Part Two

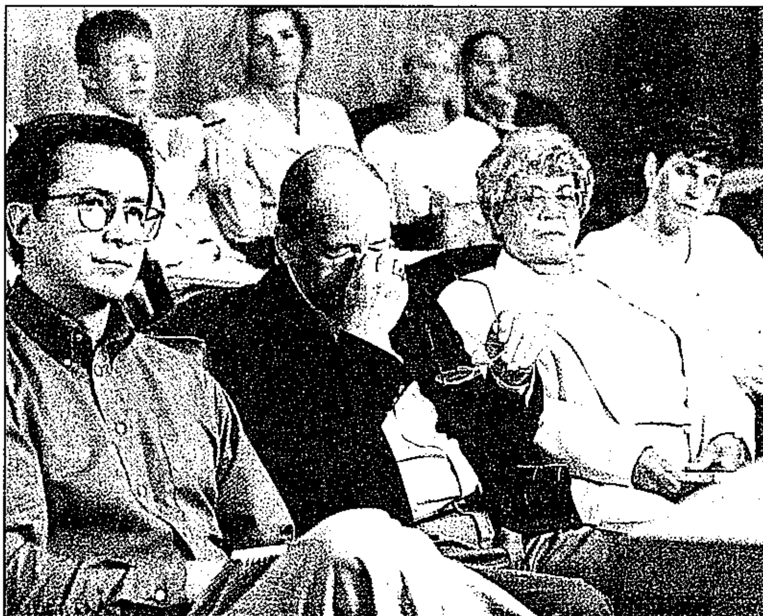
Trial Strategies and Evidence

By William Barton
Stoel Rives LLP

"The modern jury trial is one of the most important, demanding, exhausting, probing, and sometimes humbling and humiliating events that can be experienced by a person, be that person a party, witness, a lawyer or a judge." State v. Mains, 295 Or 640, 658 (1983).

This is Part Two of a paper that is a practical guide for beginning civil jury trial lawyers, synthesizing rules of evidence, procedure, proof, deposition use, ethics and principles of social psychology that form the basis of strategic trial decisions. Few areas of the law are more tactic driven than the application of evidence. Decisions are often made on one's feet, and are a function of context, strategy, and philosophy. While there is plenty of information for both sides of the table, the paper is written for the civil practitioner with an obvious lean for the plaintiff.

William Barton



The late Multnomah County Judge Robert P. Jones wrote a column titled "Tips From the Bench" for the Multnomah Lawyer. Some of the following material either quotes or summarizes some aspect of his monthly column, and is generously fertilized with my own contributions. With this concession to plagiarism and excellence, I now proceed with few citations, but much credit to "The Judge."

Your trial habits will be shaped by your temperament, creativity, the type of cases you try (whether jury or bench, criminal or civil), your opponents, and certainly the judge. A threshold question involves how much you are going to object. It depends of course upon the likelihood your objection will be sustained, and "so what" if it is? Maybe the evidence is objectionable, but doesn't really hurt you. Even if harmful and objectionable, you may decide not to object because by this proof the opponents have "opened the door" (rendered relevant) to evidence favorable to you that can later be offered in response (see #54).

23. FILE YOUR MOTIONS IN LIMINE EARLY

You can't lodge motions the morning of trial and expect a busy judge to take them seriously; the jury is waiting. Pretrial motions are where good lawyers flesh out the evidentiary aspects of their case and try to eliminate the bad stuff (ORE 403). After most evidentiary matters have been ruled upon pretrial, good lawyers know what's probably coming into evidence later, be it bad or good. Then they fashion a jury selection and case theory around what's admissible. Give some thought to the order in which you are going to list your motions. Lead with your most important ones. Do some of them belong grouped together, such as matters involving medical specials and the collateral source rule?

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24. TIPS ON DEPOSITION OBJECTIONS

Highlight the objections in the written transcript, then lodge it with the judge before trial begins; the earlier, the better. Jury selection is a good time for the court to review any objections. The judge can indicate his or her ruling on the margin of the deposition. This enables you to later edit the video before playing it for the jury. The improved presentation results in a much happier judge.

25. USE THE TRIAL LAWYER'S THREE SAFETY NETS

ORE 103 (b) Offers of Proof, ORE 104 Preliminary Hearings on Admissibility, and ORE 105 Limiting Instructions are the trial lawyer's three matchless helpers. Understand how to make an offer of proof (*see* #41); reap the many benefits of a 104 hearing; and safeguard your client with a request for a limiting or cautionary jury instruction. Don't just ask for one, have one already drafted. In an ORE 104 pretrial hearing, the judge is not bound by the rules of evidence. Leading questions spotlight the issue and reasonable hearsay facilitates the inquiry. ORE 105 instructions concerning the limited uses of evidence can be used to hem in your opponent during closing argument.

You'll also hear a lot of ORE 403, meaning yes, it's relevant, but it's "too much of a good thing." The evidence may be so good that it's too good, at which point it's "prejudicial." This is the balancing test where judicial "discretion" lurks. This is the stuff of motions in limine, and often involves threshold foundational questions involving expert testimony invoking *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579, 113 S. Ct. 2786, 2800 (1993); *State v. Middleton,* 294 Or. 427, 657 P.2d. 1215 (Or. 1982); or *State v. Johns,* 301 Or. 535, 548, 725 P.2d 312 (Or. 1986) type rulings. A leading case finding admissibility in plaintiffs' personal injury cases is *Marcum v. Adventist Health System/West,* 345 Or. 237, 193 P.3d 1 (Or. 2008).

Sometimes the judge may provisionally receive evidence, relying upon the representation of counsel as an officer of the court, that a proper foundation will later be developed. If this foundation is not forthcoming, the court will entertain a motion to strike the evidence and alternatively a motion for a mistrial if the evidence is sufficiently prejudicial. When a judge takes a matter under advisement, or defers ruling, don't mention the questionable material until after the court rules. Check with the court if you have any doubts. Your reputation is at stake.

Is it necessary to renew pre-trial motions or request a continuing objection at trial in order to preserve the error on appeal? No. *See Robinson v. Children's Services,* 140 Or. App. 429, 914 P.2d 1123 (Or. App.1996) and *Davis v. O'Brien,* 320 Or 729, 736-39, 891 P.2d 1307 (Or. 1995). The court may reconsider the prior ruling if there has been persuasive intervening evidence. If you sense an adverse ruling forthcoming on a pending motion in limine, consider asking the judge to take the matter under advisement, thereby giving you another run at persuading him/her of your position when your more persuasive trial proof is on the table. Be careful to not mention material the judge has excluded. These are the mistakes that sanctions are made of. If you want to know how not to practice law, read *Tahvili v. Washington Mutual Bank,* 224 Or. App. 96, 197 P.3d 541 (Or. App. 2008).

While motions in limine are used defensively to obtain a pretrial ruling excluding evidence, they can also be useful offensively to gain pretrial rulings on whether evidence is admissible. Such a pretrial decision can save you the expense of bringing a witness to the courtroom or avoiding a mistrial.

26. PLAINTIFFS GET THE FULL VALUE OF ANY MEDICAL BILLS

Plaintiffs are entitled to claim all economic damages—including the full value of medical expenses which were billed, irrespective of any amount which was later written off by their respective providers or insurers.

In *White v. Jubitz Corp.,* 219 Or. App. 62, 182 P.3d 215 (Or. App. 2008), review allowed, 190 P.3d 1237 (Or. Aug 06, 2008), the Court of Appeals held a plaintiff may include in his/her request for economic damages all of those medical expenses incurred—including medical expenses written off by a medical provider. This "difference" can be a factor in negotiating a close case.

27. NO POST-VERDICT REDUCTION IN ECONOMIC DAMAGES DUE TO SOCIAL SECURITY ACT OR DERIVATIVE "WRITE-OFFS"

Defendants should not be allowed to reduce any jury award of economic damages for medical expenses due to write-offs by Medicare, Medicaid, the Oregon Health Plan, or any other progeny of the Social Security Act.

Again in *White v. Jubitz Corp.,* the court held that Medicare write-offs are exempt from post-verdict deduction by the court.

In holding that Medicare write-offs cannot be deducted, the court focused its analysis on ORS 31.580(1)(d), which excludes from post-verdict reduction "federal Social Security benefits." The court determined the Social Security benefits exclusion "encompasses all benefits flowing from the Social Security program, including Medicare." *Id.* at 76. Therefore, Medicare benefits, including those which were written off, could not be used to reduce an award of economic damages.

In a related, contemporaneous case, the court also held when medical expenses were paid by the Oregon Health Plan, the court "could not reduce a plaintiff's award of damages by the amount of write-offs that an injured party receives pursuant to Medicaid coverage." *Cohens v. McGee,* 219 Or. App. 78, 80, 180 P.3d 1240 (Or. App. 2008). Since the Oregon Health Plan is the state branch of Medicaid, these benefits also flowed from

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the Social Security Act, and therefore could not be reduced post-judgment by the court.

28. AN ENHANCED RISK OF FUTURE HARM IS RECOVERABLE

Plaintiffs may recover for an enhanced susceptibility or risk of future harm caused by the defendants. Plaintiffs don't need to show that such future harm will happen, but only that it's "probable that it might." *Feist v. Sears Roebuck*, 267 Or. 402, 517 P.2d 675 (Or. 1973) and *Pelch v. United Amusement Co.*, 44 Or. App. 675, 606 P.2d 1168 (Or. App. 1980).

29. START AND FINISH STRONG

This is true for each witness, each morning, every afternoon and all day. There are many psychological and strategic reasons for this ordering, which have been previously discussed.

30. SCHEDULE YOUR EXPERT WITNESS AS THE FIRST WITNESS

Schedule your expert either first in the morning or first in the afternoon. Otherwise you risk the expert's testimony won't be finished by 5:00 p.m., which may require the expert to return the next day. Keeping jurors past 5:00 p.m. to accommodate an (out of state) expert who is getting paid for his time isn't smart. You're signaling jurors that you are insensitive to their commitments such as child care, transportation, and personal plans. This is in addition to your expert being upset and charging you more money.

31. MOTIONS TO EXCLUDE WITNESSES, AND REQUESTING THAT COUNSEL AND PARTIES NOT DISCUSS TRIAL TESTIMONY WITH EXCLUDED WITNESSES

Make this motion before jury selection. However, there's authority it only needs to precede the first receipt of trial testimony. The obvious reason for this rule is to prevent witnesses from listening to what another witness has testified to, and then conforming their testimony to what the previous witness said. Three cases to cite are: *State v. Larson*, 325 Or. 15, 26, 933 P.2d 958 (Or. 1997); *U.S. v. Whiteside*, 404 F. Supp. 261 (Del. 1975) (authority for an additional motion prohibiting counsel from discussing the testimony of prior witnesses); and *Miller v. Universal City Studios*, 650 F.2d 1365 (5th Cir. 1981) (prohibits an attorney from discussing the testimony of one expert with another).

Clarify with your judge what it means when s/he rules that witnesses are excluded. Make additional explicit motions limiting the attorney communicating the testimony of prior witnesses and the testimony of other experts. However, when an expert relies on the testimony of another expert, judges usually allow that expert to sit in the courtroom and listen to the other expert's testimony.

32. OBJECTIONS TO OPPOSING COUNSEL CONFERRING WITH WITNESSES DURING BREAKS IN YOUR CROSS-EXAMINATION

This is an extension of the authorities cited above to prevent opposing counsel from "woodshedding" their witnesses. As an example, the defendant was on the stand when the testimony was interrupted by the noon recess. The trial judge ordered that counsel could not consult with the client during the lunch break. Affirmed on appeal. *New York v. Enrique*, 80 N.Y.2d 869 (1992), in line with *Perry v. Leeke*, 488 U.S. 272 (1989). This can also be true during a deposition. *See* the Multnomah County Local Rules on this matter. You can access them on the web at http://www.ojd.state.or.us/mul/index.htm.

33. CONSIDER CALLING THE DEFENDANT AS YOUR FIRST WITNESS

This is also referred to as "calling the witness out of order" and is touched on earlier when discussing the importance of the sequence or order of your evidence. This allows plaintiff's counsel to control the development of the proof, and makes it difficult for opposing counsel to generate a strong direct of the witness later during their own case because you've already examined the defendant. Otherwise the defendant sits through the entire trial hearing all the evidence as it comes in. S/he soon becomes familiar with the trial cadence and is never as nervous as s/he would have been if called as your first trial witness. Also as the last witness, the defendant can generate answers that accommodate everything s/he previously heard.

34. CONTINUING OBJECTIONS

When the court overrules an objection you have made, and opposing counsel then pursues a course of repetitive references to the matter, should you stand each time and object anew? The argument is you must "protect your record," yet in the process you appear to be an obstructionist to the jury. What to do? Request a continuing objection. Be specific about what is covered by your objection.

35. OBJECTIONS MUST BE SPECIFIC

A general objection to a document which contains both admissible and non-admissible evidence will not be preserved on appeal. In *Oberg v. Honda Motor Co.*, 108 Or. App. 43, 48-49, 814 P.2d 517 (Or. App. 1991) the court said, "Although the excerpts may have contained some evidence of dissimilar accidents, defendants did not seek to excise those portions from what was read to the jury, but instead objected to them in their entirety. Because the objections did not inform the trial court with particularity as to what evidence was objectionable, the court did not abuse its discretion (in admitting the documents)." If you are offering a document, and the court sustains an objection to it because it contains portions which are inadmissible, "sanitize" the document by redacting or removing the objectionable portions, then re-offer

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the "cleaned-up" exhibit. *See also Boardmaster Corp. v. Jackson Co.*, 224 Or. App. 533, 198 P.3d 454 (Or. App. 2008).

36. MAKE THE TRIAL ABOUT YOUR OPPONENT'S CONDUCT AND CHOICES

Don't let the trial be about your client's shortcomings. Pick the strategic high ground and fight your battles from there. If you let your opponent define and drive the issues, you're going to forever be on the defensive. When you hire jury consultants they tell you to review your allegations of negligence and turn them into choices. This process helps in selecting your case themes.

37. CONSIDER TELEPHONE TESTIMONY OR VIDEO-CONFERENCING WHEN A WITNESS CAN'T MAKE IT TO TRIAL - ORS 45.400(9)

You must make the motion 30 days before trial, unless good cause to shorten the time is shown. Maybe there's a last minute emergency preventing your expert from attending live. Judges are getting more and more lenient in finding good cause at the last minute. With video-conferencing, you need to have copies of all the documents that are going to be offered available on both ends, so the expert can discuss them with the jury on your end and the opposing counsel can timely object. You will *see* more and more of this in the future, particularly in medical negligence cases with many out of state experts.

38. ORPC 3.4 (e) EXPRESSIONS OF PERSONAL OPINIONS BY LAWYERS ARE IMPROPER

"In appearing in the lawyer's professional capacity before a tribunal, a lawyer shall not assert the lawyer's personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant or as to the guilt or innocence of a criminal defendant but the lawyer may argue, on the lawyer's analysis of the evidence, for any position or conclusion with respect to the matters stated herein." You don't need to explicitly state your opinions. Tone your argument down a little and avoid words such as "I think" or "I believe." When you're through with the closing, the jury will know exactly what you think, without you having violated the rule. You don't want the judge sustaining an objection with your opponent citing the violation of an ethical rule as authority. Ouch!

39. USING EXHIBITS DURING OPENING STATEMENT

This can be a persuasive and enriching addition to your presentation. But how can you use an exhibit in opening statement if it hasn't yet been received in evidence? Simple! First ask your opponent for an agreement and then run it by the judge. Be sure you have the clerk mark each exhibit for identification. If your opponent won't agree, make a request to your trial judge for an OEC 104 hearing to lay the foundation and then ask the court's permission to provisionally receive it for use during your opening. Odds are you will get it. Most of the time photos, charts, and x-rays, etc., will be allowed when you represent to the court that a proper foundation will be forthcoming.

> "Your Honor, I seek permission to use plaintiff's exhibits one through six during my opening statement. These are photographs of the scene of the accident. I represent to the court that I will have a witness who will testify that each of these exhibits is a true and accurate portrayal of the scene as it existed at the time of the accident in question."

Caution: You are an officer of the court. Your representation to the judge must be 100% accurate! If not, you risk a mistrial and costs might be assessed against you.

In federal court, all the exhibits are pre-marked and ruled on at the pretrial conference. The court occasionally will take certain matters under advisement for further review as the evidence develops or request a sufficient foundation be laid. Pre-marking and admission helps in the preparation of jury notebooks and the use of exhibits in the opening statement. Again, always check with opposing counsel and the judge if you want to use exhibits during your opening.

40. MAKE AN EXHIBIT BOOK FOR EACH JUROR

You don't have to put all the exhibits in it, just the ones you want. This is one more method to persuade the jury to view the case from your client's perspective. With all the exhibits pre-marked and received in federal court you can generally start using the notebook in the opening statement. Occasionally a lawyer might worry that jurors could be distracted during the testimony of a key witness by reviewing exhibits in their jury notebooks. I think this concern is overrated.

41. "MAKING A RECORD" OR AN "OFFER OF PROOF"

What is sufficient? Generally, when called early, opposing counsel will concede that if "such and such witness was called, they would testify to such and such." This means the opposing counsel has stipulated to what the witness would say, not that it's either accurate or persuasive. If such an agreement isn't forthcoming, call the witness and conduct a careful direct examination containing the elements of proof that render this witness's testimony important. With the court's approval, offers of proof can be made at any time during the trial. They are usually done during scheduled breaks in order to avoid the jury being escorted in and out of the courtroom. Make your

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offer of proof persuasive; judges will occasionally change their minds.

42. NO SPEAKING OBJECTIONS

"Trial courts must restrict counsel's objections to a statement of the antiseptic legal grounds without comment. After hearing counsel's objection, ordinarily the court should rule on the objection and if either party is aggrieved by the ruling the aggrieved party should ask to be heard on the objection outside the presence of the jury. There should be no occasion for discussion of legal matters before the jury." *Jefferis v. Marzano*, 298 Or. 782, 792, fn 5, 696 P.2d 1087 (Or. 1985). This means you stand, say "objection," and in a summary fashion state the basis of your objection, such as relevance, hearsay, etc. If your opponent insists on making a speech in the guise of an objection, stop it early. Few things will get you a tarnished reputation quicker amongst good trial lawyers (other than not being forthright on discovery matters) than speaking objections.

43. ORE 401 - RELEVANCE

This means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *State v. Gailey*, 301 Or. 563, 567, 725 P.2d 328 (Or. 1986). "The proper inquiry to determine relevancy is whether the evidence even slightly increases or decreases the probability of a material fact in issue."

In my mind, a judge's relevance rulings generally reflect the judge's philosophy as a judicial gatekeeper. Decisions on the 401 and the 403 balancing test are determined on a sliding scale based on the time of day (meaning how close to 5:00 p.m. it is...), and the level of judicial impatience as determined by the pace of the trial. Appellate courts grant judges wide latitude in rulings upon evidence; it's called "discretion." Don't feel sorry for yourself; get used to it and move on.

44. 608 (1-a) OPINIONS BY A CHARACTER WITNESS THAT A WITNESS IS A TRUTH SPEAKING PERSON

This rule is underutilized. You can bring witnesses in to testify that another witness is a truth speaking person. Remember, however, that no one can opine whether another witness is or is not being accurate or truthful concerning particular testimony. *State v. Middleton*, 294 Or. 427, 438, 657 P.2d 1215 (Or. 1983). A witness can only offer opinions on whether another witness generally is a truth speaking person. This rule and testimony pursuant to it can be a real weapon. Forget the law school "reputation in the community" rhetoric. It's arcane and when you're done, nobody understands what was said anyway.

45. ORE 703 - ONE DOCTOR CAN RELY ON THE RECORDS OF ANOTHER DOCTOR IN OFFERING THEIR EXPERT OPINIONS

Any expert can comment on, and rely upon, any records they ordinarily rely upon in forming their professional opinions. This doesn't make the underlying documents admissible; it simply means the experts can rely upon them in forming their professional opinions. Use this rule when the plaintiff has seen a large number of doctors and you are going to call only a few. It gets the job done.

46. ORS 45.250 (1-b) READING THE DEPOSITION OF A PARTY

This rule isn't in the evidence code, but it's a powerful tool that can be used both offensively and defensively. You can stand up and read the deposition of an opposing party in the trial for any purpose without calling that witness to the stand. In some states this is called "publishing the deposition." Note this rule only applies to parties, and not to non-party witnesses. When suing a corporation make sure the witness meets the definition of a corporate representative. Remember: When you want to read or use the deposition of a witness (rather than a party), you must first lay a foundation showing unavailability.

47. DON'T FORGET ORE 803(26) THE HEARSAY "CATCH ALL" RULE

Include the "equivalent circumstantial guarantees of trustworthiness" language. When something is hearsay, and you expect problems getting it into evidence, consider this rule before you give up, but it's a last resort and requires notice to opposing counsel and a rigorous foundation.

48. ORE 404(3) OPENING THE DOOR TO PROVE MOTIVE

Evidence is offered here to prove a witness's "intent, design, motive, etc." This is effective in civil cases when a defendant is called out of order and s/he denies being motivated or interested in a particular subject. This heightens the potency of later contradictory and thus impeaching evidence. Our office uses it often in child sexual exploitation cases where we call the pedophile first and ask him if he has any sexual interest in children which is always denied so the door is thereafter about as wide open as it can get to prove "intent, design and motive." Be creative.

49. ORE 801(3) YES, BUT IT'S NOT HEARSAY

Remember, nothing is hearsay unless it's offered for its truthfulness. A typical explanation is, it's offered to explain the witness's state of mind, or, it's offered to prove the statement was made, but not its truthfulness. Once it's in, it's in, and the jury's heard it. Yes, I know I talked earlier about ORE 105 (the trial lawyer's matchless helpers) limiting instruction to help reduce the sting, but it's in evidence.

Remember the inconsistency between the sterility of the court's instruc-

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tion (deductive thinking) and the inductive way jurors and persuasive trial lawyers think. Juries form early impressions, and then filter later evidence to conform to and confirm their early perspectives.

50. USE OF AUTHORITIES ON DIRECT EXAM

Most judges will allow your expert to cite authorities that support his or her opinions on direct examination. *Scott v. Astoria R. Co.,* 43 Or. 26, 72 P. 594 (Or. 1903). Authorities are generally used by lawyers to impeach a witness during cross-examination, but they can be effective when used by a witness on direct. In medical negligence cases, Oregon has not adopted the equivalent of FRE 803 (18), as has Washington. The federal rule doesn't make the authorities admissible as substantive evidence, but they can be cited if relied upon. Under the federal rule, "If admitted, the statements may be read into evidence but may not be received as exhibits."

51. ORE 704 - HYPOTHETICAL QUESTIONS ARE UNDERUTILIZED

I find older practitioners are more experienced and effective in offensively using the hypothetical question to summarize a witness's testimony, and indeed sometimes their entire case. When hypotheticals are used, a frequent non-productive objection is "misstating the evidence" when a lawyer asks a witness a question that inaccurately or incompletely incorporates prior testimony. These are usually impossible for the trial judge to resolve. The better procedure is to ask the witness to assume that a prior witness testified such and such. If the facts assumed in the question are disputed, request the trial judge, at that moment, read UCJI 2.08, Hypothetical Questions. Like any (ORE 105) instruction concerning evidence, the request must be timely in order to be effective.

Hypotheticals can be potent weapons in which to try, and retry, your case, and in effect repeat your facts under the guise of the hypothetical question. If you're going to use a hypothetical, make sure it includes all the significant evidence, both good and bad. It does no good to omit the bad, because on cross-examination the opposing lawyer can have a field day impeaching your expert, "Doctor, isn't it true that your opinion is no better than the facts upon which it is based ...," and then recites a litany of facts that you, the opposing lawyer, chose to omit in propounding your hypothetical. If credibility is everything to a lawyer and witness, you don't need this. Preparing well-crafted hypotheticals takes many drafts and lots of time.

52. CONFER REGULARLY WITH THE COURT CLERK TO CONFIRM THE ACCURACY OF YOUR EXHIBIT LIST

Before formally resting (concluding your portion of the trial), ask for a recess. Carefully examine the clerk's exhibit list to confirm all the documents you offered have actually been received into evidence, as shown by the clerk's records. If not, (re) offer them at this time. Monitoring the status of the clerk's exhibit list at the end of each day keeps you current.

53. SHOW EXHIBITS TO THE JURY SHORTLY AFTER THEY ARE RECEIVED

This allows the jury to view photographs when the witness has referred to them, rather than days later in the jury room. The court may allow you to personally pass your exhibits to the jury; however, the better practice is once the exhibits have been received, ask the court, through the courtesy of the clerk, to pass them (also called "publishing" the exhibits) to the jurors for their inspection. There's no rush, take your time. It makes no sense to go through the ritual of offering and receiving the exhibit in evidence, and then leaving the jury in the dark about exactly what it is and why it's important until your closing. It's a sad commentary on your advocacy if the first time the jurors get to really examine an important exhibit is during their deliberations. If you have many photos, mount them on a foam board. Place an exhibit sticker next to each photo on the board and have the witness identify what each exhibit shows. This helps make a record while maintaining a conversational flow to the witness's testimony. Also when exhibits are mounted on a foam board it's easy for the jury to refer to them during their deliberations, plus it allows any juror to hold up the board and point out anything they may think is important to their fellow jurors. Finally the exhibits will remain conveniently in view when the jury foreperson leans the large board against a wall during the jurors' deliberations.

54. "OPENING THE DOOR"

An opponent's proof may render your inadmissible evidence admissible. Once the evidentiary door has been opened, you're free thereafter to stuff the record, to the point of it being cumulative, with favorable proof you probably couldn't have gotten into evidence had your opponents not "opened the door." One step back to get two ahead! Remember, however, the door swings both ways.

55. MOVING TO STRIKE THE ANSWER

"Where a question asked a witness is unobjectionable, but the answer goes beyond what was called for and improper testimony is produced, an objection to the question, including a continuing objection, will not extend to the answer." *Hryciuk v. Robinson,* 213 Or. 542, 569, 326 P.2d 424 (Or. 1958). The only way to reach an unresponsive or improper response is by a motion to strike the answer, not by an objection to the question.

56. THE MAGIC WORDS FOR PLAINTIFFS' LAWYERS IN PROVING DAMAGES

Lawyers struggle in their endeavor to establish permanent injury: causation, aggravation, future medical expenses, past

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earning capacity and impairment of future earning capacity and enhanced future susceptibility. Failing to use the right words can be fatal. Don't fret. It's simple. Keep this list of questions handy:

"Doctor, these questions call for your opinion based upon a reasonable medical probability. To the extent you offer any professional opinion, will you please limit your responses to those which you hold to a reasonable medical probability."

"Is the limitation of motion in plaintiff's shoulder permanent?"

"Was the auto collision of March 14, 2007 a substantial or material cause of plaintiff's injuries?"

"Did the plaintiff have a pre-existing condition rendering him or her more susceptible to future injury?" (UCJI 70.06)

"Did the accident aggravate the pre-existing arthritis in plaintiff's shoulder?"

"Will plaintiff have future pain and suffering?"

"Will plaintiff require future medical treatment?"

"What is the present cost of those future health care services?"

"Will plaintiff's ability to work in the future be impaired?"

You may need a follow-up. It should be just one word, "explain." This prompts a narrative response, the most effective method. If you haven't used ORCP 45 and obtained a concession concerning the medical specials, or preferably resolved the matter pretrial over the telephone, as can be done most of the time, use this format:

"Doctor, have you reviewed the medical bills incurred by the plaintiff which total $3,500?" (This is the "lump sum" method preferable to reviewing each bill.)

Consider a total under ORE 1006, the voluminous records rule. Show the summary of the bills to your client and ask them if this is the total of their health care bills. When asked pretrial, opposing counsel will usually agree to the total, reserving the questions of reasonableness and/or causation.

"Are those charges reasonable for the treatment rendered?"

"Were those expenses necessary in the treatment of the injuries plaintiff sustained in this accident?"

Rehearse these questions with your doctor before trial. You must establish three things for your medical specials: that they were reasonable in cost, were actually incurred, and were necessary for treatment.

57. MAGIC WORDS IN PROFESSIONAL NEGLIGENCE CASES

Use the following formula when you need testimony from an expert witness on the applicable standard of care in a professional negligence claim. For purposes of our example, we'll use an orthopedic surgeon in a medical negligence claim.

First, establish (without undue modesty) your expert's background, training and experience (a copy of his or her CV or resume is not admissible because it's hearsay). Then, that s/he was retained by your office as a consultant to assist in evaluating your client's claims. Next, establish what records the expert was provided, and what research s/he did to prepare to testify in this case. Finally, advise the expert that to the extent s/he offers professional opinions, to please limit them to those they hold to a reasonable medical probability or certainty.

"Are you familiar with the standard of care or 'the methods of customary and proper medical treatment in that or a similar community'[1] applicable to a reasonable and prudent orthopedic surgeon at the time, place, and circumstance existing in this case?"

"Yes, I am familiar with the applicable standard of care."

"Do you have an opinion whether the conduct of the defendant met the applicable standard of care?"

"Yes, I have an opinion."

"What is your opinion?"

"My opinion is the defendant's conduct fell below the applicable standard of care."

I enlarge the allegations of negligence from the pleadings on a demonstrative exhibit. I then carefully have the expert comment on each allegation, and explain why in his or her professional opinion the defendant was negligent and how their conduct failed to meet the applicable standard of care for each separate allegation. Once you are done with the liability (I also have the witness check or initial each allegation when s/he is through discussing it), shift to questions on causation and to the (permanent) damages.

By carefully following this template, you won't have later problems when you rest and face the inevitable defense motions to strike each of your allegations of negligence for a failure of proof, repeated later by a motion for a directed verdict, also for a failure of proof. What you're doing here is ensuring there is sufficient proof to make a jury question on each allegation of negligence.

If the expert is someone other than a medical doctor, it's fine to simply phrase all the questions to a "reasonable professional probability or certainty." It's also okay to use either probability or certainty, as you wish. The idea here is that the ex-

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pert's opinions are more likely than not (over 50%) true and therefore are more than mere "speculation, conjecture or guesswork."

58. LEADING QUESTIONS ON CROSS?

Not always...ordinarily leading questions are allowed on cross-examination. However, there are exceptions pursuant to ORE 611(3). Cross-examination of a party or witnesses who are identified with the party and called by an opponent should be conducted in a non-leading manner. *Morvant v. Construction Aggregates Corp.*, 570 F2d 626.

59. DO YOU HAVE A PROBLEM WITH LEADING QUESTIONS ON YOUR DIRECT EXAM?

Everyone does....When in a jam it's okay to simply ask the witness, "What happened next?" And in the worst of circumstances you can always fall back and try "Is it or is it not true that ___________?" Effective direct is always the product of solid witness preparation. Remember, in the judge's discretion, leading questions are permitted on preliminary matters or with children.

60. LEARN AUTHOR JIM McELHANEY'S PARAGRAPH OR TOPIC APPROACH ON DIRECT

This is sometimes called BRACKETING, and is a technique that makes it easy to ask short tight questions. Think of each new topic like a paragraph. The paradox of coherence is, if you want a story to hang together, then you have to break it into pieces.[2] That's the idea behind sentences, paragraphs and chapters. Break each witness's testimony into a series of simple paragraphs. Then think of a short, simple title for each subject or paragraph. Announce the title for each paragraph before you start asking any questions about it. Example: "Ms. Collins, our first topic is the afternoon of April 17, right around 2:00 p.m. when you first encountered Mr. Smith." Then it's easy to ask short, non-leading follow-up questions that tell the witness what you want, and also show everyone else where you are going. Example: Where were you? Why were you there? Was anybody with you? Who was it? What were you doing? How long did you stay?

You can also use the paragraph technique to get a wandering witness back on track. Example: "We'll get to your engineering work in just a minute; right now I'd like to finish up this topic. I'll ask you just a few more questions about you and the defendant." After you have covered other ground and want to return to an earlier topic you can still use the paragraph technique. Example: "Let's return to the time when you first encountered Mr. Smith."

The paragraph method of direct also helps keep you, your witness, and the jury on track. Instead of writing out all your questions for direct examination (which everyone does when starting out), work from an outline that has only the paragraph topics written out and a word or two for each of the questions that follow. This helps you actually listen to the witness, and interact with them. Writing out questions has the seductive lure of security when you are preparing the case, but if you start reading from a script in court it impedes your continuity and flow. In making this statement, I fully acknowledge you must carefully write out all hypothetical questions and key standard of care questions for your experts, including causation questions on damages.

When you use topic sentences, each new subject creates a different tone, a change of pace. It's a pause that lets everyone rewind their attention clocks, and focus on something new. Each new paragraph sends the message you are organized, you know what you are doing, and thus both you and your witness are worth hearing.

61. ANSWER THE QUESTION "YES OR NO" REVISITED

Jurors are alienated by what they perceive to be rudeness. While accepted as conventional wisdom that a witness may only answer a question on cross by either responding with the word "yes" or the word "no," that view is not entirely accurate. A witness should answer the question directly and then have the right to explain his or her answer. The extent to which the trial judge allows a witness to explain "yes" or "no" questions is entirely discretionary. Irving Younger and other experts on cross examination preach "never permit the witness to explain on cross examination." That might be a desirable tactical goal. To a degree, it may be achieved by using leading questions (which are actually declarative statements with a rising intonation at the end of the statement) and avoiding open-ended questions. However, the lawyer who chooses to cut the witness off in their answer may not only incur the jury's ire, but on redirect, this is likely to happen:

"My opponent asked you if you saw the Ford pickup before the impact. What were you trying to say when he cut you off?"

The jury might also underline the answer. Jurors have the power to punish a lawyer's conduct if it does not reflect their view of good manners. I call this test the "referendum of a lawyer's citizenship."

62. BE CREATIVE WITH DEMONSTRATIVE EVIDENCE

Be creative. The foundation here is, "Will this aid and assist the jury in understanding the testimony?" If the answer is "Yes," then it comes in and it goes back to the jury room during deliberations. *Christensen v. Cober, M.D.*, 206 Or. App. 719, 138 P.3d 918 (Or. App. 2006).

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63. MAKE POSITIVES FROM DIAGNOSTIC IMAGES

Common diagnostic imaging procedures are helpful in demonstrating a medical problem to jurors. Unfortunately the films are small and even on a good shadowbox are trying for jurors to view. Solution: Get positive prints made, mount them on white foam board, and then offer them into evidence. This removes the necessity of an x-ray "light-box," and permits their later use in closing and allows the jury to revisit them during their deliberations.

64. A VISUAL AID TECHNIQUE

You may be confronted with a situation in which several witnesses mark on the same drawing or illustration. Even using different colors will not solve the problem of the cluttered look. It cannot be avoided. The jury might consider it rude if you object to your opponent's witnesses marking on your drawings. The solution is an acetate overlay, which is easy to work with and reasonably priced. Each witness can have their own sheet and their own color marker. Using acetate overlays, or at a minimum different colored writing, enables you to illustrate to the jury the differences in the witnesses' versions.

65. ORE 1006 SUMMARIES OF VOLUMINOUS RECORDS

Overlooked by many trial lawyers. This is a neat way to resolve the problem and bother of voluminous writings, recordings or photographs. Such evidence may be presented in the "form of a chart, summary or calculation." The summary or conclusion may be oral as well as written.

The underlying documentation, plus the summary, should be made available to opposing counsel prior to trial. If there is an objection, authentication of the underlying documents can be resolved in an ORE 104 hearing. If procedure is followed, the summary should be received as evidence. Whether the documents are "voluminous" is in the court's discretion.

66. A FEW THOUGHTS ON CLOSING

"A good trial theme provides an incentive for the entry of a verdict in your client's favor. In addition to being logical and believable, a trial theme invokes shared beliefs and common values. Just as a theory explains why the verdict is legally necessary, the theme explains why the verdict is morally desirable."[3]

"The first minute or two of your closing argument should communicate three things to the jurors: your theme, why the jury should find in your favor, and your enthusiasm about your case."[4] Your theme is what your case is about, i.e., this case is about a job, or this case is about public safety. As an example, in all my sex cases, my theme is generic; this case is about an abuse of trust, power and violation of human dignity.

People have short attention spans when it comes to technical matters. The heart of your case is plot, motive and characters. Remember, trials are really about competing stories. Whose story is most likely and also most deserving? Motive isn't an element in most civil negligence claims, but it's the first place jurors look to organize the information in order to understand why something has happened.

> "If the fact finder - judge or jury - reaches a conclusion on its own, it will hold that conclusion more firmly than if it had merely been told what conclusion to reach.
>
> Lloyd Paul Stryker put it superbly in the Art of Advocacy 125 (1954):
>
> No point is ever better made than when not directly made at all but is so presented that the jury itself makes it. Men pride themselves on their own discoveries, and so a point which the jury are allowed to think their own ingenuity has discovered can put the advocate in a position where the jury begin to regard him as not only their spokesman but their colleague.
>
> The problem, then, is to discover how to guide the jury so that it reaches the conclusion you want and thinks it has figured things out for itself....
>
> ...Analogies are effective, and it is worth knowing why.
>
> The answer is simple. Analogies work for two related reasons. First, good stories command the attention of the listeners. They want to find out what happened.
>
> Second, analogies challenge the listeners to test their appropriateness to the point made. When someone tells a story to prove a point, it is almost impossible to resist testing it to see if it fits the situation.
>
> What is the net effect? You are right. The audience, in testing the aptness of a comparison, reasons the problem through and reaches the conclusion on its own. That is just what Lloyd Paul Stryker told us to get the jury to do.
>
> Analogies - whether simple allusions or detailed stories - are a distinguishing mark of outstanding final arguments. They lead juries to draw their own conclusions, which they believe more fervently than if they had merely been told what conclusion to reach."[5]

67. THE DEFENSE MOTION FOR A DIRECTED VERDICT

At the close of your proof, your opponent has the opportunity to make various motions, including for a directed

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verdict, plus any other motions to strike for a failure of proof, ORCP 60.

Read and reread your pleadings. Do you have proof sufficient to make a jury question on each allegation? You too can move to strike any defense pleadings not supported by sufficient proof at the close of the defendant's case. This is the time when civil lawyers really sweat. An example of the foundation for medical specials is whether the expenses were reasonable (in cost), necessary (for treatment), and incurred (see #26 for the definition here) and if there's a failure of proof your opponent will be moving the court to strike.

68. JURY INSTRUCTIONS

Elevate the importance of jury instructions in your trial preparation. The "as is" (UCJI 70.06 Previous Infirm Condition) instruction can be lethal. Other new instructions include UCJI 16.01 Ability to Pay, UCJI 50.02 Breach of Fiduciary Duty, and hand-crafted ones on Imputed Knowledge (UCJI 30.01). Don't forget UCJI 20.07 affirms that the negligence of a subsequent health care professional is the responsibility of the original tortfeasor, as are the side effects of any medications which are also compensable. These suggestions fit within Damages Instruction UCJI 70.02, specifically #4, which invites you to supplement the standard first three damages items. Ground your case themes within the specific language of the instructions.

Request the court give the instructions before closing argument. ORCP 58 B(8). Also consider requesting that the jury be given the instructions in writing, in addition to being orally charged. ORCP 59B. Your request must be made prior to the commencement of trial. If you are willing to prepare them, the court, in its discretion, might also consider a separate set of written instructions for each juror.

Golden Rule arguments for damages are improper. *Hovis v. City of Burns*, 243 Or. 607, 613, 415 P.2d 29 (Or. 1966). Per diem arguments, while technically proper, are still discouraged. *DeMaris v. Whittier*, 280 Or. 25, 30, 569 P.2d 605 (Or. 1977). Nobody said anything is improper about dollars for pain based upon monthly or yearly quotas.

69. USE OF EXHIBITS DURING CLOSING ARGUMENT

No problem. Any exhibit received in evidence may be used in closing. What about illustrations and models, used by witnesses during trial but not received into evidence? Or a demonstration performed by a witness? There is no one answer, so check with the court if you intend to use anything in closing that wasn't admitted into evidence.

70. APPLICATION OF THE SAME NINE JUROR RULE

In a civil case, the same nine jurors must agree on every issue material to the decision in order to return a legal verdict. Or. Const., Art. VII (Amended). "[H]owever, that rule applies only to cases in which the answers are interdependent, not where they are separate and independent." *Veberes v. Knappton Corp.*, 92 Or. App 378, 381, 759 P.2d 279 (Or. 1988) (where there are two separate theories of recovery, it matters not that the same nine jurors failed to agree on two separate claims for relief). "When the questions presented in a special verdict are not dependent, neither the Constitution, statute, nor case law require that the same nine jurors agree on each question." *Davis v. Dumont*, 52 Or. App. 73, 76-77, 627 P.2d 907 (Or. 1981); accord, *Eulrich v. Snap-On Tools Corp.*, 121 Or. App. 25, 43-44, 853 P.2d 1350 (Or. 1993) (award of punitive damages on a fraud claim was not dependent on the award of punitive damages on a claim for tortious breach of the duty of good faith, and the same nine jurors did not have to agree on both awards).

CONCLUSION

There is no substitute for common sense—let's call it "sidewalk justice." This job isn't easy. You've got to be durable and work hard. You might want to read two articles I've written, The Stuff of Good Jury Trial Lawyers, and Personal Authenticity. You can download them from my website at www.bartonstrever.com. ❑

ENDNOTES

1 Our appellate courts have actually disapproved language that only refers to the "standard of care." The courts have made it clear that the expert is to be asked whether the defendant's conduct met "the methods of customary and proper medical treatment in that or a similar community." *Creasey v. Hogan*, 292 Or. 154, 166, 637 P.2d 114 (Or. 1981); *Mosley v. Owens*, 155 Or. App. 685, 690, 816 P.2d 1198 (Or. App. 1991); and *Sanderson v. Mark*, 155 Or. App. 166, 172, 962 P.2d 786 (Or. App. 1998). The courts describe "standard of care" as a legal concept and the "customary and proper methods of medical treatment in that or a similar community" to be the proper evidentiary standard and form of the question for experts.

2 *McElhaney*, p. 407-413.

3 Steven Lubet, *Modern Trial Advocacy Analysis and Practice*, 2nd Ed., National Institute for Trial Advocacy, Notre Dame, IN, 1997, p. 450.

4 Thomas Mauet, *Trial Techniques*, 6th Ed., Aspen Publishers, New York, NY, 2002, p. 406.

5 *McElhaney*, pp. 680, 681.