case and will bring a motion to compel discovery. Students 3 and 4 will represent the defendant in the civil case and bring a motion for a protective order. In the criminal case students 5 and 6 will represent the defendant in bringing a motion to dismiss, and students 7 and 8 will represent the state in opposing such a motion.

The following facts will be used in the preparation and arguing of the motions:

**CRIMINAL CASE;**

The police have charged defendant Bjorn McEnroe with possession of marijuana and drug paraphernalia in a motor vehicle, both charges misdemeanors. The defendant was charged by way of complaint and the relevant contents of the complaint

are as follows:

JOHN DOE; Complainant, being sworn makes complaint and states that there is probable cause to believe the defendant committed the following offenses. The following facts establish PROBABLE CAUSE:

Your complainant, John Doe, is a sergeant with the Corbin Police Department, who has reviewed the reports prepared by officers of the department and believes the following to be true: On July 26, 2001, Officer McCormick observed a blue Mustang, License No. 234 MIK pull into the parking lot of Dobb's Pizza parlor. The vehicle stopped and the occupant looked around appearing very nervous. When the occupant noticed officer McCormick, he began to scramble and appeared to place something under the seat of the car. The driver later pulled up to the pay phone located in the West side of the lot, and made a phone call. After completing the call the officer approached the vehicle and asked the occupant for his D. L. The driver produced a MN picture license and was identified as Bjorn McEnroe. He stated that he was looking for a tennis partner. Officer McCormick then observed a plastic bag under the passenger's front seat. He said it looked like it may have marijuana in it. Based on the officer's prior experience he had the defendant exit the vehicle and conducted a search. Officer took the bag and also found a roach clip and paper used in the smoking of marijuana. The contents of the bag were chemically tested and showed to be cannabis.

The defense lawyer should bring a motion to suppress. Prosecution should bring motion in limine to include all evidence.

### **CIVIL FACTS:**

Plaintiff Renae Johnson was injured while riding an All Terrain Vehicle manufactured by defendant HONTOY, Corp. Plaintiff's attorney served upon defendant a detailed set of interrogatories and request for production of documents, specifically asking for copies of all "records, writings, memoranda", or other documentation concerning prior litigation, and testing of the vehicle. Defendant objected to the request claiming that reports on the testing and information on past litigation was work product and privileged. They specifically object to the inter-office memos from the attorneys relating to

testing, and their recommendations to the advertising and research and development departments.

The plaintiffs should bring and argue a motion to compel. Those students representing defendant will bring a motion for a protective order.

NOTE: All cases venued in Hennepin County District Court. Prepare the appropriate Notice of Motion and Motion, together with all supporting documents. Also prepare a brief but concise Memorandum of Law supporting your side. These need not be typed but should be in the proper format and readable. Provide copies to your opponents (before class) and to your small group instructor who will serve as judge for these motions.

The supporting documents are:

1. Notice of Motion
2. Motion
3. Affidavits
4. Memorandum of Law
5. Proposed Order

SMALL GROUP  
Week 3  
September 10/11

Subject: Motion practice, criminal and civil.

Objective: Knowledge and understanding of the procedures to be followed in bringing a civil or criminal motion seeking specific relief. Proper ways of presenting and arguing motions and responding to your adversary and questions of the court.

Reading Assignment: Pretrial, Chapter 7 pp. 356-379; Minnesota Rules of Court, Rules of Civil Procedure, Rules 5, 6, 26 through 37; Rules of Criminal Procedure, Rules 10, 11, and 12. Special Rules for Hennepin County, General Rules of Practice District Courts Rule 115 and 116.

Performance Assignment: Prepare a Notice of Motion and Motion and all necessary accompanying documentation using facts set forth in week 3 of Large Group Syllabus. Argue the motions before the small group instructor. Provide a copy to your small group instructor. Provide copies to your opponents before class.

Performance Exercises:	Plaintiff's Attorneys	Defendant's Attorneys
Civil Case <u>Johnson v. HONTOY, Inc.</u>	#1 and #2	#3 and #4
Criminal Case <u>State v. McEnroe</u>	State's Attorneys #7 and #8	Defendant's Attorneys #5 and #6

NOTE: Turn in corrected motion papers to Clerk of Court's office by **Monday, September 15, 2008 by 2:00 p.m.** All time limits are statues of limitations.

LARGE GROUP  
Week 4  
September 16, 2008

SUBJECT: Jury Selection, Voir Dire in State and Federal Courts.

READING ASSIGNMENTS: Trial Techniques, Chapter 2 & 3; Chapter 6, pages 169-170 and Chapter 11, pages 513-515. Minnesota Rules of Court, Rules 47, 48 & 49, Rules of Civil Procedure; Rule 18 and Rule 26 of Rules of Criminal Procedure.

OBJECTIVES: Developing skills and techniques of questioning prospective jurors to pick a jury most favorable to your case. Understanding methods of removal, preemptory challenges and challenges for cause. Drawing for trial today.

PERFORMANCE ASSIGNMENT: Demonstration and simulation of jury selection on a criminal case using facts set forth below:

Four students will be asked to take part in this exercise, two representing the state and two the defense.

WRITTEN ASSIGNMENT: Prepare Voir Dire questions to be asked in a DWI case using the following facts: John Drinknomore is a 6 foot, 175 pound, 26 year old male, married and the father of two children. He is currently employed as a driver for UPS. He was stopped for speeding and arrested for DWI. A disputed alcohol test was administered and a reading of .081% blood alcohol was obtained. The defense is the test was administered incorrectly by an untrained officer and the defendant only had 2 beers in 2 hours. He was stopped by the Minneapolis Police at 1:15 a.m. after attending a party for his sister who had won a swimming medal at the Special Olympics.

\* For purposes of this exercise in the large group, students should assume the roles of a friend or relative. Students will act as prospective jurors.

\*\* NOTE: When preparing your trial notebook you should have a tabbed section on voir dire.

SMALL GROUP  
Week 4  
September 17/18

SUBJECT: Jury Selection, Voir Dire in State and Federal Courts

OBJECTIVES: Developing skills and techniques of questioning prospective jurors to pick a jury most favorable to your case. Understanding methods of removal, preemptory challenges and challenges for cause.

READING ASSIGNMENT: Read Brown v. Byrd and State v. Wyatt entire case file.

PERFORMANCE ASSIGNMENT: Conduct a voir dire examination on prospective jurors and make appropriate cause and preemptory challenges for the plaintiff/prosecution or defendant. For the purpose of this exercise the cases of Brown v. Byrd and State v. Wyatt will be used. Now re-read entire Brown file and entire Wyatt file. Each student will act as an attorney and question a prospective juror and each student will play the role of a prospective juror. Students will rotate roles of attorneys and prospective jurors. Students 1 and 2 will be attorneys for the plaintiff, Brown v. Byrd; Students 3 & 4 will be attorneys for the defense, Brown v. Byrd; Students 5 & 6 attorneys for the prosecution, State v. Wyatt; Students 7 & 8 will be attorneys for the defense, State v. Wyatt. When acting as a prospective juror, students should assume the role of a friend or relative who is neither a lawyer nor law student.

WRITTEN ASSIGNMENT: Prepare questions for the part you will play. Prepare a jury profile of favorable and unfavorable jurors. Go over this with the small group instructor.

PERFORMANCE EXERCISE	<u>Examining Attorney</u>	<u>Prospective Juror</u>	<u>Opposing Lawyer</u>
	#1	#5	#6
	#2	#6	#7
	#3	#7	#8
	#4	#8	#5
	#5	#4	#1
	#6	#3	#2
	#7	#2	#3
	#8	#1	#4

LARGE GROUP  
Week 5  
September 23, 2008

SUBJECT: Opening Statements, Central Theme, Trial Notebook, Goals, Sponsorship Theory

OBJECTIVES: Understanding how every trial must have a central theme stated in English (non-legalese). How to stay organized during a trial with a trial notebook. Understanding the goals of your trial and why whatever you the lawyer does represents your personal "sponsorship" of the theory.

READING ASSIGNMENT: Trial Techniques, Chapters 4 & 11.

PERFORMANCE ASSIGNMENT: Demonstrations on effective openings will be made in both criminal and civil cases.

\*Small group Assignment:

Prepare a brief opening statement to be presented in the Small Group. Students 1-2 will prepare on behalf of the Plaintiff and Students 3-4 on behalf of the Defendant, Brown v. Byrd Students 5-6 will prepare on behalf of prosecution and students 7-8 will prepare on behalf of defendant, State v. Wyatt.

SMALL GROUP  
Week 5  
September 24/25

SUBJECT: Opening Statements, Central Theme, Trial Notebook, Goals, Sponsorship Theory

OBJECTIVES: How to design the central theme and theory of a case. How to stay organized during a trial. Understanding that what you do as a lawyer represents your "sponsorship" of each witness and the theory. Planning, organizing and delivering an effective, succinct and understandable opening statement which captures the jury's attention. What can and should be said. How to present your case in the most favorable light considering its strengths and weaknesses. Telling the story. The relationship of opening statement to closing statement. How is the theory of your case laid out in the opening statement?

READING ASSIGNMENT: Re-read Trial Techniques, Chapter 11.

PERFORMANCE ASSIGNMENT: In the Brown v. Byrd, case, students 1-2 shall prepare and deliver a brief opening statement on behalf of the plaintiff. Students 3-4 shall prepare and deliver a brief statement on behalf of the defendant.

In the State v. Wyatt case, students 5-6 shall prepare and deliver a brief opening statement on behalf of the prosecution. Students 7-8 shall prepare and deliver a brief opening statement on behalf of the Defendant.

Discuss the opening statements; and any and all objections.

PERFORMANCE EXERCISE:	Plaintiff's (prosecution's) Attorneys	Defendant's Attorneys
	#1	#3
	#2	#4
	#5	#7
	#6	#8

LARGE GROUP  
Week 6  
September 30, 2008

SUBJECT: Evidentiary Objections; Litany of Introducing Evidence; Demonstrative Evidence; Use of Visuals in Introducing Exhibits and Impeaching Witnesses

OBJECTIVES: Understanding evidentiary objections, when and how they are made and used. Proper manner to raise objections, and proper means of response. How the question may be rephrased so as to be non-objectionable. Understanding the litany of introducing exhibits. Understanding the importance of demonstrative evidence.

READING ASSIGNMENT: Trial Techniques, Chapter 10.

PERFORMANCE ASSIGNMENT: 1) Become familiar with the litany of introducing exhibits. Also become familiar with the most common specific objections you would make at trial including the appropriate wording for the objections. Understanding the use of "show and tell" through the use of exhibits at a trial. 2) Some hands-on use of the equipment in the Moot Courtroom.

SMALL GROUP

Week 6

October 1/2

SUBJECT: Evidentiary Objections; Litany of Introducing Evidence;  
Demonstrative Evidence

OBJECTIVES: Understanding evidentiary objections, when and how they are made and used. Proper manner to raise objections, and proper means of response. How the question may be rephrased so as to be non-objectionable. Understanding the litany of introducing exhibits. Understanding the importance of demonstrative evidence.

READING ASSIGNMENT: Trial Techniques, Chapter 6.

PERFORMANCE ASSIGNMENT:[You will need a lap top to do several of these exercises. Bring to class.]

Groups of 8 students will proceed with their objection exercises in the following order:

Opposing

PROBLEM EXERCISES

(The expert examiner will try to introduce these exhibits. The opposing lawyer will try to keep the exhibits out.)

Wyatt

- 1) Exhibit p. 35
- 2) Exhibit p. 24-30
- 3) Exhibit p.31, Transcript
- 4) Exhibit p. 43, Photo

Brown

- 5) Exhibit p. 21, Accident Report
- 6) Exhibit p.49, Dr. Report
- 7) Others (small group instructor's choice)

Exhibit

(plainiff attorney)

Examiner

or prosecuting

Attorney)

student

#5

#6

#7

#8

#1

#2

Witness

student

#8

#7

#6

#5

#4

#3

Lawyer

(defense Attorney)

student

#1

#2

#3

#4

#5

#6

WRITTEN ASSIGNMENT: Prepare and turn in to Clerk of Court's office by **Monday, October 6, 2008 before 2:00 p.m.**, the specific objections you would make for each exhibit above using the appropriate wording for each objection. List all relevant objections you think appropriate. Turn in one page bench memo (both pl/pro attorney & def. attorney)

NOTE: Each "Exhibit Examiner" should bring to class the actual exhibit which you will try to introduce. You should prepare your witness ahead of time. The opposing lawyer should prepare objections ahead of time. The opposing lawyer should try as hard as she/he can to keep out the evidence. Be civil, be hard on the issue, soft on the people. Use every legitimate legal objection you can to keep out the evidence. Prepare your objections in advance. Prepare a two page bench memo to support your objection.

LARGE GROUP  
Week 7  
October 7, 2008

SUBJECT: Case Evaluation and Settlement (with a focus on negotiation); Alternative Dispute Resolution

READING ASSIGNMENT: Pre-Trial, Chapter 8; PI Evaluation Handbook (in library stacks, KF.1256, A8J87, Volumes 1-8m review these generally); Causes of Action, volumes 1-19 (in library stacks, KF1250.S53); Minnesota General Rules of Practice, Rule 114; Minnesota Special Rules of Practice 2nd and 4th Judicial Districts.

OBJECTIVE: Trying out negotiation tools, principled negotiation, principled changes in position, information gathering, information exchange, classic strategies.

PERFORMANCE ASSIGNMENT: 1. Write a Demand Letter to defense counsel in Brown v. Byrd. This letter should be written before class. What would you ask for and what would you include in the letter?

2. We will participate in a negotiation exercise. NOTE: Professors Daly and Karon will pass out facts for Wendy Oliver and 3-C company. You will represent one of the parties in small group this week. One half of you in each section represent Oliver (#1, 2, 3, and 4) and one half represent 3 - C (#5, 6, 7, 8) NOTE: Be sure to go to the library and look at the form books PI Evaluation Handbook and Causes of Action. They will be very helpful in drafting your pleadings and evaluating your civil case.

3. Be sure to carefully read Minnesota General Rules of Practice Rule 114, the Minnesota Supreme Court mandated ADR requirements.

SMALL GROUP

Week 7

October 8/9

SUBJECT: Settlement of a civil case and plea bargain of a criminal case.

OBJECTIVE: Learn to negotiate a civil case and plea bargain a criminal case.

READINGS: Pre-Trial Litigation, Chapter 4; Reread Minnesota Rules of Court, Rules 16, 37, 41, 53, Minnesota Rules of Court, Special Rules of Practice Fourth Judicial District, Rule 5. Minnesota General Rules of Practice Rule 114, (Alternative Dispute Resolution).

PERFORMANCE ASSIGNMENT: 1. Negotiate Oliver and 3-C case. 2. Settle the Brown v. Byrd case, one on one or in teams. 3. Discussion and plea bargain the State v. Wyatt case. How does plea bargaining really work? NOTE: In Brown you may negotiate both the charge and the disposition.

WRITTEN ASSIGNMENT: Class will be divided into two groups, attorneys for plaintiff and defendant in Brown v. Byrd and attorneys for prosecution and defense in State v. Wyatt. Write out positions for both sides before class: positions, problems, negotiation plan, possible creative settlements, (including structured settlements).

OTHER: This is for your use in class, not to hand in. Be sure to do it however. It will help you negotiate your side.

LARGE GROUP  
Week 8  
October 14, 2008

Training in Moot Courtroom Technology by Vickie Jauert

SMALL GROUP  
Week 8  
October 15/16

**NO SMALL GROUP CLASSES - Mid-term Break**

LARGE GROUP  
Week 9  
October 21, 2008

SUBJECT: Direct Examination and Demonstrative Evidence;  
Experts: Direct, Cross, Exhibits

OBJECTIVE: Learning direct examination skills and preserving a clear record; preparing and working with your witness; continued use of the liturgy for introduction of evidence; labeling, marking and proper foundation for exhibits during testimony; use of the "show and tell" technique by using demonstrative evidence.

Working with expert witnesses; when and how to use experts; using the expert in developing your case; qualifying one as an expert; learning direct and cross examination of experts and the use of exhibits through experts.

READING ASSIGNMENT: Trial Techniques, Chapter 5 and 8.

WRITTEN ASSIGNMENT: Write out direct examination problem foundation for: 1. Tom Mecklow in the State v. Wyatt case. 2. Introduce the photo arrays, Brown, through the appropriate witness. 3. Anticipate and be prepared to respond to any objections to exhibits. 4. Introduce two exhibits of your choice. 5. Describe three problems with chain of custody exhibits (to be demonstrated in Large Group)(are there any such exhibits in either case?).

Become familiar with the foundation necessary for the experts on direct examination and how to cross examine experts. We will discuss experts such as physicians, scientists, and economists.

SMALL GROUP  
Week 9  
October 22/23

SUBJECT: Direct Examination and Demonstrative and Illustrative Evidence; Experts: Direct, Cross, Exhibits

OBJECTIVE: Learning direct examination skills and preserving a clear record; preparing and working with your witness; continued use of the liturgy for introduction of evidence; labeling, marking and proper foundation for exhibits during testimony; use of the "show and tell" technique by using demonstrative evidence.

Working with expert witnesses; when and how to use experts; using the expert in developing your case; qualifying one as an expert; learning direct and cross examination of experts and the use of exhibits through experts.

READING ASSIGNMENT: Trial Techniques, Chapter 6. Read carefully all problems assigned for Performance.

PERFORMANCE ASSIGNMENT: Groups of 8 students will proceed with their direct examination exercises in the following order:

<u>Problem Exercises</u>	<u>Exhibit Examiner</u>	<u>Witness</u>	<u>Opposing Lawyer</u>
1. Using the board have a witness diagram the scene in <u>Wyatt</u> case.	student #4	student #1	student #8
2. Introduce City streets in <u>Brown</u> case. Use the proper foundation witness.	#3	#2	#7
3. Prepare a chart setting forth the requested damages you seek in <u>Brown</u> . Use a witness to introduce the chart. (Who?)	#2	#3	#6
4. Introduce a piece of evidence you have created for either case.	#1	#5	#2

WRITTEN ASSIGNMENT: Write out direct examination laying the proper foundation to admit the demonstration exhibit for "illustrative purposes only" in one of the above problems and turn in to Clerk of Court by Monday, October 27, 2008 by 2:00 p.m.

LARGE GROUP  
Week 10  
October 28, 2008

SUBJECT: Cross Examination

OBJECTIVE: Organization and purpose of cross-examination; how to prepare goals and theories; learn the process of cross examination; impeachment using prior testimony; written or oral statements; pleadings; prior bad acts or convictions.

READING ASSIGNMENT: Trial Techniques, Chapter 7.

PERFORMANCE ASSIGNMENT: Review and prepare to perform the cross examination of plaintiff in Brown and Defendant Wyatt (assume he will testify on his own behalf) from State v. Wyatt case.

SMALL GROUP  
Week 10  
October 29/30

SUBJECT: Cross Examination

OBJECTIVE: Learn cross examination of adverse, hostile, alibi and reputation witnesses. Use depositions and other written reports and documentation to impeach.

READING ASSIGNMENT: Pretrial, Reread chapter 4 pp. 96-102, (why discovery is important for cross).

PERFORMANCE ASSIGNMENT: Groups of students will proceed with their direct/ cross examination exercises in the following order:

<u>Problem Exercises</u>	<u>Direct Examiner</u>	<u>Witness</u>	<u>Cross exam Lawyer</u>
	student	student	student
A) Joe Cheshire	#5	#8	#1
B) Tom Mecklow	#7	#6	#3
C) James Wyatt (assume he will testify)	#6	#4	#2
D) Kenneth Brown	#8	#1	#4
E) Robert Byrd	#3	#5	#7

Note: The focus of this class is cross examination. Therefore, make the directs short, deal only with the essentials. Each direct should last no more than 5 minutes. The cross can be 10 minutes.

WRITTEN ASSIGNMENT: Write out the direct or cross examination for each time you are an attorney. Turn in to Clerk of Court by **Monday, November 3, 2008 before 2:00 p.m.**

LARGE GROUP  
Week 11  
November 4, 2008

SUBJECT: Closing Statements.

OBJECTIVE: Learning to prepare and deliver effective closing statements. How to give your statement impact, proper use of visual aids, use of voice inflection, pace and other methods to gain sympathy, confidence and trust of the jury.

READING ASSIGNMENT: Trial Techniques, Chapter 9

WRITTEN ASSIGNMENT: Outline a closing argument for State v. Wyatt or for Brown v. Byrd. Be sure to use exhibits and the computer as part of your closing.

NOTE: Get ready to argue motions in the next week.  
Sign up as soon as possible for times.

SMALL GROUP  
Week 11  
November 5/6

SUBJECT: Closing Statements.

OBJECTIVE: Learning to prepare and give closing statements.

READING ASSIGNMENT: Compare Trial Techniques, Chapter 9, "Closing" with Chapter 4 "Opening Statements". Consider how the closing statement and the opening statement relate to one another. Notice sameness and notice differences.

PERFORMANCE ASSIGNMENT: Each student should be prepared to give a closing statement without benefit of notes or outline in whatever case you are involved taking the opposing position. In other words if you are doing Brown v. Byrd, as a plaintiff's lawyer you should prepare the closing statement of defendant as their defense lawyer. Or if you are the prosecutor in State v. Wyatt you should prepare the closing statement as the defense lawyer.

LARGE GROUP  
Week 12  
November 11, 2008

SUBJECT: Jury Instructions, Verdict, Entry of Judgment, Post Trial Motions and Appeal

OBJECTIVES: Drafting and arguing jury instructions. Verdict forms, three major types, *General Verdict Form*, *Special Verdict Form*, and *Written Interrogatories*. Understanding which form is appropriate and how they are used.

How the verdict is announced. Right to poll jurors, and to speak to the jurors after they have been discharged.

Understanding how and when to make a *Motion for Directed Verdict*.

Understanding Post-Trial Motions, *JNOV*, *Motion for a New Trial*, *Motion to Vacate Judgment*, *Motion to Amend Findings and Conclusions*.

READING ASSIGNMENT: *Minnesota Rules of Civil Procedure*, Rules 50, 52, 58, 59, and 60. *Minnesota Rules of Criminal Procedure*, Rule 28. *Minnesota Practice Vols. 4 and 10*, Civil and Criminal Jury Instructions.

NOTE: Motion times will be available this week and next week. Sign up will be opposite of trial sign up (trial group that drew number 12 goes first, 11, second, etc.)

Week 12  
SMALL GROUP  
November 12/13

SUBJECT: Verdict, Post Trial Motions, Appeal and tying the semester together, final touches for your trial. Some motions could be argued this week and next week.

OBJECTIVES: Understanding methods, techniques and procedures employed in Post Trial litigation. Spending time with your small group instructor discussing your final preparations for your trial. Asking whatever questions you wanted to ask in the previous 11 weeks but never got around to.

PERFORMANCE ASSIGNMENT: This small group period will be used to discuss all post-trial matters, together with any other matters relating to your trial.

WRITTEN ASSIGNMENT: Prepare a verdict form to be used in your trial. This should be included in your trial notebook. Prepare jury instructions for your trial, either Taylor v. Pinnacle Packaging Products, Inc. or State v. Wyatt. These should be included in your trial notebook.

NOTE: Motion times will be available this week and next.

LARGE AND SMALL GROUPS

Week 13

November 17-21

SUBJECT: Motions argued this week.

This entire week should be spent preparing trial notebooks and witnesses for trial. Finish taking any depositions during this week. Any motions must be filed with Court Administrator and Clerk of Court and set for argument during this week. Professors Karon and Daly will hear all motions. Reminder: arguing your motions is mandatory. Each team should split the arguments equally.

NOTE: This week will begin two of the most time consuming and difficult weeks of the course. You must have all your witnesses prepared, all your discovery completed, and all your motions argued by the end of the week. Put it all together in a trial notebook and try your cases next week.

NOTE 2: We will set motion "times certain". Some will be this week, and some will be sooner. All papers and documentation must be sent electronically to Judge who will hear your motions. At least 2 days before hearing on the motions.

LARGE AND SMALL GROUPS  
Week 14 and Week 15  
November 24, 25, & December 1-4, 2008

Your completed notebooks and videotapes (labeled with your trial number [e.g. FL08-001; FL08-002, etc.] are due two days after your trial. Hand in to Vickie's office. Put your name on your trial notebook.

All trials are "time and date certain" and cannot be changed except for the most extreme circumstances.

- REMINDERS:
1. Professors Daly & Karon will not attend all of the trials. It is your responsibility to make sure you videotape the entire trial. The Lawyering Skills staff will be on hand at the beginning of the trial to get you started and give you directions on how to use the camcorder. Turn in tape (properly marked) with your trial notebooks.
  2. You must get at least 6 jurors.
  3. The work of the trial should be equally and evenly divided between the members of each team.
  4. Each student will prepare his/her own trial notebook.
  5. Each team has to present its case in no more than 1 ½ hours. Cross-exam should be limited to 10 minutes per witness. It is important that you pace yourselves. The judge will cut you off if you exceed the time limit.
  6. Time limits, such as dates to turn in, to exchange material, etc. are strictly enforced. Failure to adhere to these limits will adversely affect your grade. Dates and time limits act as statutes of limitations.
  7. Reminder - Litigation Practice Civility Standards and Rules of Decorum apply.

GOOD LUCK!

**Remember preparation is the key to trying cases.** Civility is the method professional conflict resolvers facilitate "ordered liberty". Due process of law depends on an orderly system of law due each individual. Democracy depends on professional officers of the court.

GRADING SHEET

Week: \_\_\_\_\_ Class:

Date: \_\_\_\_\_ Subject:

Class Member:

Order of Performance (1st, 2nd, etc.):

Performance in non-lawyer role: (Comment)

Circle One

Preparation:            0    1    2    3    4    5    6    7    8    9    10

Performance:           0    1    2    3    4    5    6    7    8    9    10

Comments:

Small Group Instructor:





TRIAL #12

THURS., Dec. 4

1:00-4:00 p.m.

\_\_\_\_\_ vs. \_\_\_\_\_

\_\_\_\_\_ JUDGE \_\_\_\_\_

Turn this form in to Vickie Jauert in the Lawyering Skills Office

SMALL GROUP INSTRUCTOR EVALUATION

NAME OF INSTRUCTOR: \_\_\_\_\_ (5 is high, 1 is low)

1. Overall, I rate this instructor 5 4 3 2 1  
Comments:

2. The instructor acted as a professional and courteous judge 5 4 3 2 1  
Comments:

3. The instructor demonstrated a helpful and instructive attitude during the class and critique 5 4 3 2 1  
Comments:

4. The instructor successfully imparted his or her knowledge of trial skills 5 4 3 2 1  
Comments:

5. The instructor made specific constructive comments and pointed out individual areas that need improvement 5 4 3 2 1  
Comments:

6. The instructor properly paced the exercises and the critiques and allowed sufficient time for each 5 4 3 2 1  
Comments:

7. I would want to be judged and critiqued by this person again Yes \_\_\_\_\_ No \_\_\_\_\_  
Not Sure \_\_\_\_\_

Comments:

8. Other Comments:

## WEEKLY OUTLINE

### A. Introduction: Instructors/Vickie Jauert/Small Group Instructors

1. Overview of the course, purpose, objectives and goals:
  - a. Review Syllabus
  - b. Large Group/Small Group function, policy and procedures
  - c. Attendance Requirements/Preparation
  - d. Grading and Performance Evaluation
  - e. Assignments
  
2. Civility and Ethics
  - a. Litigation practice civility standards
  - b. Rambo Tactics
  - c. Professionalism
  - d. "Strategic Friendliness" being a zealous advocate, hard on the issues soft on one another
  - e. How the jury and bench view you. Jurors and the most important person
  - f. Most proficient negotiators
  
3. Investigation
  - a. Initial client contact/initial interview. Time is of the essence
    - 1) Preliminary problem identification
    - 2) developing a rapport/trust
    - 3) Chronological overview
    - 4) Servants of the facts. Facts + Legal Principles = Legal Theories
    - 5) Theory development and overview
  - b. Informal investigation
    - 1) Getting to the scene
    - 2) Getting information and sources
    - 3) Gathering and preserving evidence/photos, diagrams, experts
  - c. Informal investigation contrasted to formal investigation or discovery
  - d. Rule 11 and duty to investigate
  - e. Togstad letter
  
4. Pleadings:
  - a. Notice and code pleadings
  - b. State of Minnesota Format and Federal Format
  - c. What must be in the pleadings
    - 1) Constitutional requirements
    - 2) Summons and Complaint
    - 3) Answer
  - d. Criminal pleadings
    - 1) Formal Complaints

# DISCOVERY

## I. INTRODUCTION/PURPOSE: CIVIL

- A. Rules 26-37 FRCP and MRCP: There are 6 basic methods of discovery
  - a. Mauet, Pretrial Fifth Ed. Pages 177- 296
  - 1. Initial Disclosures Rule 26(a)
  - 2. Interrogatories - Rule 33
    - a. Proper use and preparation
  - 3. Request for Production of Documents - Rule 34
    - a. Organizing (Bates Numbering)
  - 4. Depositions - Rule 30.02
    - a. Proper preparation of client
  - 5. Physical and Mental Examinations - Rule 35
  - 6. Request for Admissions - Rule 36
- B. Sanctions
  - 1. *Dollar v. Long*, 561 F 2d 613; *Perry v. Golub*, 74 FRD 360 (1976) failure to interpose answers, responses or timely objections constitutes a waiver of any objections not timely made
- C. Informational Statements Minn. General Rule of Practice §111. 02 and §111.03.
  - 1. Discovery conference Rule 26.06
  - 2. Signing Discovery Rule 26.07 and Rule 11
  - 3. Supplementing Discovery prior to trial and as information becomes known.
- D. Use of Subpoena - Rule 45 and *Subpoena Duces Tecum*
- E. Offer of Judgment or Settlement Rule 68
- F. Joint Statement of the Case Form 112.01

## II. CRIMINAL

- A. Rule 9
  - 1. Prosecutors duty to disclose Rule 9.01
  - 2. Defense duty to disclose Rule 9.02
- B. Notice of Evidence and I.D. Procedure Rule 7.01
  - 1. Notice of Additional Offenses Rule 7.02
- C. Depositions Rule 21

# MOTION PRACTICE

## I. INTRODUCTION/WHAT IS A MOTION AND WHAT IS ITS PURPOSE

### A. Block System and Special Term

1. Scheduling a motion

### B. Types of Motions Minnesota Rules of Practice for District Courts RULE 115

1. Dispositive: Rule 115.01 (a) (1) Seeks to dispose of all or part of the claims of the parties, except motions for default judgment.
2. Non-dispositive: Rule 115.01 (a)(2) all other motions including but not limited to discovery, third-party practice, temporary relief, intervention or amendment of pleadings.

### C. Paperwork of Motions and Service

1. Dispositive Motions Rule 115.03
  - a. Notice of Motion and Motion
  - b. Proposed Order
  - c. Affidavits and exhibits supporting motion
  - d. Memorandum of Law
2. Non-dispositive Motions Rule 115.04
  - a. Notice of Motion and Motion
  - b. Proposed Order
  - c. Affidavits and exhibits
  - d. Optional or Elective (But highly suggested) Memorandum of Law

### D. Considerations

1. Time requirements for service
- 2.. Must make settlement efforts Rule 115.10
3. Relaxation of time Rule 115.07
4. Telephone Hearings Rule 115.09 (conference calls with court)
5. Page limitations (no more than 35 pages)

### E. Motions in Criminal Cases

1. Procedure and need for formal complaint
2. Typical Criminal Procedure Motions MRCP Rule 32
  - a. Rule 17, Complaint fails to establish Probable Cause
  - b. Rule 10.02 Attacking jurisdiction of court
3. Omnibus Hearing
  - a. Constitutional hearing and probable cause hearing.

### F. Typical Motions

1. Motion In Limine
2. Discovery
3. Summary Judgment

4. Pre-Trial
5. Trial
  - a. Motion to strike
  - b. Motion for curative instruction
  - c. Motion to exclude evidence due to surprise, prejudice etc.
6. Post Trial

G. Mock Argument

1. How to present motion
2. Where to stand etc.

H. Mauet Pretrial pages 297 - 342

# VOIR DIRE/JURY SELECTION

## I. Introduction

### A. Petite Jury and Grand Jury

1. Grand Jury 16-23 duties and responsibilities, questioning and purpose
2. Petite Jury
  - a. Considerations: Do I want a jury?
  - b. Nature of the case
  - c. Evaluating complexity and trial judge
  - d. Witness impressions
3. Right to a jury
  - a. Seventh Amendment
  - b. Rule 38 (b) FRCP
  - c. Criminal Cases, Constitutional guarantees

### B. Selection of the Jury

1. Federal and State Procedures Rule 47(a)
  - a. View from the Bench purpose of voir dire
    - i. For the purposes of discovering a basis for challenging for cause or peremptory challenges. Rule 26.02 Subd. 4(1) Rules of Crim. Pro. M.S.A. § 546.10.
  - b. Attorney view:
    - i. Allows for intelligent choices; gain as much information as possible; rapport; determine bias and prejudice; determine jurors emotional response to case; relax jurors; establish credibility with jurors; educate jurors about case; educate jurors about the system and process; prepare them for opening and closing; obtain commitments.
    - ii. Obtaining a favorable panel
2. Using assistants, hiring professional associations (National Jury Project etc.)
3. Methods of picking jury, questioning entire panel, questioning individually
4. Number of jurors
5. Creating a jury profile. What characteristics are you looking for? Who is the ideal juror for this case?

### C. Challenges

1. Entire panel
2. Challenge for cause, bias or prejudice, knowledge of case or incident, etc.
3. Peremptory challenge
4. Removal on basis of race improper

### D. Demeanor

1. Types of questions
2. Method, interrogation or conversation

## **OPENING STATEMENTS/THEMES THEORY OF THE CASE/TRIAL NOTEBOOK**

- I. Introduction Developing a Central Theme (Often the title of the case)
  - A. Creating a successful theme
    - 1. Reduce to one line or phrase, (sound bite)
    - 2. Relationship of legal issues to facts good and bad
    - 3. Incorporates theories of the case
    - 4. Must be interesting to capture jurors interest, they develop perceptives immediately.
  - B. Relate to closing
  - C. Judge Stern's Methodology
- II. Effective Opening Statements  
Importance Primacy vs. Recency
  - A. Tell a story/Get their attention
  - B. Weave theme through opening
  - C. Plan it out
    - 1. Case theory/theme
    - 2. Significant issues
    - 3. References to the law
    - 4. Use of visual aids
    - 5. Parties and witnesses
    - 6. Case weaknesses/Sponsorship Theory
    - 7. Request a verdict
    - 8. Conclusions
    - 9. What are appropriate objections/when are you arguing?
- III. The Trial Notebook
  - A. Staying organized
  - B. Litany and Contents

## EVIDENCE

I. Introduction: All evidence is admissible-----unless properly objected to. Rules of Evidence are rules of exclusion.

A. Objections: Purpose, why, when and how made?

1. Mechanics, making proper objections on an appropriate legal basis.
2. Timeliness
3. Sequential relief.

B. Physical Evidence:

1. Real
2. Demonstrative
3. Illustrative

C. Trial Purposes

1. Oral Testimony;
2. Writings;
3. Tangible Objects
4. Taking of judicial notice

D. Questioning the witness:

1. Changing the pace
2. Witness preparation, instructing the witness on how to answer;
3. Strategies on making objections, may have valid basis and elect not to object.
4. Courage to make objections: trial presence.
5. **PRESERVING the RECORD:** Offer of proof, what to do if the court rules against you?
  - a. Curative instructions and jury instructions on use of objections.

E. Foundation and Authentication: Litany steps for introducing exhibits:

1. Qualify witness, lay foundation for witness to identify exhibit
2. Mark the exhibit for identification
3. Show the witness: I am showing you what has been marked for identification as plaintiff's exhibit #1
4. Lay the foundation: What is it? Are you familiar with it? How, why, etc. (Sometimes need more than one witness to lay foundation.
  - a. Chain of custody issues
5. Offer into evidence
6. Walk over to opposing counsel and show them exhibit
7. Voir dire of witness by opposing counsel for purpose of making objection
8. Offer again, if accepted show to the judge.
9. Testimony concerning the document or exhibit (question the witness about the specific piece of evidence.)
10. Display or publish to the jury if allowed or desire.

- F. Demonstrative or visual proof:
  - 1. Trial visuals, importance in electronic age.
  - 2. Methods:
    - a. Elmo
    - b. Computer simulations
    - c. Power point
    - d. Overhead
    - e. Flip Chart
    - f. Boards
    - g. Shadow box
    - h. Models

## II. Hypotheticals:

- A. Marijuana - chain of custody in drug case
- B. Gun or weapon in murder case
- C. Contract in breach of contract case
- D. Photo
- E. Diagram
- F. Illustrations on board, flip chart, etc. for illustrative purposes

## III. Objections:

- A. Is the evidence Relevant? Rule 400
- B. Is the evidence prejudicial? Rule 403
- C. Opinion
- D. Privileged
- F. Hearsay

## IV. Past Recollection Refreshed and Past Recollection Recorded

- A. Planning for trial:
  - 1. Exhibit and witness work sheets

## CASE EVALUATION AND SETTLEMENT

### I. Evaluating a Case:

#### A. How to evaluate a case:

1. What do you consider:
  - a. Your client and the adverse/initial interview/depositions etc.
  - b. Liability
  - c. Damages
  - d. Respective witnesses and experts
2. Examples

#### B. Who should you contact?

- a. Other attorneys
- b. Jury Valuation Handbook
- c. ATLA/MTLA/MDLA case analysis
- d. Causes of Action

### II. Making your Offer or Demand

#### A. Justifying your request or offer, convincing the other side

1. Demand letter/Offer letter.
  - a. Sample demand letter, what it should contain
2. Settlement Brochure
3. Visuals: Tape and animations

#### B. Settlement meetings and conversations

1. Hard vs. Soft "Getting to Yes"
2. Principled Negotiation
3. Standard negotiating techniques

### III. ADR

#### A. Rule 114 requirements

1. *Mediation*
2. *Arbitration* Presentation before a third-party neutral, may be binding
  - a. High - Low Arbitrations
  - b. Selecting a neutral
3. *Med-Arb*
4. *Mini Trial*
5. *Consensual Special Magistrate*: presented to a neutral third-party in same manner as a civil trial and is binding and appealable
6. *Early neutral Evaluation (ENE)*
  
7. *Moderated Settlement Conference*

8. *Neutral Fact Finding*
9. *Summary Jury Trial*
10. *Other*

*\*FORM 111.02 Informational Statement*

#### IV. Criminal Plea Negotiations

##### A. Negotiating with the prosecutor

1. Urge them to consider the collateral consequences and mitigating circumstances involved.
2. Don't threaten the prosecution with trial.
3. Be honest
4. Be prepared to compromise when appropriate.

**DIRECT EXAMINATION  
DEMONSTRATIVE EVIDENCE AND EXPERTS  
DIRECT CROSS AND EXHIBITS**

I. Introduction: Telling your story

A. Pacing and Focus

1. Wimbledon
2. Focus on the witness. What are your goals with each witness?

B. Questioning in chronological fashion

1. Who, what, why, where, when, and how.
  - a. Types of questions: Open ended, direct, indirect, narrow and leading
2. Humanizing your witness.
3. Telling and illustrating your story through the witness, dramatic moments, film strip

II. Witness Preparation

A. Pretrial preparation in your office

1. Ethical dimensions: telling them what to say, or going over testimony, procedures and cross-examination.

III. Experts: Rule 702

A. What is an expert?

B. Reasons to use Experts

1. Medical malpractice and negligence cases require an expert before placing in suit.
2. How to find an expert
3. Personal injury and product liability cases
  - a. Treating physicians
  - b. Accident reconstructionists

C. Direct Examination of physician

1. Qualify
2. Foundation
3. Opinion
4. Using models and diagrams for illustrative purposes

# CROSS EXAMINATION

## I. Introduction:

A. Simulation of Cross using Quayle and Ortega photo: Cross of witness who is testifying that as a secret service agent he observed and was aware that then V.P. Quayle despised Daniel Ortega. Using the photo cross-exam the agent to establish that is not the case and that they respected one another.

1. Who is your #1 witness?

## B. Preparation and Control

1. Use all discovery and investigation to avoid surprise
2. Content of witnesses testimony and how they came to conclusions
  - a. Is their seeing or hearing impaired?
  - b. External limitations such as poor lighting present, ambient noise etc.
  - c. Retention problems (poor memory)

## II. Goals and Purposes of cross examination:

### A. Supportive to your theory;

1. Build up your case by corroboration of witness being examined.
2. What can they provide that is favorable
3. Authentication and foundation for favorable evidence
4. Rehabilitate your witnesses
5. Admissions that witness has made
6. Go over helpful direct

### B. Destructive to opponents theory: Discrediting

1. Inaccurate testimony
2. Unbelievable testimony
3. Incomplete testimony
4. Inconsistent testimony
5. Impossible testimony
6. Untruthful **IMPEACH**

### C. Other purposes:

1. Show and establish poor or memory lapses
2. Show excitement
3. Establish bias and prejudice
4. Show mistakes

### D. Cross Examination is not:

1. A discovery tool
2. Not to establish a final point
3. Destroying the witness

4. To get the witness to change their mind
5. To get in an argument with or angry with

E. Aim and prepare for closing

### III. Younger's Ten Commandments of Cross Examination:

1. Be Brief.
2. Ask short questions and use plain words.
3. Never ask anything but a leading question.
4. Ask only questions to which you already know the answers.
5. Listen to the answer.
6. Do not quarrel with the witness
7. Do not permit a witness on cross-examination to simply repeat what the witness said on direct examination.
8. Never permit the witness to explain anything.
9. Avoid one question too many.
10. Save it for closing or summation.

### **DALY'S TWO RULES FOR CROSS EXAMINATION**

Rule #1: Ask only leading questions.

Rule # 2: If you hear yourself say "...who, what, why, where, when or how ..." **STOP**  
(You've asked one question too many)

### **KARON'S ONE RULE FOR CROSS EXAMINATION**

Rule #1: Control the witness: Control is established by preparation, knowing your case and responses of the witness.

### III. Special Issues in Cross:

- A. Using a deposition to impeach (role play)
- B. Using a "Learned Treatise" to impeach or support.
- C. Motion to strike and curative instruction
- D. Gerry Spence method of controlling witness
- E. Going to the Judge for Help

# CLOSING

## I. Generally

### A. Order: Who goes first? Recency and Primacy

#### 1. Civil and criminal cases:

- a. Civil cases generally party carrying burden of proof goes last.
- b. Criminal cases in Minnesota, Prosecution goes first and defense gets to go last. Minnesota Rules of Criminal Procedure RULE 26.03 Subd. 11 (j) prosecution has the right of rebuttal to defense closing Rebuttal is limited to..."a direct response to those matters raised in defendant's closing argument."
- c. Defense may then move the court for an opportunity for surrebuttal. Court must find that prosecution in rebuttal misstated the law or facts and it is prejudicial. Rule 26.03 Subd. 11 (k) SEE ALSO Minn. Stat. §631.07

2. Time limitations if there are multiple parties
3. Being dramatic, applying facts to the theory
4. Key is persuasion- it is about winning and losing

## II. Creating the Proper Mood.

- A. Compelling story relating the facts to theory. Traditional methods vs. innovative and creative presentation.

## III. Developing the Argument:

### A. Know your case. You must be convinced in order to convince others.

1. Elements necessary to prove or disprove your case. Relate to facts of case and legal issues, jury instructions that will be given.
2. What has been presented that supports your case.
3. Attacks, destroys or discredits opponents case.
4. Make a time line every case has a time line.

### B. In civil case must discuss liability and damages

### C. Criminal Case, proof beyond a reasonable doubt

## IV. Delivery:

### A. Be yourself-look to others for assistance

### B. Using analogies and anecdotes relate to the jury.

1. Circumstantial evidence

### C. Telling stories in opening and in closing and relating the two.

### D. Where to stand and deliver.

1. Use of notes
2. Proximity to jury, mobility, use of podium etc. (Don't invade the jurors space)
3. Theory of case applied

4. Sincerity
5. Tone and voice in flexion
6. Pace
7. Hand gestures
8. Power
9. Passion
10. Persuasion

V. Proposed Jury Instructions and relating closing to JIGS/Verdict Form

- A. Apply evidence to instructions

VI. Actual Closings

- A. Sample closings

VII. Objections during closing.

A. Examples: Improper mentioning of insurance companies, settlement, corporations, matters not in evidence, misstatement of law, improper use of JIG's; In criminal case statement by prosecution relating to defendant's failure to testify, personal attacks on attorney, i.e. ..."they are just trying to trick or confuse you".

B. Motions to strike and for new trial if misconduct occurs.

# **JURY INSTRUCTIONS/ SPECIAL VERDICT FORMS POST TRIAL MOTIONS, APPEAL**

## **I. Introduction: Preparing and finding jury instructions:**

### **A. Prepare and obtain early in case.**

1. Minnesota Jury Instruction Guides: Minnesota Practice.
  - a. Civil, Volumes 4 and 4A
  - b. Criminal Volumes 10 and 10A
  - c. Life expectancy tables
  - d. Sample verdict forms with special interrogatories
2. Federal: Blackmar and Devitt
3. Look to other states and prepare your own.

### **B. Generally read after summation.**

1. Jury Instruction Conference: federal usually about two weeks prior to trial. State, either just prior to trial or before closing arguments. Judge will issue order on instructions and verdict form.
  - a. Also discuss the procedures for closing and time issues

### **C. Judges Charge: What and how the jury is instructed and the verdict form constitutes the "charge".**

### **D. Objections: Must preserve the record if you object to instructions given or refused to give.**

1. Standard of Review: Was the instruction legally accurate and supported by the evidence?
2. Objection must be timely.
3. Examples of objections:
  - a. No factual support in record for instruction;
  - b. Instruction misstates the law;
  - c. Departs from accepted instruction given within jurisdiction;
  - d. Argumentative;
  - e. Confusing to the jurors
  - f. Ambiguous

### **E. Sequestering the Jury**

### **F. Hung Jury**

## **II. Special Verdict Form:**

### **A. Criminal must be unanimous verdict/civil may be a 5/6 verdict**

### **B. Objections or motions after verdict:**

1. Verdict not supported by evidence;
2. Surprise situation;
3. Verdict is contrary to the law;
4. Verdict is inconsistent
5. Errors of law objected to at the time;
6. Jury misconduct (Schwartz Hearing)

### III. Special Issues:

- A. Additur
- B. Remittitur
- C. Motion for Mistrial: Conduct was such that it may have impacted or affected the outcome of case.

### IV. Post Trial Motions:

- A. Directed Verdict in civil and Motion for Acquittal in Criminal. Made at the conclusion of opponents case or after all the evidence is received.
  1. Taking the evidence in the most favorable light to the nonmoving party the evidence is insufficient to sustain a verdict for the opponent.
- B. JNOV: Judgment Not Withstanding the Verdict: Challenges the verdict. Same standard as a directed verdict.
- C. Motion for a New Trial: Must bring to preserve rights of appeal.
  1. Grounds:
    - a. Fair trial did not take place;
    - b. Misconduct
    - c. Newly discovered evidence