Pretrial Skills and Trial Advocacy:

Brief Notes and Materials

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Preface

This teaching material is a modest attempt to avail readings to Pretrial Skills and Trial Advocacy. Students embark onto this skills-focused course after having taken various pre-requisite courses on substantive and procedural laws.

The initial readings of this material introduce the *areas of competence* in effective lawyering and show the significance of skills-focused courses that enhance the competence of students in blending knowledge and analytic skills with practice. Most of the learning outcomes of this course envisage learning through direct observation followed by hands-on-practice through written assignments, pair activities, group activities and classroom simulations.

The readings extracted from various sources coupled with the introductory notes and the exercises are meant to facilitate the learning-teaching process which is expected to be flexible and innovative depending upon the setting and circumstances that surround course delivery. The phases of litigation planning, investigation (factual and legal), pretrial negotiation and settlement, preparation of pleadings and trial simulations involve tasks and activities that require splitting large classes into smaller class size as envisaged in the course syllabus.

The real challenge in lawyering lies in relating the law with different fact situations to resolve legal issues. This material thus focuses on these skills at the pretrial and trial phases of lawyering. These skills are not "taught, as such" but rather practiced, and students are expected to carefully and diligently observe, do and simulate the skills involved in the process.

Acknowledgment

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General Introduction [1]

The course material introduces the skills necessary for pretrial (in Part I) and trial lawyering (in Part II). The first four units deal with *areas of performance in lawyering*, *litigation planning, fact investigation, legal investigation* and *case evaluation.* The topics addressed in these units include legal problems and issues communicated by clients, identification of client needs, priorities, potential claims, remedies and sources of proof, and examination of potential defenses and counter-claims of the other party. Units 5 and 6 briefly highlight *negotiation and pleadings.*

The second part of the course material titled "Trial Advocacy" is designed to assist the learning process of students with a view to enabling them to participate in simulated courtroom situations followed by feedback and recommendations for improvement. The materials included in Part II will serve as inputs in the efforts of students to present persuasive opening statements and conduct forceful direct and cross examination of fact witnesses and experts, and to successfully introduce evidence. The course material will emphasize practical solutions to typical problems that litigators encounter in the presentation of a case. The material does not, however, cover details which fall under courses on procedure and evidence.

General Objectives

At the end of the course, students are expected to:

- identify pretrial and trial phases of litigation in civil and criminal cases;
- explain the technical, ethical, evidentiary, procedural and substantive aspects of pretrial and trial lawyering;
- apply pretrial tasks;
- simulate tasks of a lawyer in trial of criminal cases;
- simulate tasks of a lawyer in trial of civil cases.

[1] The General Introduction and Specific Learning Outcomes are mainly taken from the course description of the syllabus with adjustments

Specific student learning outcomes

At the end of Pretrial Skills and Trial Advocacy, students should be able to:

a) explain the graduate profile of an LL.B graduate and relate it to pretrial and trial tasks of a lawyer;

b) discuss the legal method and relate its elements with pretrial and trial tasks of a lawyer;

c) define the concept of pretrial skills;

d) organize litigation planning;

e) structure fact investigations;

f) conduct client and witness interviews;

g) undertake legal investigation with regard to substantive and procedural laws;

h) explain case evaluation and strategy;

i) explain and simulate pre-trial negotiation and settlement

j) describe and illustrate pleadings and motions;

k) explain tasks involved in trial lawyering;

l) identify phases of the trial process in civil and criminal cases;

m) research, analyze and apply material facts, legal issues and relevant legal provisions;

n) write a persuasive analysis of legal issue that adheres to trial practice;

o) conduct direct examination, reexamination and cross-examination of witnesses;

p) orally present a client's position in a manner that conforms with trial practice.

Part I- Pretrial Skills

The first part of this course material includes six units. The first unit aims at laying down a foundation by highlighting the areas of performance that call for fundamental lawyering skills that are indispensable in the legal profession including the tasks involved in pretrial and trial lawyering.

Pretrial lawyering refers to various tasks that are required to be accomplished before litigation. It involves litigation planning (Unit 2), fact and legal investigation followed by case evaluation and designing litigation strategy (Units 3 and 4). The words 'lawyer' and 'litigator' are not synonyms because the former includes tasks far wider than litigation. Pretrial lawyering thus involves efforts to amicably settle the case (Unit 5) through alternative dispute settlement mechanisms such as negotiation. In case such efforts fail to come to fruition, however, lawyers resort to their ultimate option of drafting pleadings (Unit 6) which will then lead to litigation. Part I includes the following units:

Unit 1- Profile of Effective Lawyers

Unit 2- Litigation Planning

Unit 3- Fact investigation

Unit 4- Legal investigation, case evaluation and litigation strategy

Unit 5- Pre-trial negotiation and settlement

Unit 6- Pleadings

Unit 1- Profile of effective lawyers

Unit Introduction

Lawyers render services as attorneys, legal advisors, judges, public prosecutors, etc. in addition to which they may provide administrative services in the public or private sector. They may also be engaged in academic endeavours such as teaching. These services require subject knowledge, various skills and integrity. Lawyers who represent clients undertake pretrial and trial activities which require skills that need to be introduced in law schools and be further enhanced through services in the legal profession. These areas of competence are briefly discussed in the sections below.

The competency profile highlighted in this unit includes:

a) knowledge and understanding (of the laws, legal institutions and processes) upon LL.B graduation;

b) Ability towards identification, analysis, evaluation and synthesis of legal issues, relevant laws and relevant facts;

c) Ability towards subject application and problem solving;

d) Ability to identify and use primary and secondary legal sources and conduct research;

e) Ability to independent learning, research, analysis, opinions, reflections and conclusion;

f) Language proficiency and effective (oral & written) communication; and

g) *Other Key skills*: comprehension and usage of numerical or statistical forms, word-procession, using the internet and email, electronic information retrieval systems, and team work.

Section 1- Competency profile of LL.B graduates

The following reading states the *profile* of law graduates upon completion of LL.B Programme:

Reading 1

Graduate Profile[2] (expected upon LL.B graduation)

Law schools shall produce a graduate who should be able to demonstrate:

a) Knowledge and understanding of the principal features of the Ethiopian legal system including primarily the values, principles and policies of the federal and regional constitutions as well as international legal instruments; understanding of women's rights and ability to make significant contribution towards the promotion of gender equality in Ethiopia;

b) Ability to apply his or her knowledge to situations in order to provide (valid, but possibly arguable) conclusions for concrete problems;

c) Ability to identify accurately the issue(s) which require researching; identify and retrieve up-to-date legal information, using paper and electronic sources and use primary and secondary legal sources relevant to the topic under study;

d) Ability to recognize and rank items and issues in terms of relevance and importance; bring together information and materials from a variety of different sources; produce a synthesis of relevant doctrinal and policy issues in relation to a topic; make a critical judgment of the merits of particular arguments and present and make a reasoned choice between alternative solutions;

e) Ability to act independently in planning and undertaking tasks in areas of law which s/he has already studied; be able to undertake independent research in areas of law which s/he has not previously studied starting from standard legal information sources; reflect on his/her own learning, and to seek and make use of feedback;

f) Ability to understand and use the medium of instruction proficiently in relation to legal matters to present knowledge or argument in a way which is comprehensible to others and which is directed at their concerns and to read and discuss legal materials which are written in technical and complex language;

g) Ability to use, present and evaluate information provided in numerical or statistical form; to produce a word-processed essay or other text and to present such work in an appropriate form; to use some electronic information retrieval systems; and to work in groups as a participant who contributes effectively to group's task; and

[2] Standard 6, Reform on Legal Education and Training in Ethiopia, June 2006, pp. 57,58

h) Ability to understand his/her ethical responsibilities of a legal professional in roles assigned to such as judges, prosecutors, practitioners, legal advisors and public defenders.

Class Activity

a) Classify the areas of performance stated hereabove under knowledge, skills and attitudes.

b) Identify the ones that might fall under more that one category.

c) Which areas of performance are relevant to the tasks of a lawyer during the pretrial or trial phases.

Pair work

Discuss your views in pair.

Section 2- Sample benchmarks for LL.B graduates

Quality assurance schemes have been put in place in various countries so that the increase in the number of law students does not lead to compromised quality and standards in higher learning. Readings 2 and 3 show the profile of LL.B honours graduates in UK. The term '*honours*' doesn't represent cumulative grade point average (CGPA) but is rather based on the number of years in legal education. In Scotland, for example, three-year LL.B programmes are referred to as '*ordinary*', while the LL.B degree is awarded with '*honours*' if a student is a graduate in a four-year law curriculum. The last reading (i.e. Reading 4) states the competencies for the LL.B at University of Copenhagen, Faculty of Law.

Written assignment

1) Compare the following three readings with Standard 6 of the Ethiopian Legal Education Reform Document.
2) Think of a graduating class student whom you closely know, and give him the name X. Give him/her points based on your impression about his/her level in the areas of performance listed below. You may allot points which you feel are appropriate for each area of performance until the aggregate is 100 points.
    a) Subject-knowledge in most courses and general knowledge relevant to the legal profession
    b) Subject-application and problem-solving
    c) Ability to identify and use primary and secondary legal sources and conduct research
    d) Analysis, synthesis, critical judgement and evaluation
    e) Ability to perform tasks and conduct research with limited guidance, to reflect on ones own learning and make use of feedback

f) Ability in reading, comprehending complex concepts and effective communication (both oral and written)

g) Other key skills, i.e.

- Proficient use of word processing, libraries, online resources, and ability to specify technological tools needed for personal support
- Identify, gather and use relevant statistical and numerical materials
- Ability to work in groups.

Reading 2

Subject benchmark statement: Law

Quality Assurance Agency (2007, QAA 199 12/07) [3]

Areas of performance

Any student graduating with honours in law must show achievement in all of the following areas of performance, thereby demonstrating substantially all of the abilities and competences identified in each area.

Subject-specific abilities

Knowledge

A student should demonstrate a basic knowledge and understanding of the principal features of the legal system(s) studied. They should be able to:

- demonstrate knowledge of a substantial range of major concepts, values, principles and rules of that system
- explain the main legal institutions and procedures of that system
- demonstrate the study in depth and in context of some substantive areas of the legal system[9].

[3] http://www.qaa.ac.uk/academicinfrastructure/benchmark/statements/Law07.asp#appendD Accessed: December 13, 2008 (Serial numbers have been omitted)

Application and problem solving

A student should demonstrate a basic ability to apply their knowledge to a situation of limited complexity in order to provide arguable conclusions for concrete problems (actual or hypothetical).

Sources and research

A student should demonstrate a basic ability to:

- identify accurately the issue(s) which require researching
- identify and retrieve up-to-date legal information, using paper and electronic sources
- use primary and secondary legal sources relevant to the topic under study.

General transferable intellectual skills

Analysis, synthesis, critical judgement and evaluation

A student should demonstrate a basic ability to:

- recognise and rank items and issues in terms of relevance and importance
- bring together information and materials from a variety of different sources
- produce a synthesis of relevant doctrinal and policy issues in relation to a topic
- make a critical judgement of the merits of particular arguments
- present and make a reasoned choice between alternative solutions.

Autonomy and ability to learn

A student should demonstrate a basic ability, with limited guidance, to:

- act independently in planning and undertaking tasks in areas of law which they have already studied
- be able to undertake independent research in areas of law which they have not previously studied starting from standard legal information sources
- reflect on their own learning, and to seek and make use of feedback.

Key skills

Communication and literacy

Both orally and in writing, a student should demonstrate a basic ability to:

- understand and use the English language (or, where appropriate, Welsh language) proficiently in relation to legal matters
- present knowledge or an argument in a way which is comprehensible to others and which is directed at their concerns

- read and discuss legal materials which are written in technical and complex language.

Numeracy, information technology and teamwork

A student should demonstrate a basic ability:

- where relevant and as the basis for an argument, to use, present and evaluate information provided in numerical or statistical form
- to produce a word-processed essay or other text and to present such work in an appropriate form
- to use the internet and email
- to use some electronic information retrieval systems
- to work in groups as a participant who contributes effectively to the group's task.

Reading 3

(Levels and areas of performance) [4]

LEVELS OF PERFORMANCE

The minimum standard set here at the bottom of the third class would be treated by many institutions as disappointing performance, given the entry qualifications of their students, and it is not the outcome expected of them. But, since the students are graduating with an honours degree, which is itself a significant level of educational achievement, this statement tries to set out positively what minimally acceptable graduates are able to do. Relative to other graduates, they may be deficient; but they have demonstrated an important level of attainment which justifies the social standing of a graduate and the public and private investment in higher education. …

The concept of `satisfactorily' demonstrating achievement is critical and can only partly be captured in words. It depends on the professional judgment of examiners, informed especially by external examiners. They have to review the evidence presented by the student through the structure of the programme followed, the assessment on modules, progress files, student records and other processes and decide whether this is sufficient to meet the claims which this statement of standards makes for the minimum achievement of graduates. …

[4] http://webjcli.ncl.ac.uk/1999/issue2/aclec7c.html (Accessed: December 13, 2008)
Serial numbers have been omitted)

AREAS OF PERFORMANCE

The standards set out in the section on `Areas of Performance' are a minimum level of achievement required to pass an honours degree in any institution. In devising the statements of what their own graduates can do at the end of their own programmes of study, institutions are expected to include all the features listed below. However, institutions will also wish to describe the outcomes expected of their students in terms appropriate to their mission. …

How much must be achieved? The statement makes it clear that a student should demonstrate achievement in all of the seven area of performances. Within each area of performance there are often a number of specific items. Not all of these items must be demonstrated, but a student must have a sufficient level of achievement in that area taken as a whole and sufficient reliability of performance that a Law School can confidently state that s/he has substantially demonstrated the outcomes of that area of performance. Ultimately the question of sufficiency is a matter of judgement exercised by internal and external examiners.

Knowledge:

Legal system studied: This statement applies to the study of any legal system for which an English, Welsh or Northern Irish university awards its degrees, even if is not in the law of that jurisdiction. …

Questions have been raised as to whether an ability to compare the law in one jurisdiction with others should be a requirement. We believe this is desirable, but not a minimum requirement for graduation with an honours degree in every HEI.

The law of the European Union and of the European Convention on Human Rights and Fundamental Freedoms are relevant to most European legal systems as part of their domestic law and are not specified as separate requirements here.

Principal Features: The statements requires an overview of the main features and ideas involved in a legal system, rather than requiring detailed knowledge of every major branch of law. Within such a broad framework of knowledge, students can be selective as to the areas in which they engage in detailed study.

Study in depth: Unlike professional requirements, this statement does not require students to demonstrate depth of study in particular branches of law. This is for the student to choose within the framework established by a particular HEI.

Study in context: Within different kinds of degree programme, there will be different emphases on the context of law. Each institution would specify the kinds of context to which they would expect their students to relate their knowledge of substantive law. Study in context includes that a student should be able to demonstrate an understanding, as appropriate, of the relevant social, economic, political, historical, philosophical, ethical, and cultural contexts in which law operates, and to draw relevant comparisons with some other legal systems;

Application and problem-solving:

An ability to apply knowledge and to solve problems need not be demonstrated in relation to each subject studied. It is sufficient that a student can demonstrate with sufficient frequency an ability to apply knowledge. A student might demonstrate application through moots, law clinics, tutorial work, as well as through conventional problem questions in unseen examinations.

The Ormrod Report suggested that one of the three features of the academic stage of legal education was to develop an ability to handle facts and apply abstract concepts to them. This is certainly one of the aspects which Law Schools would wish to test in the area of application.

Sources and research:

There are a variety of ways in which this can be demonstrated. A dissertation may well be used in some law schools whereas others will set a number of assignments or projects over the course of the degree which enable a student to demonstrate ability to use primary sources and to undertake legal research. The structure of taught modules may require students to undertake independent research for seminars, even though the final assessment is by terminal written examination. The essential point is the evidence of research activity. In particular areas, it may well be appropriate to require students to engage in research which involves non-legal sources and materials, as well as legal sources.

Analysis, synthesis, critical judgment and evaluation:

These general intellectual skills are likely to be demonstrated pervasively through a programme of study, particularly in the final years. The essential point is that students should be required to undertake exercises (assignments, coursework, or examinations) which enable them to demonstrate that they have such abilities.

The skill of analysis requires, inter alia, that students be able to discriminate between the legally relevant and the irrelevant. Synthesis can be demonstrated through a variety of tasks, whether it be bringing together material studied in lectures, seminars and wider reading, or in bringing together material from different assigned reading or research.

Critical analysis is recognised as a key attribute of graduates. It involves the ability to identify flaws in an argument. This can be demonstrated in relation to a variety of tasks, e.g. commentary on a new case or article. In evaluation, ability to offer reasons for a point of view is essential, though the depth and fullness of the justification will not be very great. The panel considers it sufficient that the student can choose between the views of authors by adopting one of the perspectives with limited further justification, rather than requiring a developed personal point of view.

Autonomy and ability to learn:

This is perhaps the key feature of graduateness. The ability to learn and make use of learning in an independent fashion is what is generally taken to distinguish the final year student from the first year student. The learning activities required by a Law School

should be such that students should be required to demonstrate what they can do independently, rather than just demonstrating that they have learnt what they have been told. This can be demonstrated by the structure of a particular module. For example, all students may be required to study a module without lectures and which requires them to prepare material for seminars, not all of which is directed by the teacher. This could provide a basis of evidence on whether individual students are able to learn on their own with limited guidance.

Limited Guidance: Obviously, an independent learner will need some support and some broad structure within which to operate. The extent of guidance required will depend on a student's stage of development in the field and the complexity of the material. The independent graduate should be able to take the initiative to seek support and feedback.

Ability to reflect critically: A student should be able not only to learn something, but to reflect critically on the extent of her or his learning. At a minimum, a student should have some sense of whether s/he knows something well enough or whether s/he needs to learn more in order to understand a particular aspect of the law.

Key Skills [5]

Communication and Literacy:

Law students are expected to be good at both written and oral communication. Whereas written communication is assessed heavily by formal examinations, oral communication is demonstrated by a variety of compulsory and voluntary activities, e.g. tutorial performance or mooting.

Law students are expected to be able to read complex primary materials and to find the key statements from them. As such the statement here adds little to the requirement under sources and research, but merely makes clear the broader applicability of the skills used in that activity.

Numeracy:

Typically, law students demonstrate their ability to make use of numerical and statistical information in a variety of ways. Many legal subjects presuppose an ability to understand and make use of numerical and statistical information in sophisticated ways. In company law, succession or trusts, the student needs to be able to understand proportions in order to comment on the allocation of shares in companies, estates or trust arrangements, issues on the measure of damages also require understanding of numerical information. In subjects such as English Legal System or criminology, statistics might be used to demonstrate the effectiveness of civil justice or forms of crime prevention. The concern

[5] Further articulation of what might be involved in setting standards and assessing key skills can be found in the report of the Law Discipline Network on General Transferable Skills in the Law Curriculum (available on the Internet: http://www.law.warwick.ac.uk/ncle)

here is not the ability to undertake complex calculations, but to be able to use and evaluate the information provided as the basis of an argument.

Information technology:

Given the background of many students, many aspects of performance may well have been achieved before they arrive in university. The requirement is fairly limited. In terms of word-processing, the essential skills required are to be able to produce a word-processed essay or other text and to present such work in an appropriate form. Information retrieval systems may, but need not, include LEXIS. Standard information retrieval systems would include electronic library catalogues.

Teamworking:

A variety of activities can be used to demonstrate that students can work together in teams. Group projects are a typical way in which individual students provide evidence of their teamworking skills, but team negotiations or student-led tutorials would be other alternatives. Teamwork can be demonstrated not only by activities in class, but also on work placements or student-led court visits, as well as in some extra-curricular activities.

Reading 4

Competencies of the Bachelor of Law Degree Programme [6]

(University of Copenhagen, Faculty of Law)

1. Competency Profile

The LL.B. degree programme equips graduates to apply legal method within fundamental areas of the judicial system and to be able to understand the societal significance of the law.

On the basis of the knowledge and skills acquired by the Bachelor of Law Programme, the graduate will be qualified for admission to a relevant Master's degree programme or to occupy professional positions suited for those with a bachelor degree.

2. Competency Goals

2.1. Intellectual Competencies

An LL.B. graduate can:

2.1.1. Work independently, both individually and as a part of a team.
2.1.2. Work in a focused and structured way.
2.1.3. Work systematically, having the ability to differentiate correctly.
2.1.4. Plan own learning, including through the medium of a foreign language.
2.1.5. Familiarise independently with new issues and problems.

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[6] http://jur.ku.dk/pdf/uddannelsesservice/kompetencebeskrivelsebaogka-uk.pdf (Accessed: December 25, 2008)

2.2. Professional Competencies

An LL.B. graduate can:

2.2.1. Apply legal methods in order to a) Identify and comprehend fundamental legal issues, b) Analyse fundamental legal issues, incorporating relevant legal sour ces, and c) Incorporate societal concerns when solving legal issues.

2.2.2. Convey and formulate fundamental legal issues, both in writing and orally.

2.2.3. Argue for different legal solutions and make reasoned professional choice between these.

2.3. Practice Competencies

An LL.B. graduate can – when tackling legal issues within basic areas:

2.3.1. Evaluate whether a case is sufficiently elucidated.

2.3.2. Make decisions.

2.3.3. Counsel on legal options and implications.

2.3.4. Draft legal provisions.

Section 3- The Legal Method: Research, Analysis and Communication

Like all professions, lawyers have methods while performing their tasks. Lawyers retrieve legal facts, i.e. the relevant laws and facts that are relevant to a given issue or case). Secondly, lawyers critically analyse, interpret and apply the law to the given fact situation based on the issues involved in a case. The third component of the legal method is oral and/or written communication. This phase of written communication may take the form of legal opinion, a statement of claim, a statement of defence, charge, judgement, appellate brief, etc.

These three components of the Legal Method are crucial in all phases of lawyering including pretrial. Retrieval of facts involves identification of all facts, sources of proof, gathering evidence; and the retrieval of relevant laws requires exhaustive research into primary and secondary sources. [7] The second aspect of the legal method, i.e. synthesis of facts, laws and issues necessitate critical evaluation and analysis of the facts and laws gathered on the basis of the issues identified. In case of representation, for example, this task targets at resolving the problem from the perspective of the client.

The third element of the legal method, i.e. communication (both oral and written) at the pretrial phase applies not only to writing up pleadings but also involves pretrial activities such as negotiations and settlement. Moreover, communication skills are indispensable during client interview, witness interview, writing notice to the other party, and during the preparation of written request to various institutions while gathering evidence.

[7] As discussed during various courses (such as Legal Research Methods) primary sources are the laws themselves while secondary sources mainly refer to commentaries, treatises, etc.

Reading 5 [8]

The Legal Method

"Legal Method" is an expression to describe the fact that the practice of law at all levels and in all places of employment requires a methodology whereby each participant in the process must properly research and find the law, interpret the law, explain the law to others, and, if that is your role in the legal process, to advocate a certain interpretation of the law that may require the law to be modified, revoked, or extended. This process fits within the three general terms of legal method: **research, analysis and communication.** …

The Role of a Lawyer

The nature of lawyering is to determine what the law is and how it is likely to affect a 'client' in a given situation. … The client can be a person or business entity that hires the lawyer, or a private or public entity that employs the lawyer, or a court or judicial body in which the lawyer is employed. A good lawyer in each of these sectors can tell you what the current law is, predict how the law will work in various real or hypothetical situations, and advise the 'client' on what to do or what to avoid doing in those situations.

When a person goes to a medical doctor's office, they often chat for a while about their problems, called 'symptoms' in that context, and the doctor may or may not do some fact gathering on his or her own, through a physical examination or by questioning the person. At the end of the visit, the doctor tells patient what he or she thinks the problem is and prescribes a solution. Medical doctors do not often create the impression that they have to scurry off to their library or jump on the computer very often and look up the problems that their patients are having and the probable solutions to these problems.

As a lawyer, you will not enjoy that luxury. Rarely, will you know what the law is ahead of time. You will know a great deal of legal principles in many areas of the law, and a number of actual legal rules of general and specific application, but these will not be enough to answer even the average question that reaches your desk. What usually happens is that a client or a supervisor will come into your office with a problem that has legal implications, and you will listen to the problem, ask questions to gain additional information relating to the problem, and then go to your sources in the library or on-line and attempt to figure out what to do or what will happen based on the law that applies to the problem. Occasionally, you will have had this exact issue come up recently, and you will already know what happens and what to do about it. When this happens, you should gloat and enjoy a momentary feeling of great wisdom and power, and then go and double-check yourself by looking it up and making sure you still are the master of this legal information.

The process of finding the law - (i.e.) looking it up, finding the proper sources, compiling the information, following up the leads, and using what you have found to find other

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[8] Michael D. Murray and Christy H. DeSanctis (2006) *Legal Research and Writing* (New York: Foundation Press) pp. 1- 4

sources- is the first essential skill of a lawyer, which is referred to as **research.** The process of determining what legal issues are implicated by the facts of the problem and what sources should be consulted, reviewing and analyzing what these sources say, and reaching a conclusion about what the law is regarding the problem, is the second essential skill, referred to as **analysis**. The third part of the process is being able to communicate your findings to a variety of persons. (These persons may be) your colleagues where you are working, senior lawyers in your firm, your clients, the courts, your opponents, and various governmental or regulatory bodies. … This skill will be referred to as communication …

Written Assignment:

The reading above clarifies the three elements in the legal method. Summarize the reading and relate the theme to the tasks of a lawyer at pretrial and trial phases of a case based on what you have studied in the courses of Civil Procedure and Criminal Procedure.

Unit 2- Litigation Planning

Unit Introduction

Litigation is the last option that lawyers resort to in the resolution of a client's case. This is so because litigation involves a heavy cost in terms of expenses and time. There are cases whose outcome is obvious in light of the facts involved and the laws that are applicable to the issues. A lawyer who takes up such cases to litigation subjects his/her client to court fees, lawyer's fee, and other cost. Such lawyers might obtain some fee despite their loss of a case, but ultimately they lose goodwill, credibility and reputation. Thus lawyers are expected to take a case only where there are points of fact and/or law that warrant litigation.

A lawyer who decides to take a case *primarily* makes sure that the terms of client-attorney relationship is determined. This involves material facts regarding the representation and determination of mutual obligations. *Secondly*, the lawyer examines (short and long-term) needs and priorities of the client. For instance, whenever litigation adversely affects a longstanding social or business relationship, the lawyer advices the client to focus on long-term impact rather than short-term outcomes of a given litigation thereby suggesting out of court settlement than litigation.

The *third* element in litigation planning is analysis of potential claims and remedies along with an equally important analysis of possible defences and counterclaims of the other party. Fourth, the lawyer is required to assess likely sources of proof that are evidence in favour of the client. This involves interviewing witnesses, obtaining documents and records and other data, expert review, and other pertinent reliable and valid evidence.

Section 1- Pretrial legal service observations

Pre-trial (legal service) observation assignment

You are expected to go to any office and ask a lawyer what s/he does before the trial phase. You are advised to choose a task which you intend to join upon graduation or anytime in the future. You are expected to state the date and the person you talked to. Write your report in not more than three hundred words.

The following are two sample pre-trial observations made by graduating class students in December 2006:

Sample pretrial observations

Pre-trial Observation Report 1

Date: December 26th 2006

Venue: National Bank of Ethiopia

Submitted by: Yidnekachew D.

This is a report of Pre-trial observation based on my observations at the National Bank of Ethiopia and my discussion with Ato Dawit Zergaw, Head of the Litigation Division.

1. NBE as respondent

When the National Bank of Ethiopia is involved in cases as defendant, the case is referred to the Litigation Division of the Legal Department.

a) In labour cases, the Record Office refers the case to the Administration and the latter, after having screened cases, passes it to the Litigation Division.

b) In cases other than labour, the Record Office directly refers the case to the Litigation Division.

The Litigation Division then identifies the issues of fact and legal issues. This facilitates the efforts of the Division to exhaust all available means of solving the case without going to litigation. Where the only option becomes litigation, the Division gathers information from pertinent organs of the National Bank of Ethiopia and other sources. Most cases require information from Accounts Department in cases other than labour.

And the Litigation Division will conduct legal investigation and examines the relevant laws along with gathering documents from the relevant sources.

2. NBE as plaintiff

When the National Bank of Ethiopia is a plaintiff, the case may be initiated by other departments or by the Litigation Division. After a case has been initiated the Division examines the advantages of filing the case in court and the disadvantages in doing so. After the issuance of notice, efforts are made to solve the problem amicably out of court. Where the Division decides to resort to litigation, it determines its claims, the factual and legal basis of the claims and identifies the remedies it seeks from the judicial proceeding. Thorough assessment is made regarding the laws that directly regulate the functions of the National Bank of Ethiopia and other laws that are applicable, based on which a statement of claim is prepared with all the relevant evidence annexed.

Pre-trial Observation Report 2

Date: December 27th 2006

Venue: Offices of attorney in front of Oromia Supreme Court, Sidist Kilo (on December 23rd 2006, and near St. George's Church on December 26th 2006)

Submitted by: Teferi B.

In both offices that I observed, the attorney, after exchanging greetings interviews the client to disclose the facts. Some clients were too shy to tell the facts in detail, and the attorney thus raises various questions for facts that determine the outcome of the case. As I have been told by both attorneys, they will relate these facts with the law.

1. Civil Cases

The client is party plaintiff, if he/she has vested interest (cause of action) in the subject matter of the suit.[1] And for the client to be party defendant, the plaintiff should allege some claim against him/her.[2] If the client has no vested interest in the subject matter, or if there exists vested interest but no sufficient evidence to prove the claim the attorney advises the client not to take the case to court. Examples include unlikelihood of obtaining a favourable judicial decision, lapse of period of limitation and the like. Under such circumstances the attorneys advise their clients to handle the case though alternative dispute resolution methods. …

Where clients have cause of action, in case the period of limitation has not lapsed and if evidence (i.e. witnesses and documents) are available the attorneys prepare statement of claim in accordance with Articles 222, 223 and 92 of the Civil Procedure Code. The Statement of Claim is submitted to the Registrar of the Court [3] who then causes the

[1] Civ. Pro. C., Art. 33 (2)
[2] Civ. Pro. C., Art. 33 (3)
[3] Civ. Pro. C., Art. 230

particulars of the suit to be entered in a book called the Register of Civil Suits. [4] And finally, the case is referred to a judge.

If the client is party defendant, the attorney prepares preliminary objections[5] of statement of defence based on the claims made by the plaintiff in the statement of claim.

2. Criminal cases

A client may come to an attorney even in criminal cases. In such situations, the attorney refers the client to the police as the plaintiff is the government. The case is reported to the police. The latter will make investigation and then send the case to the Public Prosecutor [6] which is entrusted by the law[7] to do one of the following:

a) draw a charge and send it to court
b) order the police to undertake further investigation, or obtain additional information, or,
c) refuse to institute the case.

3. Comments

Both attorneys go directly to the discussion of the case with the client after greetings. They should have given some time for casual talks before resorting to the case.

The attorneys I observed allow other persons to be present during their discussion with their clients, thereby denying privacy to the client who needs to talk to the lawyer in private. This is not of course a problem with regard to higher level lawyers who do not share an office space with their secretaries or other persons.

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[4] Civ. Pro. C., Art. 211
[5] Civ. Pro. C., Art. 244
[6] Crim. Pro. C., Art. 38
[7] Crim. Pro. C., Art. 42

Section 2- Reading on Litigation Planning

Organizing litigation planning [8]

Litigation planning deals with two basic questions. First, what overall litigation strategy will best serve the client's realistically attainable goals? Second, how does each piece of the litigation plan contribute toward achieving those goals? Addressing these two questions early, and constantly keeping the answers to them in mind will do much to develop and implement an intelligent, realistic litigation plan.

An effective litigation plan obviously requires structure. That structure should trigger the important thinking, at the right times, so that you will not 'miss the boat' during any step n the litigation process. The basic steps in this plan are listed (below): …

- Establish the terms of the attorney –client relationship
- Determine the client's needs and priorities
- Determine the elements of potential claims, remedies, defenses and counterclaims
- Identify likely sources of proof.
- Determine what informal fact investigation is necessary
- Determine what formal discovery is necessary (N.B- inapplicable in Ethiopia)
- Identify solutions
- Develop a litigation strategy
- Make litigation cost and timetable estimates
- Use a litigation file system.

1. Establish the terms of the attorney-client relationship

The first step in any litigation plan is to formally establish the attorney-client relationship. This must be done through a written agreement, unless the client is a regular cent with whom you have an established business relationship, because an attorney-client agreement is a contract between the attorney and client, and the general contract principles apply.

The agreement should spell out who the client is, who will do the work to the client, what work will be done, how you will be compensated and when the client will be billed for costs and legal work. All too often either a clear understanding with the client is never reached or all likely issues are not covered, causing serious problems later. Representing a client in litigation is difficult enough without adding client relationship problems adding to the difficulties.

Before entering to agreements of course, your must first decide if you should take the case. In a simple case you can frequently make and intelligent decision after interviewing the potential client and reviewing available records. For example, in a personal injury

[8] Thomas A. Mauet (2005) *Pretrial*, 6th Edition (New York: Aspen Publishers), pp. 3 -17 with omissions. Some explanatory or supplementary reading footnotes have been omitted.

case arising out of an automobile accident, you can probably determine whether the client's case has merit by interviewing the client to get the history of what happened, and by reviewing available records, such as police reports and medical records. In more complicated cases, substantial factual and legal investigation may be necessary. For example, in a medical malpractice or product liability case, the common practice is to send all the records about the patient or product to an appropriate expert for evaluation before deciding whether to take the case. …

2. Determine the client's needs and priorities

People seek out lawyers when they have problems that need to be managed and solved. The lawyer, therefore, should first identify the client's problems and needs, viewing them broadly. The client's needs, seen from his perspective, may well be in conflict with possible solutions; however, finding out what the client wants to have happen is the beginning step in dealing with the problem that brought him to a lawyer in the first place.

Keep in mind that the client's needs must be considered in the long-term as well as in the immediate sense. Clients often demand a lawsuit against every imagined wrongdoer; when any lawsuit may be against the client's best interests. You need to assess what can be gained by a lawsuit, and then see how a suit would affect the client in the long term. For example, consider the frequently encountered situation of a client who wishes to sue another party with whom there is an ongoing business relationship. While the particular matter may have merit, suing the other party may put in jeopardy that valuable relationship and adversely affect current deals with that party. A lawsuit that may vindicate the client on one deal may not make sense when viewed in light of the overall picture.

You will also need to assess the client's priorities. Clients rarely get everything they want, so they must develop a scale of priorities that will help you fashion the litigation strategy. For example, suppose your client wants to sue another party over a contracts dispute. Does she want a quick, inexpensive resolution to preserve an ongoing relationship? Does she simply want the other party to live up to the agreement, or is she primarily interested in money damages because she considers the relationship destroyed? These possibilities must be arranged to reflect their relative importance to the client before you can sensible decide how best to help that client. …

3. Determine the elements of potential claims, remedies, defenses and counterclaims

The initial client interview will often identify the legal areas involved. At this early stage, however, it is better to think expansively and consider all legal theories that might apply to the case. …

After you have identified the possible applicable legal theories, determine what the legal requirements are for each theory. …

The same type of analysis mist be made for remedies. The availability of remedies is related to the choice of claims, and some remedies are broader than others. For example, in a contract dispute, contract damages will be an available remedy. However, if the dispute has fraud aspects, you may be able to bring a business tort claim and have broader damages rules apply. …

Potential counterclaims must also be considered. Before bringing a lawsuit, always check on what the other side has against your client. This is particularly important in commercial litigation, where the parties have dealt with each other many times over a period of time. There is little point in starting a lawsuit if it succeeds in provoking a large, previously dormant counterclaim. …

After you have identified the possible legal theories and the elements of each or them, it is best to set up some type of litigation chart, or diagram, to list the theories and elements. For experienced litigators planning routine cases, this may not be necessary. New litigators, however, should develop a chart system to systematically analyze cases from the beginning by correlating the elements of claims, defenses and counterclaims, sources of proof, … fact investigation … . When fully developed, the litigation chart will form the basis for your trial chart, should the case eventually go to trial.[9]

Example:

You represent the plaintiff in an automobile negligence case. [10]

Litigation Chart

Elements of Claims, Defenses, and Counterclaims	**Sources of Proof**	**Informal Fact Investigation**
1. Negligence		
a) negligence		
b) causation		
c) damages		
1) lost income		
2) med. expenses		
3) disability		
4) pain and suffering		

The chart should be continued for each potential claim, defense, and counterclaim. …

4. Identify likely sources of proof.

Most litigation involves events or transactions that have occurred in the past. The likely sources of proof will be centered on those witnesses who have some knowledge of, and exhibits that contain information about, past events or transactions.

The usual witness sources include your client, other witnesses to the events or transactions, the opposing parties, witnesses who have no direct knowledge of the events or transactions but may have useful circumstantial information and experts. Exhibit sources include physical objects, photographs, police reports, business records, transaction documents, and any other paperwork that has bearing on the events or

[9] See T. Mauet, Trial Techniques, § 103 (6th ed. 2002)

[10] The elements of negligence claims are duty, breach of duty, proximate cause, injury, and damages. Duty is a legal question, however, so the terminology used here fits more to the trial proof.

transactions involved. At this stage it is best to think expansively. Develop a long, thorough list early and refine it over time.

Finally, list the likely sources of proof of the elements of each possible legal theory on your developing litigation chart.

Example:

Litigation Chart

Elements of Claims, Defenses, and Counterclaims	**Sources of Proof**	**Informal Fact Investigation**
1. Negligence		
a) negligence	plaintiff police officers bystanders defendant	
b) causation	plaintiff defendant treating doctors police officers police reports	
c) damages		
1) lost income	plaintiff employer employment records	
2) med. expenses	medical bills treating doctors pharmacy bills	
3) disability	plaintiff treating doctors employment records	
4) pain and suffering	plaintiff treating doctors	

5. Determine what informal fact investigation is necessary

Once you have identified the likely sources of proof, you then need to decide how to acquire information from those sources. …

… It is vitally important to acquire as much information as possible *before* filing a suit. … As a defendant, you will most likely begin (fact investigation) after the suit has been filed, but you should still consider informal sources of proof. … {T)he lawyer make(s) a 'reasonable inquiry' to determine if a pleading is well grounded in fact before signing the pleading.

Informal fact investigations are principally conducted by interviewing witnesses and obtaining documents, records, and other data from willing sources, and getting expert reviews of the case. These investigations have advantages and disadvantages. On the plus side, they are relatively quick and inexpensive and can be done without other parties being present. This is important because evidence can become lost unless identified and obtained quickly. On the negative side, while such investigations can yield important information, it is usually not developed in a way that makes it directly admissible at trial. For example, taking a written statement from a witness during an interview does not normally create a statement that is admissible as an exhibit at trial. At best, the statement is useful for impeachment.

When you have identified the witnesses and exhibits that are best reached through informal investigation, note on your litigation chart how you plan on getting the necessary information from those sources:

Example:

Litigation Chart

Elements of Claims, Defenses, and Counterclaims	**Sources of Proof**	**Informal Fact Investigation**
1. Negligence		
a) negligence	plaintiff police officers bystanders defendant	interview interview interview
b) causation	plaintiff defendant treating doctors police officers police reports	interview interview interview request letter
c) damages		
1) lost income	plaintiff employer employment records	interview interview request letter
2) med. expenses	medical bills treating doctors pharmacy bills	pl. possession interview pl. possession
3) disability	plaintiff treating doctors employment records	interview interview request letter
4) pain and suffering	plaintiff treating doctors	interview interview

6. Determine what formal discovery is necessary (N.B- inapplicable in Ethiopia)

(*Omitted* owing to its remote relevance to the Ethiopian legal system)

7. Identify solutions

There are many ways to deal with conflict, and litigation is only one of them. Before a decision to litigate is made, a client's problems should be considered in broad terms to determine what approach will best serve the client's immediate and long-term interests. The best approach must be arrived at through discussion with the client, with whom the decision about what to do ultimately rests. There are several basic possibilities:

1. Do nothing
2. seek an informal resolution
3. seek formal dispute resolution
4. Litigate.

Doing nothing should always be considered. The case may simply be a high risk case. The amount realistically recoverable may not be enough to justify the financial cost of seeking it. In addition, the non-economic costs should always be assessed. Your client may not have the resolve to get involved in a lengthy fight. He may not want to take his time, and that of others, away from other pressing concerns. He may have more important ongoing business, professional, or personal relationships with the adversary. Finally, negative publicity surrounding the disputed matter may make litigation prohibitive. If you decide nothing to be done, let the client know and get his agreement in writing so you can formally end the case and your representation.

If your client decides to push ahead, you should always consider resolving the dispute informally. Your adversary may also wish to avoid a lengthy, expensive battle. He may admit liability, and dispute only damages. It is always worthwhile to look at informal solutions before battle lines are drawn.

If informal solutions are impossible, think next about alternative dispute resolution, such as mediation, arbitration …. These can be relatively quick and inexpensive, and frequently are required in commercial contracts. By getting an impartial, experienced outside party involved, the adversaries can frequently get advisory opinions or binding decisions on both liability and damages.

The last possibility is formal litigation. Keep in mind that litigation is expensive and time-consuming and that even the winning litigant is rarely made whole. These realities must be driven home to the client. The worst thing that can happen is for a lawyer to quickly yield to a client's insistence to sue, only to have that client become disinterested, then uncooperative, as the realities of litigation set in. The only safe way to do this is to develop a litigation strategy, litigation budget, and litigation timetable and have your client approve them before starting the lawsuit. …

8. Develop a litigation strategy

Up to now you have been thinking expansively, to ensure you are not 'missing the boat' on anything that might influence the case. If you and the client have decided that litigation is the only solution, it is time to focus your thinking and begin making choices.

Assume that your client has valid claims, that attempts to resolve them informally have failed, and that the client agrees that the only recourse is formal litigation. What do you do now?

Everything you do in litigation must have a purpose. A common mistake inexperienced litigators make is to conduct litigation mechanically so that it becomes an end unto itself, rather than becoming a means to an end. Always, ask yourself two questions. What are my client's goals in this lawsuit? How does each thing I do help achieve those goals? Only if you constantly focus on the desired result will the individual steps in the process help achieve it. Perhaps the easiest way to think of litigation strategy is to consider its principal parts.

1. where can I file the lawsuit?
2. what claims, defenses, or counterclaims should I plead?
3. …
4. What motions should I plan?
5. When should I explore settlement?

First, where can you bring the lawsuit? …

Second, how 'big' a lawsuit do you want? The decision centers at the pleading stage. There is a world of difference between a simple contract case involving two parties and a complex commercial case involving multiple parties. You have to keep in mind the consequences of your pleadings. Multiple claims frequently require multiple parties, which in return usually generate extensive pleadings … and motions … . Also, litigation must be cost conscious. Inexperienced litigators sometimes allege every conceivable claim, with the result that the client becomes immersed in expensive, time-consuming litigation which may not be in his best interests. This is the time to review your litigation chart, see which claims and remedies are the most meritorious, and structure a lawsuit that will serve the client's objectives and that is feasible in light of the client's economic resources.

As plaintiff, when you have decided on appropriate claims and remedies, you must determine where, and against whom, you can bring the suit. … (T)here are several procedural issues that must be considered:

1. What parties must or can I Join?
2. Will I have subject matter jurisdiction over the claims?
3. Will I have personal jurisdiction over the parties?
4. Where will the proper venue lie?

Asking and answering these questions is critical because they determine what actions can properly be brought in a particular court. The questions are interrelated. …

… Your motions strategy must be part of, and coordinated with, your overall litigation plan. …

Finally, when should you explore settlement, if your opposing party doesn't? Since 95 percent of civil cases are settled before trial, you need to think through what your position on settlement should be at those points when the issue is likely to come up. This includes assessing the 'value' of the case at various times, as well as the financial and emotional

benefits of settlement. The likelihood of a settlement, particularly and early one, will also affect your handling of the litigation and the relationship with your adversary. …

9. Make litigation cost and timetable estimates

A litigation cost estimate is something every litigator should make in every case. The client, particularly a sophisticated one, will always ask: "How much is this going to cost me?" All clients, except those whose cases are on a contingency fee basis, will ask this question sooner or later. You should give your client an estimate of likely costs *before* starting the litigation and get the client's approval, keeping in mind that you are dealing with an estimate, not a guarantee, and that you do not have complete control over costs.

Creating a litigation budget forces you to develop a realistic litigation plan and assess the tasks required at the beginning of the case. Over time, you will become more accurate in estimating how much time and cost the various parts of the process will likely require in a particular type of case. …

The cost estimate should be broken down by basic litigation categories. For example, in a simple personal injury case your estimate may be as follows:

Litigation Cost Estimate

Facts and legal investigation	15 hrs
Pleadings	5 hrs
…	
Motions	20 hrs
Pretrial memorandum and settlement	20 hrs
Trial preparation and trial	60 hrs

…

As plaintiff's lawyer, even though you will usually handle a personal injury case on a contingency fee bass, preparing a cost estimate is still useful to determine if taking the case makes economic sense to you.

The last step n the litigation plan is to create a realistic timetable that will control the litigation. As plaintiff, you have substantial flexibility. Unless there is a statute of limitation problem, a short notice of claim period, or a particular reason to file suit quickly, you will have the advantage of time to think through your litigation plan before filing the complaint. Once the complaint is filed, the litigation timetable is largely controlled by procedural rules and judges' practices. …

When you have structured a realistic timetable for your litigation plan, it is best to plot it out on a calendar to ensure that you don't omit any steps or lose track of when particular steps should be taken. …

Every client will ask: "How long is my case going to take?" Keeping in mind that your timetable is an estimate, not a guarantee, you should let the client know what your best estimate is, revising it later if necessary. …

10. Use a litigation file system

The last step is to develop and use a system for organizing your litigation files. There is no magic in doing this. Most law firms have systems for the types of cases they routinely handle. The important point is that your system must be logical and clearly indexed to reflect the kinds of materials your cases will generate. It should be in place when litigation starts. The more lawyers and paralegals that work on one case, the more important it is to use a good file system.

Litigation files are usually divided into several categories. The files should have tabbed dividers for each category, and categories may be further divided. …

Certain paperwork, such as pleadings, orders, and correspondences should be clipped together in chronological order with the most recent on the top. Original evidence, such as bills and correspondence, should be put in clear plastic sheet protectors so that the originals will not be marked during the litigation process.

11. Conclusion

This overview chapter has discussed the basic sequential steps in litigation planning. The critical concept is that every step of that plan is interdependent with every other. Each step you take influences what happens later, and the various steps you take will make sense only if they are part of an overall plan. When you are immersed in the technical details of any particular step in the process, it is easy to lose sight of the overall plan. Consequently, before doing anything, always ask yourself two questions. Why am I doing this? How does it promote my overall litigation plan? If you never lose sight of the big picture and keep your long-term objective in mind, you will have a much better chance to conclude your litigation with satisfactory results.

Review Exercises [11]

The vessel Green Glory was scheduled to land at Djibouti on 16th of October 2001. Gift Trading Private Limited Company assigned its clearing agent Addis Asqual Transit and Trading PLC to clear 2,770.45 tons of steel from Djibouti and to undertake customs clearing tasks and then have the goods transported to Addis Ababa. Addis Asqual entered into contract with Shebele Transport Share Company for the transportation of the goods to Addis Ababa. The Shipping Agent of the Vessel Green Glory (i.e. Massida Shipping Company) had informed Gift Trading Company that the vessel will arrive at Djibouti port on 16th of October 2001. The maritime transport was arranged by Ethiopian Maritime and Transit Enterprise in its capacity as the agent of Gift Trading PLC.

Trucks of Shebele Transport Company (the number of which has been contested) were ready at Djibouti Port for direct loading from vessel to trucks so as to minimize Djibourt port dues. But, on October 15th 2001, the vessel had to proceed to and undertake repairs at Alexandria (Egypt) due to damage that couldn't be repaired in a short time. Nor was it (under the circumstances) possible to load the cargo in another vessel and have it transported to Djibouti within a reasonable time. Thus, Gift Trading Company had no option other than selling the goods at Alexandria to minimize the extent of the damage to be incurred.

Task 1 (Individual Activity: Home work)

Underline the party that you represent

a) Shebelle Transport Share Company
b) Addis Asqual Private Limited Company
c) Gift Trading Private Limited Company

1. State the potential claims/ defenses of your client (Four lines)
2. What are the potential claims/ counter claims/ defenses of the other party. (Four lines)
3. Analyze the material facts and the major legal issues involved in the case:

   3.1- Facts

   a) What happened (Four lines)
   b) Where and when did it happen (Two lines)
   c) Why/how did it happen (Two lines)

[11] The tasks are based on material facts in a dispute that involved three companies (Shebelle Transport Share Company, Addis Asqual Transit and Trading Private Limited Company and Gift Trading Company Private Limited)

3.2- Law

a) Points of law in favour of and against your client (Two lines)
b) Relief (Two lines)
c) Procedure (Two lines)

4. Write a legal opinion addressed to your client.

Task 2: Group activity

Students are expected to group themselves into units comprised of six lawyers. Each group will have three teams of lawyers (with two members in each team) who represent:

a) Gift Trading Company
b) Addis Asqual Transit and Trading Private Limited Company
c) Shebele Transport Share Company.

Each team is required to:

a) Produce a written document that states terms of attorney-client relationship
b) State and analyze your client's needs and priorities
c) Identify potential claims and remedies
d) Identity potential defences and counter claims, and
e) Enumerate likely sources of proof.

Task 3: Drafting Notice and Reply to Notice

1. In case you represent Shebelle Transport Enterprise (Later renamed Share Company), write a notice (dated October 22nd 2001) to Addis Asqual PLC requesting payment of damages. Submit the notice to a student who represents Addis Asqual PLC. The number of the trucks that were sent to Djibouti has been contested and you may state a hypothetical number of trucks.
2. To students who represent Addis Asqual:
   a) Write a reply to the notice you have received from Shebelle Transport's lawyer.
   b) Is it necessary to write a letter to Gift Trading? If so do so and submit it to the student who represents Gift Trading.
3. If you are the lawyer of Gift Trading write a reply to the notice

Task 4

On October 22nd 2001, Shebelle Transport Share Company claimed to have sent 92 trucks to Djibouti on October 15th 2001 and that it has incurred damages because

the trucks have not been able to render other transport services and generate income to Shebelle Transport SC. The concluding paragraph of the notice states that it will proceed towards demanding payment of damages incurred. If you were Addis Asqual's lawyer:

a) Do you consider the letter as a notice given in accordance with Article 1772 (*et seq*.) of the Civil Code?
b) Should you respond to the letter? If so, draft the reply submitted to you by Shebelle SC's lawyer.

Task 5

On the same day, i.e. October 22nd 2001, Addis Asqual wrote a response to Shebele transport stating that the occurrence was beyond its control thereby constituting force majeure.

a) The parties to the contract of land transport services are Addis Asqual and Shebelle Share Company. And, the maritime transport was arranged by Ethiopian Maritime and Transit Enterprise. Is the company that owns the vessel (Green Glory) a third party (to whose act Addis Asqual is not responsible) thereby enabling Addis Asqual to invoke Article 1793(a) of the Civil Code?
b) Under what circumstances can the damage to the vessel (Green Glory) be considered unforeseeable and insurmountable?

Task 6

Efforts were made by Addis Asqual and Shebelle Transport to minimize damages. Accordingly, thirteen trucks managed to load other cargo from Djibouti and there is a very wide opportunity for Shebelle Transport to conclude series of upcoming contracts with Addis Asqual for cargo transportation from Djibouti. Assume that you are Shebelle's lawyer, and list down the advantages and disadvantages of taking the case to litigation.

Supplementary Reading

Supplementary Reading 1

10 T.M. Cooley J. Prac. & Clinical L. 205

Thomas M. Cooley Journal of Practical and Clinical Law Hilary Term 2008

(*Omissions indicated by dots*)

Gilbreath's Paradgm: Helping your clients understand what they are getting into with this lawsuit

John S. Gilbreath, Jr., Scott Waldron [FNa1]

> Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser-in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.
>
> Abraham Lincoln [FN1]

I. Introduction

Clients visit an attorney with the expectation that the attorney will solve their legal problems in the same manner in which a physician eradicates a patient's medical problems. Clients expect a particular outcome when seeking legal counsel: part of this expectation is a day in court. Many clients believe that a judge will hear the facts of the case and automatically rule in the clients' favor. Clients, typically, believe that litigation is quick and inexpensive because clients do not fully understand what happens in the litigation process.

Clients expect the attorney to handle all aspects of the case. Some clients believe that once the attorney is hired their only obligation is to appear in court. Part of this perception, the inevitability of prevailing and the omnipotence of "my attorney," is based on clients' emotional attachment to their subjective position. Money and economics directly bear on clients' attitudes. If clients understand the amount of time and money spent on litigation, clients may be likely to reconsider their legal position-especially when clients learn that a monthly bill will arrive.

***206** An effective lawyer will be up front with clients about the costs involved in the litigation process. A lawsuit can be financially draining and have unexpected emotional costs. Clients often get caught up in the adversarial process and lose sight of the mental and emotional toll associated with protracted litigation. For example, two small businesses with a long-standing relationship can forget that they may need to conduct business in the future. In a divorce, many litigants fail to appreciate the unintended aftermath of a bar-room, brawl-style divorce proceeding on themselves and their family members. If clients understand the litigation process and its inherent costs and tensions, clients will be in a better position to choose the best resolution for their unique situation. There are situations where litigation and trial are unavoidable, but in the end the clients need to understand all of the possibilities.

Practicing attorneys are always cognizant of clients' monetary, litigation costs because the costs may also affect the lawyer's business. A critical component of the litigation process is a lawyer's knowledge of the client's resources and financial situation. … By explaining the relationship between the litigation process and litigation costs, clients will understand that the attorney is considering their best interests. In a private-practice setting, a client may advance $5,000 to retain the attorney's services and to prepay litigation expenses. The attorney should deposit the client's retainer into a separate bank account in trust for the client. As necessary, the attorney will withdraw funds from this separate account in order to pay for litigation costs.

A problem could arise if the $5,000 is exhausted before the client's case is ready for trial. If this occurs, the client must advance more money to allow the attorney to continue the client's case. Even if the client signs a comprehensive retainer agreement, the client may not understand why a subsequent advance is required. Therefore, the attorney should explain how unforeseen expenses may accumulate in order to prevent the client from feeling cheated later on. Sufficient ***207*** communication will reduce the public's stigma of lawyers as sharks that prey on clients' bank accounts. [FN2]

The generalized experiences described above were the impetus for the creation of Gilbreath's Paradigm. [FN3] … Gilbreath's Paradigm applies to all varieties of litigation because it focuses on the individual client's perspective. As an example, the meaning of cost may be entirely different for a city planner who views his life in terms of hours as opposed to a paying client. But, it is important to note that Gilbreath's Paradigm is not about discouraging anyone from having their day in court. However, clients need to know the consequences of arriving there. …

II. Client Interview

Every case begins with a client interview. The client expects, or hopes, for a particular legal resolution when walking into an attorney's office. The client thinks that the client's case will always ***208*** arrive at some judicial hearing. Simply put, the client expects a day in court. This notion stems from the basic need everyone has to be heard. One of the clients' most important objectives is satisfying this need to be heard. The attorney can help satisfy this need by listening carefully to the client.

However, the attorney needs to listen to the client through a filter. That means evaluating and discussing all the client's needs throughout the interview. At the interview, the attorney establishes a relationship with the client, and the attorney must understand the legal framework surrounding the client's particular issue. It is the attorney's role to communicate with the client.

In some cases, an attorney's intervention is not always the appropriate solution. Sometimes, the client's needs are best served by advising the client to resolve the issue by talking to the other party. The client should be advised that this is the least expensive way to resolve an issue. The result is that the client will have spent time and money (if any) only in the initial interview. And, the client still has control over the direction of their case. Even though a judge has not heard the client's case, the client has received a legal opinion, sanctioning the client to pursue the client's own course of action. This opinion is empowering. The client leaves having learned that a trial, in this case, is expensive, and the litigation process can be protracted. The client has also learned that the attorney can be trusted and, with some knowledge, the client can resolve the issue independently.

Consequently, a client learns that receiving legal advice does not always mean that a lawsuit will be filed.

In all cases, no matter who the client is, whether a person or a municipality, the attorney is still talking to a person. The attorney is conducting an interview, and it is critically important to understand the core issue immediately. An effective technique is to ask the client what the case is about. After the client explains it, the attorney should repeat the story to ensure accuracy and to encourage clarification.

Too often, attorneys interrupt clients and project their own anxieties and concerns into the case. This is disastrous because interruption disrupts the client's flow of ideas. Allowing the client to speak freely, allows the attorney to get more of the actual facts. But, the attorney will also get facts that quite often lead to unpleasant ***209*** truths. For instance, in divorce cases the client might not want to divulge his or her own past infidelity. Yet, to learn about this fact beforehand is far better than being blindsided at an initial, court-mandated conference.

To stress this point, the most important aspect with all clients in the initial interview is to read their story back to them so that they can hear what they are talking about. This way clients can reflect on what they have said and begin to solve problems for themselves. They might even interject something on their own that, otherwise, they would not have realized or consciously volunteered.

This dialogue with clients is necessary and very practical. A vast majority of cases are settled. It is important to help clients work through their options and participate in their own problem solving. To that end, the following is a means to help clients shift from passive bystanders into enlightened participants in their own legal process. …

III. Gilbreath's Paradigm Explained

If the client decides to hire an attorney and proceed with a lawsuit, then certain procedural events will happen. Depending on the court involved, all litigation progresses through these general stages and only terminology changes. As a case moves along, keep in mind that it may, potentially, span several months to several years before an ultimate resolution is achieved.

There are two timelines at work in Gilbreath's Paradigm: the legal process and the cost. The legal process timeline tracks both the stages of a case from the initial complaint or petition to trial. The cost timeline tracks the expenses and diminution of client control from the beginning of a case to the end. The basic principle is that these two timelines converge and culminate with a trial. As the case proceeds through the pretrial stages … the ***210*** client spends more time and money, but the client retains less control over the litigation and less control over the resolution. At trial, the judge has total control over the case and the client loses all control. Attorneys must communicate and emphasize to the client that as litigation progresses, the client will lose more control over the process. To explain in greater detail, each litigation phase will be discussed, along with the corresponding costs to the client.

A. Initial Pleading

First, the attorney files a written, initial pleading on the client's behalf. A civil lawsuit will usually be filed at a courthouse. For criminal cases, the prosecutor … will file a charge with the court, which leads to an arrest warrant. For cases in an administrative agency hearing, like a state property tax matter, a standardized form will be filed. In some particular instances, clients must exhaust administrative remedies before they can file an initial pleading. For instance, in a real-property, valuation hearing, the client may need a local board's review before being allowed to petition a higher court. The client may not understand the necessity of this administrative step before getting to the resolution the client has in mind. This process must be explained.

Regardless of its form, whenever the initial pleading is filed, the client is making it known to the other side, and to the court, what the client's dispute is. Although the client often believes that the client's claims are fact, they are really allegations that need to be proven and applied to a viable legal theory. This is the first time the client faces a moment of truth: the client must prepare, and justify, the client's case. The initial pleading is the beginning of this process.

Once the initial pleading is filed, the plaintiff must formally serve the defendant with this initial pleading; a process known as providing notice. Clients are many times adverse to providing this notice because when notice is properly given, it provides the opposing party with an opportunity to respond. Before the client goes to court, the process slows down and costs begin increasing. Assuming that the opposing party is properly notified and served, the opposing party ***211** gets time to respond. This response brings the client's facts and motives into question.

B. Discovery

… (*Omitted*)

C. Motion Practice

… (*Omitted*)

D. Pretrial

At some point, the judge will sit down with the attorneys for a pretrial hearing. Typically, this is the first time the judge will look at the file purposefully with the intent toward resolution or toward setting the parameters of the endgame as the process winds down toward trial. In most cases, the judge will send parties willing to negotiate into the next phase-alternative dispute resolution (ADR). Even when the parties resist negotiation, the judge will compel ADR hoping that some settlement might occur. The pretrial hearing is used to finalize the schedule for the conduct of trial.

***213** Pretrial is the stage where the attorney-client relationship can quickly sour. This is the first time the client partially realizes the expectation of a judicial hearing. Often, pretrial hearings are not conducted by the trial judge: they are sometimes conducted by the judge's assistant so that the judge can deal with other matters. If the person conducting the pretrial hearing sends the parties into ADR, it may signal that the case is not ready for the judge's attention yet.

By this time, the client has not even gone to trial and has spent a considerable amount of money. The client may not understand why the litigation has both cost so much and

they still have not achieved any results. If the concept of pretrial had, initially, been properly explained, the client would understand that the process is possibly working to their advantage: costs can be reduced and a result can be obtained. If the lawsuit can be satisfactorily resolved before trial, the client will be spared the most expensive costs of the final litigation phase.

E. Alternative Dispute Resolution

A collection of ADR processes comprises the last line of defense against a trial. The majority of cases end here. Two options stand out as the most common: case evaluation and facilitation. Case evaluation is where a disinterested third party or panel of attorneys listens to both sides and recommends a settlement amount. Facilitation involves a mediator who guides the parties towards their own settlement. Both case evaluation and facilitation can be binding, or non-binding, on the parties, but they give the parties perspective on the strengths and weaknesses of their case. Each side can strike a deal with the other as a result of either of these processes. The possibility that a case ends up being settled like this leads some clients to wonder why they did not try this in the first place.

F. Hearing

Finally, the actual hearing arrives. This is the event that the client has waited for. But, when a case reaches trial it means that negotiation and court prodding has failed. At this stage, the client has no control over the outcome. The expenses in time and money are ***214** enormous, expert witnesses may be needed, and the client might need to take time off from work. Further, the client faces the exhaustion of trial, hearing evidence, and not knowing what the outcome will be. Unfortunately, by now the client has spent a vast amount of money and continues to do so. Months, or years, have passed and the client's priority may have changed from winning a large judgment to hoping to break even. Attorney's fees are often the most expensive part of litigation. After all the time and money is spent, the client may question why the only people who really seem to profit from the whole ordeal are the attorneys.

Had the attorney, initially, discussed the realities of how the litigation would unfold, the client might have chosen a different path. Or the client might not have changed a single thing. The difference is that the client would have been able to make a better, informed decision.

V. An Application of Gilbreath's Paradigm: Jesse Driver

Jesse is a twenty-one-year-old undergraduate student. While driving home from class one day, he stopped at an intersection to make a right turn on a red light. He began to make the right turn, but stopped quickly because an oncoming car swerved into Jesse's lane. A pickup truck behind him, driven by Rick Reckless, slammed into Jesse's car. The oncoming car swerved to avoid hitting Jesse. Stunned and shaken, Jesse steered the car onto the road's shoulder and sat in the car. A few minutes later, a police officer happened to drive by and investigated the accident.

Rick was a small-business employee and drove a company pickup truck. Rick told the officer it was his fault because the brakes were broken, and he was on his way to get them fixed. Jesse was shaken up, but felt well enough to refuse medical treatment. After the accident report was taken, Jesse drove home. Three hours later, he sat in an emergency

room with a sharp, piercing pain in his neck and back. The next day he saw his primary doctor who referred him to Andrew, an attorney. Jesse also filed a claim with his auto insurance company. In the course of filing the claim, the insurance agent called ***215** Rick at work. The other driver admitted, with Jesse on the three-way call, that it was his fault.

Two days after the accident, Jesse met with Andrew. Jessie told Andrew what happened and signed a contingency fee agreement. Jesse had no idea what would happen and had no idea how the law worked, but he knew he was hurt and that the other driver was at fault. He thought this would be a slam-dunk trial or, at least, lead to a quick settlement.

Months passed and Jesse was referred to numerous specialists for examinations to deal with his injuries. He saw a chiropractor, acupuncturist, and physical therapist regularly. For a few months, he spent five evenings each week attending medical visits. Jesse never worried about the medical bills, understanding that they were being paid by automobile insurance coverage. He did not have a clear idea of how it all worked: it just made sense to him that Rick's auto insurance was paying for everything.

After a year, the first settlement offer totaled $10,000. Jesse rejected the offer and months later the second offer totaled $20,000. Jesse accepted the offer, but wondered how Rick seemed to get off so lightly. Jesse was more shocked when the unreimbursed medical bills (those not paid by Jesse's own automobile insurance coverage) were deducted from the $20,000 settlement. After Andrew's fees were deducted, Jesse received about $10,000.

Jesse's bewildering ride as a plaintiff lasted one and a half years. He thought it would be a stronger case that would involve telling his story to a judge and jury. He, especially, thought that the settlement offers from Rick's insurance company would be much larger. After it was all done, Jesse wondered if Andrew, his attorney, had breezed through the case.

Jesse's story is typical for a client that vaguely understands the litigation process. Automobile accidents are a different breed of personal injury lawsuits, governed closely by state statutes. The injuries that can occur from these accidents may take months to appear. But, for our purposes, Jesse's story demonstrates some potential pitfalls and misperceptions between clients and attorneys. Let us examine how things could have gone differently by applying Gilbreath's Paradigm.

***216** First, Andrew should make sure Jesse receives medical treatment. Assume Jesse went straight to the primary care doctor office instead of the attorney's office. A thorough legal practitioner will attend to the client's well-being, in addition to, the client's legal issues. In this case, Jesse is seeing a primary care doctor and being referred to specialists, so Andrew moves past that matter. After hearing Jesse's rendition of the accident, Andrew paraphrases the story and repeats key phrases he heard Jesse use. Jesse thinks some more and then adds that he visited a chiropractor a few years ago to adjust backaches. This new information is significant. If Andrew had not probed further, he would have only learned about the previous chiropractor visits later on during the discovery phase.

Armed with Jesse's account of the situation and a working knowledge of the state's automobile injury law, Andrew is ready to advise Jesse. Andrew will explain Jesse's options, and what each option means for Jesse. Since Jesse must play by the rules of the state's complex, auto-injury statutes, both attorney and client agree that Jesse handling the case alone is out of the question. Nevertheless, Jesse is young, injured, and will most

likely require medical treatment for years to come due to the accident. Andrew recognizes that Jesse has no experience with civil litigation and must guide Jesse through this process.

Andrew hands Jesse a copy of the chart for Gilbreath's Paradigm. He explains that Jesse's case will go through certain stages, starting with the interview they are in now. Next, Andrew will notify Jesse's insurance company and the other driver's insurance company that an accident occurred. The statute of limitations in Jesse's state allows three years for Jesse to file a formal complaint, so Andrew explains why the court filing will be postponed. Next, Andrew will begin building a case by filing a complaint-the initial pleading-against the other driver. In this instance, before Andrew files the complaint, he must make sure there is a solid case and that medical records will support Jesse's claims. Jesse will require money to pay for future medical treatments and any surgeries, or periodic examinations, resulting from the automobile accident.

Notice begins discovery (the phase that constitutes the bulk of the lawsuit). Andrew explains that building enough documentation for automobile accident cases can take several months to a year. ***217*** Eventually, there will be a point in time where doctors will agree that Jesse will not improve any further from physical therapy. [FN4] Until then, Jesse will be interviewed by attorneys from Rick's insurance company. In addition, they will ask Jesse to answer written interrogatories about what happened in the accident, how he was affected, and about his past medical history. Jesse needs to obtain his medical history that reveals his prior back problems, even though it may hurt his case. Most of the documentation needs to be turned over to Rick's attorneys. In addition to seeing his own array of physicians, Jesse may be examined by doctors chosen by Rick's attorneys.

After several months, if the physicians agree that Jesse's condition will not improve, Andrew will probably demand settlement or a lawsuit may be filed. From here, Jesse's options branch out. If Rick and Andrew reach a settlement agreement, the case is over, and Jesse receives the benefit of a hearing without the burden of the litigation process. Nonetheless, Andrew knows it probably will not be so easy. Therefore, he tells Jesse to assume the case will not settle. Consequently, Andrew would need to file a formal lawsuit against Rick.

The next stage is the pretrial hearing. Andrew and Jesse agreed to a contingency fee, which means that Jesse only pays Andrew if Jesse collects from Rick. Meanwhile, all of the litigation expenses and Andrew's fees are adding up. Andrew explains that when the pretrial judge calls the attorneys into the courthouse for a meeting, the state requires mandatory case evaluation for auto accidents. The outcome of the evaluation is not binding on the parties, but gives the parties an idea of a possible settlement range.

Andrew ensures that Jesse understands the stages and the costs they just discussed. Jesse looks at the chart and agrees that Andrew should continue. If the case evaluation is in Rick's favor, Rick will make a low settlement offer or no offer at all. However, if the evaluation is in Jesse's favor, Rick will probably make a better settlement offer. Jesse could accept or push for trial. Andrew explains that although they can make predictions based on the judge's ***218*** reputation and the facts of Jesse's case, there is no definite way to guess what will happen at a trial.

Jesse decides to proceed with the lawsuit and knows what to expect, even if he does not know the final outcome. Andrew's small investment of time prevented future shock and hard feelings between himself and his new client.

We see from this example that Gilbreath's Paradigm can be applied to cases that do not neatly fit into a standard, sequential order. What matters most is that the client gains insight into the legal system, so the client can make better decisions on how to proceed. The attorney in this example used the opportunity to educate the client about the way litigation would unfold, and what each major fork in the road meant to the client.

V. Conclusion

Attorneys are physicians for societal ills. The issue a client brings to an attorney is as personal as life and death, even if the issue is a barking dog. This is an extraordinary responsibility placed upon the legal profession. An attorney must be able to communicate the strains and problems associated with litigation to a client. Therefore, it is critical for an attorney to listen empathetically, and to effectively explain the true costs of litigation. When a client presents a critical situation, the attorney must explain how the resolution will proceed. Gilbreath's paradigm can be a helpful tool to the practitioner because it provides straightforward explanation. It provides potential solutions and helps both the attorney and the client appreciate Abraham Lincoln's admonition to settle all cases. And, in the end, "[a]s a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough." [FN5]

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[FNa1]. Scott A. Waldron is a 2008 cum laude graduate of the Thomas M. Cooley Law School. The authors gratefully acknowledge Lauren Tomlinson for her assistance.

[FN1]. Allen D. Spiegel, A. Lincoln, Esquire: A Shrewd, Sophisticated Lawyer in His Time 59 (2002).

[FN2]. Marc Galanter, Lowering the Bar: Lawyer Jokes & Legal Culture 74-76 (2005).

[FN3]. Early in his private practice, Judge Gilbreath found himself trying to convey to his clients the depth of what litigation entailed. It did not matter if the client was a private citizen, a business, or a governmental entity. One day he thought to himself, "How can I best explain this to people?" and graphed out a set of timelines. The resulting model, refined through many years of application with diverse clientele, is known as Gilbreath's Paradigm. Judge Gilbreath uses this model when teaching his **Pretrial Skills** course at the Thomas M. Cooley Law School.

[FN4]. This is also known as a maximum medical improvement.

[FN5]. Spiegel, supra note 1.

Supplementary Reading 2

(*Footnotes omitted.*)

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***213** HOW MUCH JUSTICE CAN WE AFFORD?: DEFINING THE COURTS' ROLES AND DECIDING THE APPROPRIATE NUMBER OF TRIALS, SETTLEMENT SIGNALS, AND OTHER ELEMENTS NEEDED TO ADMINISTER JUSTICE

John Lande [FNa1]

…

… Presumably most ***216** analysts would agree, in principle, that courts should try cases when appropriate-and help litigants [FN16] find just resolutions without trial when trial is not needed. It seems obvious that the courts' ability to provide trials in some cases is possible only if the vast majority of other cases are not tried. No one proposes a trial rate above 50 percent or even anything close to that. The real controversy is about when trial is appropriate and how that decision should be made. [FN17]

…

Galanter presents a compelling compilation of data to show a general pattern of decline in the proportion and number of cases terminated by trial in recent decades. For example, the number of civil trials in the federal district courts fell from ***217** 5,802 to 3,951 between 1962 and 2004, despite the fact that there were five times as many cases filed in 2004 as in 1962. [FN19] Thus, civil trials comprised only 1.7% of terminations in 2004, compared with 11.5 percent in 1962. [FN20] Galanter finds a particularly "precipitous decline" in the last two decades, [FN21] which he relates to a combination of factors, including what he describes as a "jaundiced view" of the law promoted by major elements of business, political, and legal elites. This jaundiced view depicts a litigation explosion caused by opportunistic plaintiffs, greedy lawyers, activist judges, and biased juries who combine to produce outrageous verdicts that "unravel[] the social fabric and undermin[e] the economy." [FN22]

To account for the declining trial rates, Galanter offers five possible explanations that are not mutually exclusive. First, American legal procedure is "converging" with that in other court systems, where courts embrace a more managerial judicial role, relying on procedures such as multiple hearings in trials over extended periods of time. [FN23] Second, court trials are "displaced" by "trial-like events" in non-court forums such as administrative tribunals, arbitration proceedings, and hearings in various organizations. [FN24] Third, and related to the second, non-court organizations are "assimilating" law into their regular governance processes, which mimic legal procedures. [FN25] Fourth, the law is being "transformed" to embody "a new process rationality that supplants rule-centered, top-down, formal rationality with a decisional process that is negotiative, informal, participative and interactive." [FN26] Fifth, and presumably related to the fourth, the Anglo-American legal system is "evolving" because parties are seeking more tailored, complex, and future-oriented solutions to problems and thus look to non-court dispute resolution procedures in many cases. [FN27] All these explanations seem quite

plausible, with combinations of causal forces varying in different contexts. [FN28] Although the ***218** precise mechanisms causing the vanishing trial phenomena are unclear, it appears that the causes are complex and deeply rooted in larger social changes. [FN29] It follows that substantial changes in the patterns of court trials in the future are likely to require more than simple changes in policy or procedure.

Analyzing the district courts' combined civil and criminal caseload between 2000 and 2004 shows that the number of trials declined as the number of filed and pending cases generally increased, consistent with the pattern Galanter identifies. Table 1 [FN30] indicates that the number of cases filed grew about 30,000 cases (from about 322,000 to about 352,000). [FN31] The number of pending cases grew by about 50,000 cases (from about 301,000 to about 351,000 cases) and the number of cases pending per authorized judgeship increased from 459 to 518 cases. [FN32] If the number of trials had not declined in this period (from 14,679 to 12,938), [FN33] the number of pending cases would presumably have increased even more because the additional tried cases almost certainly would have consumed more court time than if they were terminated by non-trial procedures.

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Unit 3- Fact investigation

Unit Introduction

Truth is either material (i.e. empirical which can be perceived and proved) or logical (which can validly be drawn from valid reasoning and true premises). The lawyer is expected to prove her client's case through evidence that convinces the court that an event, a transaction, performance or non-performance of an obligation, etc. has or has not happened.

Whoever alleges a given occurrence and seeks to file a claim or deny it needs to prove the proposition or statement. This is the only route towards convincing courts of law that the alleged events or occurrences are true. This necessitates investigation of facts that verify the client's version of events and sequences within the context of time, place, setting and other elements that can prove and justify claims, defences, counterclaims and other pertinent positions.

Fact investigation requires a structure that has developed over a long period of legal practice. The structure provides a lawyer with the major components of a litigation plan which will enable her to prove or disprove in a case. Components of the litigation plan arise from the elements of the provision/s that the lawyer intends to invoke on her client's behalf. In case, for instance, the elements are cumulative, the lawyer needs evidence for each element to convince the court that the provision invoked is applicable in her client's favour.

After having identified the elements that need to be proved, the lawyer is expected to identify potential sources of proof (client, witnesses, experts, documents, pictures …) and methods of acquiring them (client interviews, witness interviews, gathering material evidence, expert review, etc.).

Section 1- Structuring fact investigation

Fact investigation needs a structure and a roadmap. The accuracy of facts including facts that are not favourable to the client determine the outcome of a given case. The sooner facts that are relevant to a case are gathered, the more reliable would interviews become owing to their proximity to the event or occurrence, and the lesser would be the risk of losing some physical evidence.

The facts we need depend on the legal arguments that we intend to invoke or respond to, and the claims, remedies, defences and counterclaims that are likely to be involved in the case.

For example a person charged with negligent homicide while driving at Debrezeit Road comes to your office and asks you to represent him. The element of fact investigation will emanate from the elements of Article 59 of the Revised Criminal Code which require:

a) *imprudence or disregard of the possible consequences* of one's act while he was *aware* that his act may cause illegal and punishable consequences; or
b) criminal lack of foresight or without consideration while he *should or could* have been aware that his act may cause illegal and punishable consequences (having regard to his personal circumstances …)

The element which will capture the attention of the lawyer are thus:

1- whether the victim's death is caused by the act of the defendant;
2- whether the defendant was aware that his act may cause and accident such as the one that happened, and (was imprudent) or he disregarded the possible consequences despite his awareness of such consequence; (advertent negligence);

Or, alternatively

whether the defendant (unaware of the possible consequences) should or could have been aware of the consequences having regard to his personal circumstances …

The fact investigation chart can be summarized into:

- The defendant's act and its causal relationship with the victim's death
- The defendant's awareness about the nature and possible consequences of his act
- Whether the defendant foresaw the potential danger but disregard its occurrence
- Whether the defendant didn't foresee the potential danger while he could or should have.

After having identified the elements, the lawyer proceeds to the identification of potential sources of proof and methods of acquiring them.

The elements of the structure of fact investigation mainly follow the elements of the charge which states the name of the defendant, the vehicle he was driving, the time of the accident, place of the accident, the mental state of the defendant (advertent or inadvertent negligence), and the resultant harm (identity of victim, death of victim, time of death, cause of death …). Any of these elements of the charge can become elements of defence if the defendant contests them.

Reading 1- Structuring fact investigation

(Mauet, **Pretrial,** *Supra* Unit 2, note 8, pp. 19 – 28)

…(I)information is power, and the party that has a better grasp of the favorable and unfavorable facts is in a stronger position to accurately evaluate the case. Second, information obtained early on, particularly from witnesses, is more likely to be accurate and complete. Third, information sought before the action is formalized is more likely to be obtained, since a lawsuit often makes people cautious or uncooperative. Fourth, information obtained before suit has been filed is less expensive to acquire. …

a) When to start

The best time to start is immediately, particularly in cases that are based primarily on eyewitness testimony. For example a personal injury case should be investigated as soon after the accident as possible. Witnesses forget or have second thoughts about being interviewed; witnesses move away and disappear; physical evidence can be lost, altered, or destroyed. In this type of case where liability will be determined largely by eyewitness testimony, it is best to start quickly.

On the other hand, an immediate investigation is not always required. For example, in contract and commercial cases, where the evidence will primarily consist of documents, correspondence, and other business records, and there is no danger that records will be

lost or will disappear mysteriously, a prompt fact investigation may not be essential. Contract and commercial cases may have complex legal questions that must be researched and resolved before you can start an intelligently structured fact investigation. In addition, delay sometimes helps. For a defendant who expects to be sued, starting an investigation may only serve to stimulate the other side into investigating the case. Unless the defendant needs to investigate an affirmative defense or counterclaim, a sound approach may be simply to wait for the other side to do something.

b) What facts do I need to get

Your job as a litigator is to obtain enough admissible evidence to prove your claims and disprove the other side's claim. Therefore, you need to identify what you must prove or disprove. This is determined by the substantive law underlying the claims, remedies, defenses, and counterclaims in the case. However, how do you research that law if you do not yet know what the pleadings will allege? What do you research first, the facts or the law?

There is no easy answer here. In litigation, the facts and the law are intertwined. The investigation of one affects the investigation of the other. You will usually go back and forth periodically as you develop your theory of the case.

Example:

You have what appears to be a routine personal injury case. From your initial interview of the client it appears to be a simple negligence case against the other driver. You do preliminary research on the negligence claim … (and) then continue your fact investigation. … Of course you need to research the law here. If there is (law) [1] supporting such a claim, you then need to go back and see if there are facts that support that (law). Back and forth you go between getting the facts and researching the law until you have identified those legal theories that have factual support. This process, going back and forth between investigating the facts and researching the law, is ongoing, and is how you will develop your "theory of the case," what really happened from your side's point of view.

c) How do I structure fact investigation?

The easiest way to give structure to your investigation is to use a system of organizing the law and facts based on what you will need to prove if your case goes to trial. In short, this is a good time to start a 'litigation chart'. [2] A litigation chart is simply a diagram that sets out what you need to prove or disprove in a case and how you will do it. The chart is a graphic way of identifying four major components of the litigation plan.

1. Elements of claims, remedies, defenses, and counterclaims
2. Sources of proof
3. Informal fact investigation
4. …

[1] The word "law" is used instead of the original (legal theory) because in the Ethiopian context we look for specific laws in Codes, Proclamations, etc. rather than legal theories and principles derived from case precedents.

[2] The litigation chart will become a 'trial chart' if the case ultimately tried. …

Start with the 'elements' of each potential claim, remedy, and defense in the case. … Regardless of where the applicable law is, you must find it and determine what the specific elements are. When you have done this you will have completed the first step in your investigation chart.

Example:

You represent the plaintiff in a potential contract case. Your client says she obtained goods from a seller and paid for them, but the goods were defective. From your initial client interview, and from reviewing the documents and records she provided, you decided to bring a contract claim against the defendant. …

Litigation Chart

Elements of Claims	**Sources of Proof**	**Informal Fact Investigation**
1. Contract		
a) contract executed		
b) plaintiff's performance		
c) defendant's breach		
d) plaintiff's damages		

This approach should be used for every other possible claim. … Many lawyers also use the chart for potential defenses and counterclaims.

The litigation chart has two principal benefits. First, it helps you identify what you have to prove or disprove so that you can focus your fact investigation on getting admissible evidence for each required element. Second, a litigation chart helps you pinpoint the strengths and weaknesses of your case as well as your opponent's case. In most trials the side that wins is the one convinces the fact finder to resolve disputed issues in its favor. The litigation chart will help you identify the disputed matters on which you will need to develop additional admissible evidence to strengthen you version and rebut the other party's version.

… In addition to the four fields in the litigation chart, you can add fields for: questions, favorable/unfavorable facts … etc.

d) What are the likely sources of proof?

Facts come from five basic sources: the client, exhibits, witnesses, experts, and the opposing party. Of these categories, most can often be reached by informal investigation. The client, of course must be interviewed. Whenever possible obtain exhibits in your client's possession, and other evidence such as physical objects, photographs, documents, and records in the possession of third parties. Witnesses can frequently be interviewed. …

…

Example:

In a contract case, determine the witnesses and exhibits that will provide the facts about the case. Your client, the plaintiff, is an obvious witness, and the contract is a central exhibit. Other than these obvious sources, where else can you go for proof? For example, what proof is there that the plaintiff performed his obligation under the contract? The plaintiff is again a source of proof. In addition, the plaintiff may have business records showing the performance. The defendant may have written letters acknowledging the plaintiff's performance. The defendant may have business records proving performance. There may also be nonparty witnesses who may have knowledge of the plaintiff's performance.

Continue this type of analysis of each element of every claim you are considering and put these sources on your developing litigation chart.

Example:

Litigation Chart

Elements of Claims	**Sources of Proof**	**Informal Fact Investigation**
1. Contract		
a) contract executed	- plaintiff - defendant - contract - plaintiff's secretary	
b) plaintiff's performance	- plaintiff - plaintiff's records - defendant's records	
c) defendant's breach	- plaintiff - pl.'s correspondence - def.'s correspondence - plaintiff's records - defendant's records	
d) plaintiff's damages	- plaintiff - plaintiff's records - replacement vendor - replacement vendor's records - experts	

The third step is to determine whether these sources of proof can be reached by informal fact investigation and, if so, what method is best suited to getting the necessary information. Witnesses can be interviewed. Exhibits in your client's possession should be obtained and reviewed; exhibits possessed by nonparties can frequently be obtained from friendly or neutral nonparties simply by requesting them; experts can be interviewed, and you can sometimes obtain their reports. Once again, think expansively here, since obtaining information informally is quicker; less expensive, frequently more candid and accurate, and can be obtained without opposing party participating or perhaps even being aware that you are investigating the case. Put the methods by which you plan to obtain the information on the litigation chart.

Example:

Litigation Chart

Elements of Claims	**Sources of Proof**	**Informal Fact Investigation**
1. Contract		
a) contract executed	- plaintiff - defendant - contract - plaintiff's secretary	- interview - obtained from pl. - interview
b) plaintiff's performance	- plaintiff - plaintiff's records - defendant's records	- interview - obtained from pl.
c) defendant's breach	- plaintiff - plaintiff's correspondence - defendant's correspondence - plaintiff's records - defendant's records	- interview - obtained from pl. - obtained from pl. - interview
d) plaintiff's damages	- plaintiff - pl.'s records - replacement vendor - replacement vendor's records - experts	- interview - obtained from pl. - interview - request letter - interview

The last step is to decide what to (include in the list of evidence attached in the statement of claim or defence as evidence which can be obtained through formal order of the court).[3]

e) What is my litigation budget?

You can't buy a Cadillac on a Ford budget, and the same holds true for litigation. The client's financial resources are an important consideration. The 'value' of the case, the amount you can reasonably expect in a … verdict, is another. The amount of work the case requires for adequate preparation is a third consideration. Consequently, you need to estimate how much work the case will require, and see if it is feasible that you can accomplish the work given the resources involved. You need to prepare a litigation budget. …

_____

[3] The original reads "The last step is to decide what to use formal discovery methods for, and how and when to use them. …"

Section 2- Client interviews

Client interviews begin from the very moment a lawyer meets a client. The person who seeks representation or any other legal service tells a lawyer about her problem. What the client communicates to a lawyer is information about her problem which may involve a family dispute, successions, breach of contract, personal injury, the case of an arrested person, and so on. The lawyer seeks information that is necessary and relevant to the case. The client on the other hand inclines to narrate various events that may include facts which might not be relevant to the case.

The client-lawyer conversation is initially informal because lawyers do not take down notes of a given case from the moment they meet a potential client. The means of conducting interviews thus requires methods which will create a setting of confidence and trust on the part of the client so that she communicates not only the good facts that would encourage the lawyer to take the case, but the 'bad' facts as well that would save the lawyer from future surprises and setbacks.

Clients have expectations when they visit lawyers. Client interview is thus a two-way communication during which the lawyer is expected to take good note of the facts, issues, the law, current judicial jurisprudence and the feasibility of the expectations of the client based on which lawyers are expected to offer pragmatic opinion regarding the possible outcome of the case if it goes to amicable settlement, arbitration or litigation.

Depending upon the complexity of the case there might be series of follow-up interview sessions with the client for further information, focused understanding of certain aspects of the case, gathering and discussing various sources of proof, etc. The frequency and depth of interviews is usually determined by its role in enabling the lawyer to gather the information needed. It would also continue as needed even during the litigation.

Reading 2

Client interviews

Mauet, **Pretrial,** *Supra* Unit 2, note 8, pp. 28 – 36

(Explanatory or supplementary reference footnotes are omitted)

The initial meeting between client and lawyer may be the most important meeting in the client's life. How it goes will largely determine the nature of that relationship during the course of the litigation. Understanding what is involved in the meeting critically important.

Client interviewing has two components: what information to get, and how to get it. What to get will be determined by your litigation chart. How to get it is based on interviewing techniques that must be fully understood in order to get the important information from the client.

1. Client Attitudes and Disclosure

The typical client is unsure of his rights and obligations, and a lawyer's office is an unfamiliar, imposing environment. The lawyer who empathizes with the client's psychological needs and knows the factors that promote and inhibit client disclosure will be more successful in getting an accurate picture of the problems that brought the client to a lawyer in the first place.

A client comes to a lawyer to determine if there are actual legal issues relative to his problems and, if so, how to deal with them. The lawyer needs to interview the client so she can identify the legal issues, get all relevant available information, and discuss with the client how the problems can best be handled. How does a lawyer go about getting that information from the client?

There are several factors that can inhibit a client from a full disclosure of information. First, a client being interviewed often feels that he is being judged. This causes the client to withhold or distort facts that may create negative impressions about the client or his case. Second, a client being interviewed often tries to satisfy what he feels are the lawyer's expectations. This causes the client to tell the lawyer what he thinks will be a pleasing story and, again to withhold negative and contradictory facts. Third, a client may have a variety of internal reasons, such as embarrassment, modesty, and fear that once again, prevent him form disclosing all information.

On the other side, there are positive factors that promote full disclosure. First, a client is more likely to disclose fully if he feels that the lawyer has a personal interest in him. A friendly, sympathetic lawyer is more likely to get "all the facts" from a client. Second, a client is more likely to disclose fully if he senses that "she's been there too," or is familiar with and understands the client's situation, is more likely to draw out all the facts. Third, some clients enjoy being the center of attention. Supplying critical information makes the client feel important and may stimulate his supplying more information. Fourth, a client enjoys feeling that he is doing the right thing. The lawyer who can instill the feeling that full disclosure is the proper, decent approach is more likely to achieve it.

Lawyers will obtain the fullest possible disclosure by stressing the positive psychological influences and by understanding and minimizing negative influences that inhibit disclosure. Lawyers who create a comfortable physical environment and show an understanding and appreciation of the client will be more successful in obtaining "all the facts," both good and bad. This sensitivity will establish a positive context for client relations during the course of the litigation process.

2. Interview Environment

Creating a positive interview environment had several components. What kind of physical setting should you have? How will you record what the client says? What should the client do to prepare for the interview? What topics will you cover during the actual interview?

Many clients will be uncertain and insecure during the interview. After all, it may be the first time they have ever been to a lawyer's office. A physical setting that is informal, friendly, and private will help make a client feel relaxed and comfortable. A lawyer's office is a good place to conduct an interview; a small conference room is another.

Strive for informality. Sit in a place other than behind your desk, have coffee and soft drinks available, perhaps play quiet background music. Avoid interruptions. Leave the telephone alone, and close the door to keep others out. Schedule the interview so that you will have enough time to accomplish what you have planned. An interview with a client can easily take one or two hours, but perhaps much more. If possible, schedule client interviews as the last appointment for the day, provided you are still mentally sharp at that time. This will allow you to continue the interview without running out of time because of other appointments. Remember that as you are sizing up the client, the client is sizing you up as a lawyer.

A principal function of a client interview, in addition to establishing rapport and gaining the client's trust, is to obtain information. This information needs to be recorded and there are several ways to do this. First, you can take notes yourself. This has the advantage of allowing for privacy, but has the disadvantage of interfering with your interview. Second, you can have someone else, a secretary, clerk, or paralegal, take notes. Here the advantage is that you are relieved of note taking, but it puts a third person into the interview environment, which may be an inhibiting influence, particularly during the client's permission. Here the advantage is completeness. However, you will still need to make a summary of the interview, and many clients are uncomfortable having their statements recorded. Fourth, you can avoid taking notes altogether and dictate notes immediately following the interview. This has the advantage that your notes of conducting the interview without distractions, but has the disadvantage that your notes of the interview may not be as complete as they otherwise would be.

The paramount consideration is creating an atmosphere in which the client feels comfortable and tells everything she knows about the problems that brought her there. Most lawyers conduct the initial parts of the interview without note taking. After the client becomes comfortable with you and the interview environment and you begin to get the details of her story, you can discuss the need to record what she says and then ask her if she will feel comfortable with the method you suggest. Once you explain why it is so important for you to have an accurate record of what she says and how the attorney-client privilege will prevent anyone else from getting it, the client will usually agree.

What can you have the client do to prepare for the first interview? First, the client should be told to collect all available paperwork, such as letters, documents, bills, and other records. Second, many lawyers ask the client to write down everything she can remember about the legal problems, particularly if they involve a recent event, list the names of all persons involved, and create a chronology of events. If the client's memo is directed to the lawyer, and no one outside the lawyer's staff is permitted to see it, the memo should be protected by the attorney-client privilege, even though the attorney-client relationship may not yet formally exist. The records and memo should be rough tot the initial interview.

Some lawyers, particularly plaintiff's personal injury lawyers, frequently use paralegals to screen prospective clients by conducting the "intake interviews." The interviewing techniques discussed here obviously have equal applicability regardless of who does the initial client interview.

3. Initial Client Interview

The initial client interview should have several objectives, although accomplishing all of them may require more than one session. First, conduct yourself in a manner that establishes a good working relationship. When the client arrives at your office, don't make him wait. Greet him personally. Have the client make himself comfortable in your office or conference room, and spend little time making small talk-about traffic or the weather, for instance. Offer him coffee or a soft drink. Remember that the client is sizing you up both as a lawyer and as a person. Second, spend a few minutes learning about the client's background. This shows the client that you see him as a human being and not just as another case. It also helps you evaluate the client as a witness and provides important biographical and financial information. Third, let the client know what is going to happen during the interview, what you need to accomplish, and the reasons for it. Explain that you need to get all the important facts in order to intelligently identify and analyze his legal problems. Stress the importance of condor and completeness. Give the client an overview of the litigation process and why this interview is an important part of it. Tell the client that his conversations with you and your staff are private and protected (privileged), so long as the client does not tell anyone else about the conversations (which would waive the privilege).

Fourth, have the client identify the general nature of his problems. You will usually have a general idea –a "Car accident," a "contract problem"– when the client makes the appointment. However, it is always useful to have the client initially tell his story his own way, without interruptions, sizing him up as a trial witness. You may also discover facts you might never otherwise have stumbled upon, and it allows the prospective client to get the matter off his chest in his own words. These considerations are well worth "wasting time" on, even if the client talks about seemingly irrelevant things. The usual way to get client to tell the story his way is to ask open –ended, non leading questions. For example, simply asking, "I know you were in an accident. Why don't you tell me what happened in your own words? will usually get the client started. While the client tells his story, listen not only to what he says but also note things he omits, things that would usually be mentioned. When the client is done, you can paraphrase what he has said. This serves as a check on accuracy and shows the client that you have been listening carefully.

Fifth, after the client has told his story, you need to get a detailed criminological history of the events and other background facts. It is frequently advantageous to make an outline or checklist so that you do not overlook important topics. Your litigation chart, setting out the elements of the claims you are considering, should provide a start. … However, don't use a checklist as a questionnaire, since your interview will quickly lose the personal touch. The standard method is to use the chronological storytelling approach. Most people think chronologically, and that is usually the best way to elicit details. While your checklist should be tailored to fit the particular case involved, you will usually cover the same basic topics regardless.

Sixth, you need to ask follow-up questions on potential problem areas. Hear it is best to use specific, focused questions that bear on potential claims, remedies, defenses, and counterclaims (although most lawyers avoid aggressively cross –examining clients during the first meeting). A client naturally wants to impress his lawyer and convince her that the case is a good one, so he will often give only "his version" of what are disputed facts and omit altogether the unfavorable ones. It is always better to get the bad news early. Remand the client that your job is to get all the facts, both good and bad, so you can accurately assess the case and represent him effectively. Remind him that the opposing lawyers will discover the bad facts soon enough, so it is better to deal with them now. This will usually keep him form adopting an "I thought the lawyer was on my side" attitude.

Where do you probe? Look for information that might adversely affect the client's creditability. Are there problems with the client's background? Is there a spotty work history? Are there prior convictions or other such trouble with the law? Clients frequently omit negative facts in their background. Therefore, you should be looking for the gaps and asking what the client has left out to the story. For example, in an automobile accident case, has the client omitted fact that he was given a traffic citation? Was driving with a suspended license? Was drinking? Had just left a bar before the accident happened? Or was using a car without permission? A useful device in getting out these kinds of facts, without directly suggesting to the client that you don't believe his story, is to get the client to be a kind of devil's advocate. Ask him what the other side is probably going to say to his lawyer about the event. This will frequently draw out the "other side's version" of the disputed facts. Keep in mind that … it is at your peril that you accept your client's version of the facts. The client needs to be pushed, probed, even cross-examined to test the facts he gives you. You may need to verify his version to the facts with an independent investigation.

The usual topics you will need to discuss with the client during the initial interview include the following.

a) Statute of limitations

Determine when the statute of limitations begins to run on all potential claims, and when it ends. If the time to file a lawsuit is about to end, you will need to file a complaint quickly to toll the statute and protect the client's rights.

b) Liability

Facts bearing on the liability of all parties must be developed fully. Details are critical. For example, in an automobile accident case, you will need to explore how the accident

happened step by step. You need to get a detailed description of the scene of the collision. Diagrams and charts are very helpful. You need to establish the location of each car involved before the collision occurred, at the point of impact, and after the accident had run its course. You need to get details on speed, distance, time, and relationship to road markings. In a contract case, you will need to get a detailed chronology of all contacts between the parties before the contact was executed, when it was executed, and all events that have happened since it was executed.

c) Damages

Damages information must be obtained, for both your client and all the parties, for each possible claim. For example, in an automobile collision case, damages should include out-of-pocket expenses, lost income, future expenses, and future lost income, as well as intangible damages such as permanence of injury, and pain and suffering. Find out if the client suffered an injury, the extent of it, how she was treated, how she felt then and feels now, and how the injury has affected her life. Find out if she had a preexisting condition that could affect damages. You should also explore insurance coverage for all parties, as well as collateral sources such as health insurance, employer benefits, and government entitlements (e.g., Social security and Veterans Administration benefits). In contract and commercial cases, and cases in which equitable relief is sought, you need to determine if the injuries to the client can be measured in monetary terms.

You must determine if the defendant has the ability to pay a judgment. Find out if the defendant has insurance, the amount of the policy's coverage and the policy covers the event or transaction. Determine the defendant's income sources and assets, particularly those that can easily be attached to collect a judgment. When representing a defendant, determine if the defendant has any insurance policies that may cover some or all the claims against the defendant, and notify the insurance companies of the claims. Failure to do so in a timely manner may affect the insurance coverage and the insurance company's duty to defend.

d) Client Background

Your client's background is important for several reasons. The client's personal background –education, employment, family history– is important for assessing the client's credibility as a trial witness. His financial background –income and assets –is important for assessing damages. …(L)et the client know why this personal information is important for your evaluation of the case.

e) Parties

It is frequently difficult to ascertain who all the parties to an event or transaction are and, if businesses are involved, their proper legal identities. Often the client does not know and has given little thought to this aspect of the case. Now is the time to begin obtaining the facts that will help you identify those parties. … For example, in an automobile accident case you will need to know not only who the other driver was, but also who owns the other vehicle and whether it is a business or rental vehicle, or was loaned or stolen. You will also need to know where the accident occurred and need to determine who owns, or is in control of, the accident location, since that entity may be responsible for designing, building, and maintaining the roadways. If a workplace accident is

involved and state law bars bringing an action against the employer …, look for other potential defendants, such as manufactures of equipment or independent contractors.

From your fact investigation you will usually be able to identify the parties you will want to name in your lawsuit. However, identifying parties is not the same thing as learning the proper technical identity of parties. For example, just because the truck that ran into your client had the name "Johnson Gas" on its side does not necessarily mean that the Johnson Gas Company is a properly named party. The potentially liable party may be a sole proprietorship or a corporation with a different name entirely. You need to find this out.

For individuals, learn their correct full names. For corporations, partnerships, unincorporated businesses, and other artificial entities, you must not only learn the proper names, but also whether they are subsidiaries of other entities that should be brought in as parties. …. If the party is an unincorporated business operating under assumed name, you may be able to determine the true owners and properly named parties ….

f) Defenses, counterclaims, and third-partly claims

Plaintiffs and defendants alike must look closely at a frequently overlooked area: What do they have on us? And who else can be brought into the case? Cases are legion where a plaintiff has filed an action only to be hit with a much larger, previously dormant, counterclaim. Think expansively, particularly in the commercial area, since the parties usually will have had previous dealings that could give rise to counterclaims or third-party claims. You should look at both related and unrelated transactions, since liberal joinder rules usually permit raising unrelated claims in the same action.

g) Witnesses

The client must be questioned on all possible information sources, whether eyewitnesses, experts, or any one else who possibly has useful information. Get names and information that will help to identify and locate people with information. Think expansively here, and don't be concerned with the admissibility of testimony at this point. Find out who your client has already talked to about the case, what he has said, and whether he has signed any written statements.

h) Records

The client should bring to the interview all paperwork in her possession, such as accident reports, insurance claims and policies, bills, checks, personal records, medical records, tax records, business records, and correspondence. If the client does not bring them, have her do so as soon as possible. You should keep these records; if the client needs them, make photocopies for her. Learn what other records may exist and who has them, so that these can be obtained now, or later through discovery.

i) Physical evidence

Does the case involve objects such as vehicles, machinery, or consumer products? While most common in negligence and products liability cases, such evidence can exist in other cases as well. …

j) Other lawyers

Clients often shop around for lawyers. While a client has a perfect right to talk to more than one lawyer about taking a case, there are always clients who go from door to door until they find a lawyer willing to take it. It is important to find out if the client has seen other lawyers about the case. On the theory that lawyers turn down cases because the cases lack merit, you should be appropriately cautious.

k) Client Goals

What does the client really want? In some case, such as personal injury, the answer is often simple. The plaintiff basically wants money damages and the defendant wants to avoid paying them. But even then it is important to probe deeper. What does the client view as a favorable outcome? Does he want the case to go to trial, or is he willing to have it settled? Is he looking for vindication, revenge, to money damages? In other cases, such as contract and commercial disputes involving businesses, the answer may be difficult to discern. Money damage is not always what the client has an ongoing relationship, and that relationship may be more important than the money damages. Perhaps relief such as specific performance is more important than money damages. Now is the time to find out what the client thinks he wants and begin assessing whether his expectations are realistic or need to be modified.

Avoid predicting what the case is "Worth," or when the client will get any money. These are questions that all clients ask sooner or later, usually sooner. Explain that you cannot at this early stage make any such predictions and that it would be foolish to do so before you have gathered more information, researched the applicable law, and are then in a position to make an informed analysis of the strengths and weaknesses of the case. Consider putting this in writing in a follow-up letter to the client. When the case reaches the settlement stage, some clients always think that the settlement amount is much less than what the lawyer earlier "said the case was worth."

l) Next Steps

Following a client interview, write a short memo evaluating the client and her story. It is easy to forget your specific impressions of a client, yet her credibility as a trial witness will often be critical to her case's success. This is particularly important where more than one lawyer will work on the file.

If you conclude form the initial client interview that you will take the case, you will need to discuss the details of a contractual relationship, including fees, and you should let the client know what steps you will take concerning her problem and what she will need to do to help you. …

4. Follow-up Client Interviews

Many things should be done during the initial interview of the client. Some cases are relatively simple, and interviewing a well prepared client can take less than an hour. Many cases, however, will require more than one session to collect the basic information. Accordingly, you might use the first session just to build rapport with the client, get the client's story out, and compile a chronology of events. A second session could then be used to review the client's records and ask focused follow-up questions about problem

areas. In more complicated cases, it may take several client interviews to acquire the necessary information.

Follow-up interviews will also be periodically necessary during the litigation process. Whenever you receive additional information, through informal fact investigation or during formal discovery, you should review it with the client. The new information may differ from what the client previously told you. Obviously the contradictory information must be evaluated, discussed with the client, and dealt with. In some cases the client may admit that what he previously told you was not entirely true, and change his story. In others, he may deny the new information and stick to his version of the facts. Whatever the client's position, the new information, if it is at odds with the client's story, must be dealt with. Is it true? Is it more accurate? What does the new information do to the client's story? This is an ongoing process, but the key point to remember is that the client must be kept informed as the fact-gathering process progresses.

Section 3- Acquisition of material evidence

Evidence may include statements made by witnesses, material evidence and documents. The Criminal Procedure Code requires "all exhibits to be marked and numbered by the registrar …" and they "shall not be withdrawn without an order of the court."[4] The record of a trial shall include "a note of exhibits admitted as evidence and the numbers attached thereto including whether the exhibit has been put in by the prosecutor or the accused."[5] Exhibits which cannot be conveniently forwarded to the registrar of the court "may remain in the custody of the police. [6]

Article 223 of the Civil Procedure Code states the list of evidence that shall be attached to a statement of claim. By virtue of Article 234(2) this list shall also apply to statements of defence. Article 223/1(a) of the Civil Procedure Code requires list of evidence to be attached to a statement of claim or statement of defence. The list shall state "the witnesses to be called at the hearing, with their full name and address ad the purpose for which they are to be called, and … documents on which he relies, specifying in whose possession or power such documents are."

Materials and documents can be referred to as material evidence even if they are, in some literature, treated distinctly as material and documentary evidence. This course material will rather consider materials and documents as material evidence. Both types of material evidence are sources of proof for claims, remedies, defences and counterclaims and they should be gathered during the pretrial phase of the case. This section deals with the methods of identification, acquisition of material evidence starting from the first client interview until the evidence is submitted to court, and at times, even thereafter.

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[4] Crim. Pro. C., Art. 97
[5] Crim. Pro. C., Art. 98/1(j)
[6] Crim. Pro. C., Art. (Art. 91 /1)

Reading 3

Exhibits acquisition

(Mauet, **Pretrial,** *Supra*, Unit 2 note 8**,** pp. 37 – 40)

Your interviews with client should also identify future exhibits. These include the scene, physical evidence, documents, and records. In addition, interviews with witnesses and your review of exhibits when you get them, particularly documents and business records, may disclose additional exhibits.

You need to acquire these exhibits, get copies of them, or protect them from being lost or altered. The order in which you do things will depend on how important it is to obtain the particular exhibits. For example, physical evidence, such as the condition of a vehicle, machine, or consumer product, should be acquired quickly, before it is repaired, altered, destroyed, or becomes lost. Some records, such as a police accident report, are essential for you to begin your investigation.

The basic types of exhibits are the following.

1. Scene

If a lawsuit involves an event, such as an automobile accident, investigating the scene is vital. Whenever possible, the lawyer should visit the scene, even if someone else will do the technical investigation. That should include taking photographs of all locations from a variety of perspectives and making all necessary measurements so that you can make scale diagrams. Photographs should be both in black and white and in color and be enlarged to 8 inches X 10 inches for courtroom use. Diagrams for courtroom use should be at least 30 inches X 40 inches. While photographic enlargements and courtroom diagrams need not be made now. You should visit the scene at the same time and day of week on which the event occurred, so your photographs will accurately show the relevant lighting, traffic, and other conditions. You might also find additional witnesses to the event- people who are there each day at that time.

If you are reasonably proficient in taking photographs and have the equipment to take photographs that can be processed and enlarged with sufficient quality to make effective courtroom exhibits, you can take them yourself. This will not create a problem for you, a lawyer in the case, becoming a witness, since any person familiar with how the scene looked at the relevant time is a competent qualifying witness. However, where you will be the only person who can qualify the admission of the photographs, obviously someone else must come along because the lawyer cannot usually be a witness in a case she is trying. If you are not a proficient photographer, hire a commercial photographer to accompany you. You must tell the photographer specifically what pictures you will need.

Numerous photographs should be taken form a variety of perspectives. For example, in an intersection. Collision case, you will normally want pictures of how the intersection looked to each of the drivers as they approached it. Accordingly, pictures should be taken, starting from perhaps 300 feet away, then moving to 150 feet, and so on. The photographs will then show what each driver saw as he approached the intersection. In addition, photographs should be taken from where other eyewitnesses, such as other drivers and

pedestrians, were when the crash occurred. Finally, if there are nearby buildings, it's always useful to have overhead, bird's-eye-view pictures taken that will show lane markings, pedestrian walkways, traffic signs, and signals in the intersection. You must review witness statements before hand to know where the witnesses were, and what they saw and did, before you can know what photographs you will need.

Diagrams present a different problem. Since the person who look the measurements and made a scale diagram is often the only witnesses who can qualify the diagram of admission in evidence, it is better to have someone other than the lawyer do this.

2. Physical Evidence

Physical evidence, such as vehicles, machinery, and consumer products, if not already in the possession of police, other investigative agencies, or your client, must be obtained and preserved for possible use at trial . This includes not only locating them, but also keeping them in the same condition and establishing chains of custody. This is particularly important if the evidence will be tested by experts before trial.

Preserving physical evidence often requires that you act quickly. In an automobile accident case, for example, skid marks wear off ad the vehicles are repaired. In these situations you must take immediate steps to prevent the loss, destruction, or alteration of the evidence. … Have someone such as an investigator do this, since he may be a necessary witness at trial.

How do you actually "preserve" physical evidence? Two concerns are involved. First, you must gain actual physical possession of the objects so that they are kept in the same condition until the trial. Second, you must either label the objects or, if they cannot readily be labeled, put them in a container that can be sealed and labeled. Both of these steps ensure admissibility at trial by establishing the two basic requirements- identity and same condition. The usual way to accomplish this is to have someone like an investigator, who can serve as a trial witness, get the objects from wherever they are, label or put them in a container that is sealed and labeled, and have them taken to your office for safekeeping. This label should describe the object; show where it came from, who obtained it, when it was taken, and who received it at your office.

Evidence is frequently in the possession of nonparties, such as police departments and repair shops. If the evidence does not belong to your client, the nonparties are probably under no legal obligation to preserve the evidence for you. However, most will be cooperative when they learn that what they have is important evidence. They will usually keep the evidence in an unaltered condition until you have had an opportunity to photograph and measure it. You should check if someone ease, such as an investigator from the police department or insurance company, has already taken these steps. Finally, a non party will sometimes agree to preserve evidence until you can serve him with a subpoena, or have the court issue a protective order.

Many times, of course, a client comes to a lawyer too late to take theses steps, and the evidence will be lost. If the client comes to you shortly after the event, however, you should always act quickly to preserve the evidence. Many cases, particularly in the personal injury and products liability areas, are won or lost on this type of evidence.

3. Records

You should obtain all available documents and records from your client. You may as well obtain everything your client has because once suit is filed, the opposing party will be able to discover from your client anything that is relevant and not privileged. If important documents and records are in the hands of other persons, see if those persons will voluntarily turn them over or provide copies. Public records are usually available on request. In many jurisdictions persons have a statutory right to obtain certain records on demand, such as their own medical reports. A written demand on behalf of the client, coupled with her written authorization, will usually suffice. If not, contact the sources to learn the required procedure for obtaining the records. These records are, of course, usually available by subpoenas after suit is filed, but it is better to get them as soon as possible, since the records may be essential to evaluate the case before suit is filed. For example, in a personal injury case, you will need to review police accident reports, doctor's reports, hospital records, employment records, and perhaps others. In a contract action, you will need to get the contract itself, and records that bear on the performance and nonperformance of the parties, such as orders, shipping documents, invoices, and payment records.

If you can get these kinds of records from others, maintain them properly. Keep the records you receive together, in order, and do not mark them. Keep a record of how, from whom, and when you got them, since these persons may be necessary foundation witnesses if the case later is tried. Make additional copies that you can mark up and use during client and witness interviews.

4. Electronic Research

Never overlook information that may be available on the internet. You can find and locate people, learn about corporations and other business organizations. Acquire information about products, and get medical information about diseases, hospitals, and doctors. You can obtain financial information form government and private databases, identify experts and their backgrounds, learn about business competitors and suppliers, and research opposing lawyers. Don't overlook public records that may be available online or through … requests … to appropriate federal or state agency.

Section 4- Witness interviews and expert review

Lawyers focus on witness interview after having conducted client interviews and gathered material evidence. Witnesses are very essential as source of proof. Witnesses may be favouable or unfavourable to the client. In some cases they may be neutral. The interview targets at all potential witnesses irrespective of their favourable or unfavourable inclination to the case because the spectrum gives the lawyer a holistic picture of the evidence and further avoids adverse surprises during the litigation. A witness speaks out facts that she knows, and this clearly presumes that she actually knows a fact, recalls the fact and speaks out the whole truth. These crucial factors require the prudence of the lawyer during witness interviews so that the facts that she gathers are genuine and reliable.

Expert witnesses, on the other hand, are interviewed for consultation on a specific field of expertise, and where expert testimony becomes necessary during litigation or arbitration. Issues such as medical malpractice or insanity usually require expert testimony. For example when there is doubt as to the mental state of an accused person, "the court shall obtain expert evidence."[7] However, the court shall be bound "solely by definite scientific findings and not by the appreciation of the expert as to the legal inferences to be drawn therefrom."[8]

The readings in this section address questions such as when and whom to interview as witnesses, who does the interviewing, locating potential witnesses, purposes of the interview, arranging the interview, structuring and recording witness interview, interviewing techniques and evaluation of witnesses. The section also highlights expert review. And finally the section includes a brief reading on cases that might be considered 'small' as compared to the efforts and cost involved in litigation.

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[7] Crim. C. (2004), Art. 51(1)
[8] Crim. C. (2004), Art. 51(3)

Reading 4

Witness interviews

(Mauet, **Pretrial,** *Supra*, Unit 2 note 8**,** pp. 40 – 48)

After you have interviewed your client, and obtained the available exhibits, the next stage of your informal fact investigation is interviewing witnesses. Here a great deal of flexibility is possible, and it is particularly important to plan ahead.

1. Who and When to I interview

The more you know, the more accurately you can assess the strengths and weaknesses of your case. It makes sense, then, to interview every witness, favorable, neutral, and unfavorable, to find out what each knows, the benefit of interviewing everyone, however, are always tempered by economic realities. There are few cases in which you can simply interview every one regardless of expense. On the other hand, every case has critical witnesses that you must try to interview regardless of the cost. In addition, once taken, the case must be handled competently regardless of the cost constraints. Between these two extremes, you need to decide whether you should try to interview a particular known witness and attempt to identify and interview others. For example, suppose you represent a party in an automobile collision case. From you client and the accident reports, you learn what other persons were present. If a police report identifies an eyewitness, you need to interview him; but what else should you do? Should you try to locate bystanders who were present but have not been identified?

How far you go is determined by three basic considerations. First, you need to interview all critical witnesses regardless of cost. A competent lawyer simply must always do this. The critical witnesses are the eyewitnesses to an event, the participants to a business transaction, and other persons such as the principal investigating officers. Such witnesses will probably be witnesses at trial .in the above hypothetical, this would mean interviewing the known eyewitness, the police officer who prepared the accident report, and other eyewitnesses whose identity you are able to learn. Second, with witnesses who are not critical, interviewing is influenced by your cost constraints. For example, canvassing homes and stores near the accident scene may turn you someone else who saw the accident; however, doing this is expensive and may produce nothing useful. Attempting to identify and interview such possible witnesses may be worthwhile in a $200,000 lawsuit in which liability is unclear, but cannot be done in a $20,000 case where liability is clear. Third, how far you go in locating and interviewing witness depends on what you have developed so far. For example, if you client and two solid eyewitnesses clearly establish liability, it may not make sense to find other eyewitnesses who can corroborate the client. On the other hand, if your client's version is contradicted by one eyewitness, it is obviously important to locate and interview other witnesses to see which version they support.

When you have decided on the witnesses you need to interview, you must decide the order in which to interview them. Here again flexibility is required. It is frequently better to interview favorable and neutral witness first, before you interview the unfavorable ones, since you will have better success in pinpointing the difference is their stories.

Identifying and interviewing the favorable and neutral witness first will give you the basis for your side's version of any disputed events and will help you identify the areas of disagreement when you interview the unfavorable witnesses. These areas can then be explored in detail. Frequently, however, you won't know for sure whether a given witness will be favorable.

On the other hand, there are advantages in interviewing unfavorable witnesses early before their attitudes and recall have solidified. For example, in an accident case you know a witness will be unfavorable because that witness is quoted in a police accident report. It may be useful to interview that witness quickly. He may change his mind, or tell you that he "didn't really see it happen," or "isn't sure" about important facts. You may minimize the impact of the witness through and early interview.

Are there limits on who you can interview? Ethical rules control here. … You *cannot* interview any person *known* to be represented by counsel in the matter, unless the counsel gives you consent or you are authorized by law. This clearly means that you cannot communicate with the opposing party if you know the opposing party is represented by counsel in the matter. This rule applies even though a lawsuit has not yet been filed.

Difficult questions arise when the opposing party is a corporation or other artificial entity. The only persons who can "speak" for the corporation are its employees and agents….

2. Who should do the interviewing?

Either the lawyer or an investigator should conduct the actual interviews. There are advantages and disadvantages with each approach. If the lawyer interviews, the advantages are that no additional investigator costs are incurred, and he can get a first-hand impression of the person as a trial witness. This is particularly important with key witnesses. On he other hand, lawyer interviews can create impeachment problems. If at trial the witness denies making a statement to the lawyer, which is inconsistent with his testimony, the lawyer will have to be a prove-up witness. This puts the lawyer in conflict with ethical rules that generally prevent a lawyer from being a witness in a trial in which the lawyer represents a party. A common approach is to have the lawyer personally interview witnesses know to be favorable, but have another person present when interviewing neutral or unfavorable witnesses. That person can then prove up impeachment at trial if necessary.

If an investigator interviews witness, the advantages are economic and practical. An investigator's time will usually be less expensive than the lawyer's, so there may be cost savings for the client. However, the time saving may be minimal, since the lawyer must spend time educating the investigator about the known facts the issues, and about what direction the interviews should take. The principal benefits of a properly experienced investigation are that she will probably be better at locating witnesses, and will be an available impeachment prove-up witness at trial.

When hiring an appropriate investigator, you should establish a contractual relationship and give her specific instructions. A contract with the investigator will prevent misunderstandings about what work will be required, what the cost limitations of the case are, and how the investigator will be paid. The contract should expressly state the

investigator will be and employee of the lawyer, and that everything the investigator learns and obtains during the investigation will be reported only to the lawyer and will otherwise be kept confidential. This will improve the chances that the investigative reports will be protected from disclosure by the attorney's work-product doctrine.[9] As always, it is best to put the agreement in writing, either in a simple contract or in a letter to the investigator.

3. Locating Witnesses

Lawyers are perfectly capable of locating many witnesses. The client frequently knows the important ones. Records, such as business records and accident reports, will usually identify others. When their names are known, it is surprising how many witnesses can be located over the telephone or by checking basic, available sources. The telephone book, neighbors at a previous address, workers at a former job, friends, and relatives are all good sources in locating a known witness. It is often the case that a witness has merely changed a telephone number, moved to a different apartment, or changed jobs, and tracking her down is relatively simple. If these leads do not work, check with the post office, voter registration and motor vehicle departments, utility companies, and other government agencies …. If the witness is important to you and cannot be located through these types of leads, you may need and experienced investigator.

4. Purposes of the Interview

There are several purposes you should try to accomplish during a witness interview. These purposes usually should be pursued in the following order. First, learn everything the witness knows and does not know that is relevant to the case. Have the witness tell what he knows, by using open-ended questions. These can be followed later with specific, focused questions; however, you want details only of the critical events and transactions, not everything the witness knows that may possibly be relevant. When learning what the witness knows, make sure you pinpoint the admissible facts based on first-hand knowledge, separating them from opinion, speculation, and hearsay. With witnesses who have unfavorable information, you should try to limit the damage by limiting the witness' testimony. Find out what the witness does not know, is not sure of, is only guessing about, or has only second-hand information about.

Second, pin the witness down. This means going beyond generalizations and getting to specific, admissible facts. For example, "driving fast" should be changed to an approximation of speed in miles per hour. "He looked drunk" should be pursued to get the details underlying the conclusion, such as "staggering, glassy eyed, and smelling of alcohol." Getting only generalizations and conclusions makes it easy for a witness to change his testimony later.

Third, get admissions. With unfavorable witness, having the witness admit that he "isn't sure," "didn't really see it," "was only guessing" or "was told" all serve to prevent the witness from changing or expanding his testimony at trial.

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[9] A lawyer's notes summarizing a witness interview are usually non-discoverable … (i.e- not subject to be available to the other party during formal fact investigation – discovery- a scheme which doesn't however exist in Ethiopian law).

Fourth, get information that might be used for impeachment. If an unfavorable witness says something that later may be useful to impeach him, pin him down. For example, if an unfavorable witness to an accident says he was 200 feet away when it happened, make sure you commit him to that fact. Use "200 feet" in other questions, and recommit him to that fact, since at trial he many claim that the distance was shorter.

Fifth, get leads to other witness and information. It is surprising how often a witness will name other witnesses or divulge information not previously mentioned in any report. For example, asking a witness if anyone else was present at an accident scene will sometimes get a response like: "Sure, Ellen, my sister, was standing right next to me and saw the whole thing."

Finally, try to record the interview or get some type of written statement. How to do this is discussed later in this section.

5. Arranging the Interview

Often the most difficult part of witness interviews is getting witnesses to agree to be interviewed in the first place. With favorable witnesses this is not usually a problem, and selecting a convenient time and place for the interview is a routine matter. Unfavorable witnesses, however, are frequently reluctant. Here you can take either of two approaches: attempt to arrange an interview, or attempt a surprise interview. A reluctant witness may agree to be interviewed at a convenient time and place, where privacy is assured, and if the interview won't take too long. ... Tell the witness that you need and appreciate her help in understanding what really happened, and that her information may help resolve the case more quickly.

If a witness will not agree to an arranged interview, the only alternative is the unannounced interview. Frequently, a witness who doesn't want to be bothered or "get involved" will nevertheless agree to talk when an investigator "pops into" the witness' office or "stops by" the house. Again, it may help to reassure the witness that the questions won't take long and may eliminate the need for further involvement. However, a witness has a perfect right to refuse to be interviewed, and you cannot harass or badger the witness hoping to change her mind. The only alternative is to depose the witness after the lawsuit has been filed.

Whenever you interview a witness, you must tell her that you are a lawyer, that you represent one of the parties in a dispute, and that you represent only that party. Tell the witness what you want to talk to her about. …

6. Structuring the interview

How do you go about structuring a witness interview? First, review the case file, which should contain client interviews, exhibits such as police reports, perhaps other witness interviews, and the developing litigation chart. Second, get copies of any diagram, photographs, and records you may use during the interview. Third, decide if and how you will record the interview. Finally prepare an outline for the interview. A frequently followed order for witness interviews in the following:

1. Witness background
2. Story in witness's own words
3. Detailed chronological story
4. Questions focused on your theory of the case.

First, witness background is important for assessing witness credibility and determining if there is any bias, interest, or other facts that affect credibility. Most witnesses don't mind talking about their work, family, and home. Asking these background questions usually puts witnesses at ease. Some witnesses, however, may resent what they consider being intrusions into their private lives. In such cases you may want to slip the background information later into the interview, or simply touch on it at the end. Second, let the witness tell her story in her own words, even at the price of hearing irrelevant facts. It gives you a good picture of the kind of witness she will be at trial; and you may discover important facts that would never have come to light. Third, go over the story in chronological order and in detail. Get specifics on what the witness saw, heard, and did at all important times, and what she saw others do and say. Find out what exhibits the witness knows of, and other witness she is aware of. Find out what the witness personally knows and what is only opinion, speculation, or hearsay. Find out to whom the witness has talked or given statements. Finally, ask focused questions based on your theory of the case. For example, if the witness gives information that contradicts your version of thee events, see how you can minimize its effect if the witness is "not sure," "guessing," "didn't see it myself," or says other things that lessen the damage, make sure you note it. In addition, see if the witnesses are rarely completely unfavorable; a little searching will often turn up something positive.

7. Recording the interview

…

The approach you use depends on what will best serve your interests and what the witness will permit.

… What is best, and what a witness is willing to do, are two different things. Many witnesses are reluctant to talk, and they are usually under no legal obligation to talk to anyone, unless compelled by legal process. … Hence, your priority should be to get the witness to tell what he knows so you will learn what his trial testimony is likely to be, and get leads on their witnesses and evidence. Only then should you try to get the most reliable type of statement the witness agrees to give. …(I)t is usually better to conduct an interview without any recording than to have no interview at all. You can always dictate immediately afterwards what the witness has said.

…

8. Interviewing techniques

Every witness is influenced by both positive and negative factors that affect her willingness to be interviewed and disclose what she knows. An interviewer, therefore, should understand these factors and use them to accomplish his primary purpose of finding out what the witness knows. These factors bear on both friendly and hostile

witnesses. Hostile witnesses may be unwilling to talk at all; friendly witness, although willing to talk, may be influenced by a variety of negative and positive factors.

Negative factors inhibit witness disclosure. Some witnesses feel that they are being judged by the interviewer. Others tell the interviewer what he apparently wants to hear. Still others become inhibited by emotions such as fear or embarrassment. The interviewer must learn to recognize situations in which these factors exist and use interviewing techniques that reduce their effect.

Positive factors promote disclosure. Witnesses usually respond favorably when the interviewer shows a personal interest in them. Witnesses like to feel that they are doing the decent thing by talking to the interviewer. They tend to identify with the side that values their testimony. Witnesses enjoy feeling important and may be more likely to help if they feel that the information they can provide is important to resolve a dispute fairly. Positive reinforcement is a strong motivator.

Getting witness to disclose fully and accurately is best achieved by minimizing the negative factors and reinforcing the positive ones. Accordingly, pick a convenient time and place for the interview. When scheduling the interview, remind the witness that it's always better to talk when the events are fresh in her mind. Remind her that it is natural to want to help others, and that her disclosing information will help ensure a just and accurate result. Point out what other witnesses have said about the case so as to give her an opportunity to correct inaccuracies. Finally, show interest in the witness. Empathy is also a strong motivator; a witness naturally will want to please someone who appears interested in her.

An interviewer can use either open- or closed –ended questions to achieve desired results. Use open –ended, direct –examination questions to get the witness talking, to obtain the basic story, and to pursue leads. For example, questions in a "describe how" and "tell me" format will force the witness to give descriptive answers. But use closed, leading cross-examination questions to pin the witness down and develop potential impeachment. This question form can focus on specific, isolated facts. For example, ask: "you're sure the car was going 40 mph?" and "she couldn't have been going faster than that, could she?"

…

9. Evaluating witnesses

Following a witness interview, write a short memo evaluating the witness and information. It is easy to forget your impressions of the witness, yet witness credibility is frequently the critical component in case evaluation. The memo is particularly important if more than one lawyer will work on the file. The memo should evaluate the witness' credibility and effectiveness as a trial witness, note the witness' attitude toward the case, and summarize where the witness' anticipated testimony will help and hurt your case.

Reading 5

Expert Reviews

(Mauet, **Pretrial,** *Supra*, Unit 2 note 8**,** pp. 48 – 49)

Wrongful death, medical malpractice, product liability, major negligence, and commercial cases almost always use expert witnesses at trial. he plaintiff's case will probably require expert testimony to establish a *prima facie* case on liability and causation and to make out a solid case on damages. The defense case will probably have opposing experts. Accordingly, your investigation is frequently incomplete unless you have the file reviewed by appropriate experts.

You may need two experts: one to review the file and consult with you in order to develop facts and theories for trial, the other to be a trial witness. Of course, one expert can and sometimes does perform both roles. … Make sure that your agreement with the consulting expert clearly shows her status, and requires that she communicate only with you… .

If a case is complex and will involve substantial work, it may be advisable to insist that the case be reviewed by an expert before you agree to take it. The cost of the review should be paid by the prospective client. While the lawyer can usually advance the cost of the review, requiring the client to pay for the review in advance is often an effective way of weeding out clients who already know they have a weak case. Such clients will often refuse to pay for the review, which should make you think carefully abut taking the case in the first place, particularly where the client had the ability to pay. This is a sensible approach whenever you have a case that will require expert witnesses. Regardless of how the review comes out, both you and the client will benefit. … . Some jurisdictions require, in certain types of cases such as medical malpractice, that you have expert who has reviewed the case and is of the opinion that it has merit, before you can file suit.

Do not send out a file for expert review until you have collected the reports and records the expert will inevitably need. Make sure the written materials you send her give a complete and neutral picture of the case, but do not give the expert privileged materials. … For example, in a medical malpractice case you might tell the expert that your potential theory of liability is that the anesthetic was improperly administered, and ask the expert if the standard of reasonable care was breached. A focused review is usually more productive.

….

Because an expert is so important, and because a consulting expert may later be the testifying expert at trial, you must be careful in selecting one. Perhaps the best way to select an expert is simply to ask litigators you know to recommend one who is knowledgeable in the subject area of your case, is willing to work with and educate you, and will be an effective trial witness. If this fails, or you need an expert in an extremely specialized area, some (some associations and institutions) maintain expert directories, and law libraries sometimes have directories for various specialties.

The "Small" Case

(Mauet, **Pretrial,** *Supra*, Unit 2 note 8, pp. 49 – 52)

…

When a case is sufficiently large … it makes economic sense for the litigants to devote substantial legal resources to achieve the best possible result. In such cases, the lawyers representing the parties will usually be able to do all the things a conscientious litigator should do without being seriously constrained by cost. However, consider the client with a "small" case … although appearing to have merit, involves so little money that is not economically possible to handle it competently and receive adequate compensation for the work involved. What do you do?

This is hardly a theoretical question. … Automobile accident involving a few hundred dollars in direct losses, and consumer contract matters involving similarly small sums, are common disputes, and some are litigated.

The very small cases present less difficulty. Most jurisdictions have small claims courts in which the litigants can represent themselves at trial. Many jurisdictions do not allow lawyers in small claims courts, and judges hear the cases informally without adhering to strict rules of procedure or evidence. They frequently have brochures that explain how to bring a claim in small claims court and how the case will be heard. In addition, some jurisdictions have special procedures for other small cases. … The intent if (such) procedures is to bring down the cost of tying a case so that tit makes economic sense to ring a lawsuit to enforce a claim in the first place. The cases that are too large to be brought as small claims, yet too small to make normal litigation cost effective, cause the greatest problems. What can you do when presented with such cases? These small cases are particularly problematical, because a case that is small in dollar amounts may be just as legally and factually complex as a larger case. However, keeping several concepts in mind can at least reduce the concerns.

First, screening small cases in particularly important. This involves carefully assessing liability, damages and the other party's ability to pay a judgment. There is nothing more unproductive than taking a small case with questionable liability or filing an action against a party who is effectively judgment proof. Small cases must be screened quickly before any substantial investment in time is made.

Second, the client must understand what you can realistically do given the size of the case, and agree to your approach. For example if the case is not worth the filing of a suit, perhaps you can attempt to get a settlement or resolve it through an alternative dispute resolution method. … . Whatever your approach, make sure the client knows what it will be and the reasons for it, and also agrees to it in writing.

Third, make sure you get your costs covered in advance, and let the client know the overall anticipated costs. A client who has paid the anticipated costs in advance has a direct financial interest in the litigation and will usually be more cooperative and realistic. A client who understands how costs, such as a medical expert's fee, can devour any recovery will have better grasp of what can realistically be done.

Fourth, get the client to do as much work as possible, such as obtaining document and records and locating witnesses. This can substantially reduce costs. You can also tell the

client that you will not take the case until he has done this kind of preliminary work. Again, this not only reduces expenses but also involves the client in the litigation.

Fifth, you can sometimes economize without seriously compromising the preparation of the case. … These savings, of course, must be discussed with the client, and he must agree to the procedures you take.

Sixth, the paramount rule, regardless of the size of the lawsuit, is always the same: The client's case must be competently handled. This means that you must do whatever is necessary to uncover the important facts and witnesses, even if it is not cost effective. If the opposing lawyer will not agree to informal interviews of parties and you do not know what the opposing party will say at trial, you simply must depose the party. If the case cannot be settled short of trial, you simply must try the case. Lawyers, wittingly or not, sometimes take cases that are uneconomic from the lawyer's point of view. Once taken, however, the lawyer has the same professional obligation to prepare that case competently as he has for any other case.

Finally, keep in mind that when lawyers take cases, they frequently do so for reasons other than the compensation they will directly receive form that particular case. In small cases, accept the fact that you simply will not be paid at your usual rate. However, that fact alone should not prevent you from taking certain cases. The case may be from a regular client, whom you want to ensure remains satisfied with your overall representation. The case may come from a new client who may become a regular client if he is satisfied with the way in which you handle a small matter. The case may be legally or factually challenging. The case may be a high profile case that will enhance your reputation among lawyers and in the community. The case may be a new type of case and involve an area you have become interested in. Finally, you may decide to make a case to meet your *pro bono* obligations as a lawyer.

The high cost litigation is a serious concern in our society and has sparked considerable discussion among the public, government, and the organized bar. Litigation procedures have become more streamlined in small cases; … alternative dispute resolution is becoming common; judges are taking a more active role in litigation management and settlement discussions. If a lawyer decides to take a case, however, the cardinal rule is that he always has a professional obligation to represent a client competently. That the client's matter is a small case connot serve as an excuse for the lawyer to avoid professional obligations. The realities of your professional life as a lawyer are that once you agree to take a case, adequate planning and preparation are required to resole the matter, regardless of its size. Accordingly, the basic steps discussed in this book must be followed to ensure that your representation is adequate.

Review Exercises

Task 1

Abraham D.[10] encountered an accident and was referred to a hospital in Addis Ababa from DebreTabor. The victim had injury on his left leg from the accident, and (on 1st Pagumen 1, 1997 Eth. Cal.) a surgery was negligently conducted on his right leg. Four medical doctors were charged under Article 559(2) of the Criminal Code for having negligently caused physical injury.

a) Who are the potential witnesses of the Public Prosecutor?
b) What are the potential elements of material and documentary evidence?
c) Does the public prosecutor need expert evidence to prove malpractice in this case?

Task 2

Assume that you are an attorney, and the four doctors have asked you to represent them.

a) Would you accept their offer to represent all of them? Why or why not?
b) Attorneys represent clients in criminal cases not only to have them acquitted but also to contest the various elements stated in the charge. Explain.

Task 3

On Ginbot 15th 1998 Eth. C., the plaintiff [11] requested judicial declaration of paternity in accordance with Article 143/1(d) of the Revised Family Code. The plaintiff and defendant have not concluded marriage. Nor have they lived in cohabitation without marriage. The child has the name of the mother's patronymic as his surname. The applicant has submitted list of witnesses and has further requested the court to order DNA test.

[10] Public Prosecutor File No. 3666/98
[11] Names of the parties have been omitted.

a) List down questions the plaintiff's lawyer could have asked during client interview.

b) State the potential defences that can be forwarded by the defendant.

c) List down questions to the defendant which can be used during client interview.

Task 4

On Meskerem 9th 1999 Eth. C., customs inspectors seized 11 boxes of pharmaceutical products [12] while they were being smuggled to Addis Ababa. The boxes were deposited at Customs Store through Deposit Slip No. 305610. The persons who seized the items were two customs inspectors. Assuming that you are the public prosecutor:

a) List down potential evidence that can be used during the prosecution

b) Conduct witness interview with the two customs inspectors who seized the boxes.

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[12] Eth. La gare Customs Police Investigation File No. 13/99

Unit 4- Legal investigation, case evaluation & litigation strategy

Unit Introduction

Legal investigation involves identification of legal issues and retrieval of relevant laws that can enable the lawyer to arrive at a conclusion regarding the legal issue/s under consideration. A **legal issue** is an "*individual legal question implicated by a problem (a set of facts) that needs to be answered in order to render advice (or arrive at a conclusion) concerning the problem.*"[1] Legal investigation and analysis are conducted to answer questions of law that determine the pattern in which a client's problem can be resolved.

During her first interview with the client, a lawyer usually identifies the area of the law that is relevant to the case and the legal issue/s in the case. To this end, there is the need to do some research after client interview whenever the case so requires. A lawyer is not expected to have a prompt memory of every substantive and procedural law (and specific provisions) when she meets a client.

If the lawyer specializes in the particular area of the law (relevant to a given case), she will have a wider opportunity to have prompt awareness about most applicable legal provisions and binding Cassation Chilot interpretation precedents. She might also have a relatively closer knowledge about the judicial interpretation patterns of various court chilots on a particular legal issue. Nevertheless, legal investigation of relevant laws ought to be conducted under all circumstances starting from the day a lawyer meets a client.

> "… To determine whether a rule of law is relevant you must ask what your problem is and then determine if the rule you are testing was intended to apply to that kind of problem. For example, if you wanted to know if it was a crime to insult a man … you should not look into the Civil Code Articles dealing with defamation, because the Civil Code is not concerned with defining crimes. The Civil Code is thus *irrelevant* to your problem. Likewise the portion of the (Article 613 of the Criminal Code) stating that defamation is publishable with up to six

[1] Murray & DeSanctis *Supra* Unit 1, note 8, p.5

> months' imprisonment is not 'relevant' because your problem is *to determine if the use of a particular word constitutes defamation* – whereas the point of the cited provision is to define the punishment after the crime has been established. It is not the purpose of the cited part of Article 613 to answer the type of problem you are interested in. It is therefore irrelevant to your problem. …" [2]

Case evaluation is one of the pretrial tasks of a lawyer that follows the investigation of facts and identification and analysis of the relevant laws that are applicable to the case. It is unethical to take a case where it is clear that the client's claims and remedies are not based on facts that can be proved and where they are not supported by the relevant laws. If the lawyer decides to take the case on the basis its merits, a client-attorney contract need to be signed which clearly determines the obligations of both parties. This is followed by litigation strategy which needs to be devised based on the needs and peculiarities of the case under consideration.

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[2] A. Goldblatt, Introduction to the Legal Method in Ethiopia (Unpublished, §7, Para 2 1966.

Section 1- Primary and secondary sources

Your client may be an employer, a person seeking representation or a legal entity that seeks your legal service. Your service is sought because the client has a problem. The first task in legal investigation is thus to "*assess the problem so as to identify the issues—the specific legal questions that need to be answered*—then to determine if additional facts are needed from the client or other sources, and finally to put together a plan of action to find the legal sources necessary to answer the questions." [3]

The lawyer is expected to adequately examine primary and secondary sources before she starts analysis.

> The law consists of those recorded rules that society will enforce and the procedures by which they are implemented. … Legal sources differ in the relative weight they are accorded. .... Each source must be used with a sense of its place in the hierarchy of authority. … The most important distinction is between primary and secondary sources. Primary sources are the official pronouncements of the governmental lawmakers. … Not all primary sources have the same force for all purposes. …. Works which are not themselves the law, but which discuss or analyze legal doctrine, are considered secondary sources." [4]

<u>Reading 1</u> [5]

Primary and Secondary Authority

a) Primary Authority

Primary authority constitutes the law. It is issued by a branch of the government acting in its lawmaking capacity. … (L)egislative bodies at the federal and state levels create constitutions and statutes; legislative bodies at the local level create charters and ordinances. Constitutions and charters create the government and define the rights of citizens vis-à-vis the government. Statutes and ordinances regulate a wide range of behavior by individuals, private entities, and the government. Enacted law typically is written in broad, general terms. It is interpreted according to legislature's intent; thus materials created during the legislative process are (important). …

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[3] Murray & DeSanctis, *Supra* Unit 1, note 8, p. 225

[4] Morris L. Cohen and Kent C. Olson (2003) Legal Research in a Nutshell (Thompson West) pp. 3, 7

[5] *Christina L. Kunz et al*, (2004) *The Process of Legal Research* (Aspen Publishers) pp. 7, 8, 117 – 120).

b) Secondary Authority

Secondary authority is defined by what it is not: It is not primary authority. Rather it is created by lawyers, scholars … not acting in a lawmaking capacity. Because most secondary authority comments on the law, it is also called "commentary". All secondary authority describes what the law says, much also explains how the law came to be, and some analyze and critique the law. Some secondary authority also states the author's view of what the law should be; on occasion secondary authority does indeed influence lawmakers. …

… In addition to the major secondary sources …, other categories of secondary sources merit mention (which include practice materials). After researching and analyzing a client's problem, a lawyer often moves on to various activities designed to solve that problem, such as drafting documents or litigating a case. Some secondary authorities provide practical advice and model forms for such activities. These authorities may also provide an overview of the law behind the advice or form. …"

c) Choosing Among Secondary Authority

All the secondary authorities … serve dual functions as commentary and finding tools for primary authority and other secondary authorities. You do not need to use every authority on every research project. How do you know when to use which authority, so as to produce comprehensive, correct, and credible research and yet avoid costly excessive effort? …

d) Deciding whether to cite secondary authorities

As you research, keep in mind which authorities you eventually will be able to cite in the final written product embodying your research. You should cite to primary authority … whenever possible. Secondary authorities most often are cited for several purposes:

- A secondary authority may be cited if primary authority does not support a proposition.
- A secondary authority can be cited for some general propositions that do not require a citation to primary authority, such as a statement about the number of jurisdiction adopting a certain rule of law.
- A secondary authority could also be cited for its criticism or policy analysis of an established rule of law.

Moreover, you should not rely on a secondary authority without reading the major primary authority on which it relies. Only by reading the primary authority will you get the full flavor of the law and detect ambiguities, misinterpretations, and perhaps even mistakes made by the commentary author.

Choice among secondary authority [6]

Factor 1: ***Correctness***
- Accuracy, lack of bias,
- Updating means and frequency.

Factor 2: ***Comprehensiveness***
- Breadth of topics covered
- Depth of coverage of each topic
- Attention to rules, facts and principles
- Description only, or critique too.

Factor 3: ***Credibility***
- Reputation of author(s), publisher(s), or source
- Strength of supporting references
- Clarity, persuasiveness

Factor 4: ***Cost-effectiveness***
- Clarity of organization
- Means of access (index … etc.)
- Ease of reading and retention
- Total cost (fees and time).

Task

"Sources that state legislative intent are secondary sources."
Comment, and compare your opinion with the following reading.

Reading 2 [7]

Legislative history is a term used to designate the documents and materials that contain the historical and background information generated while a bill or other legislative action is on its way to becoming a law. It includes draft versions of the bill, redrafts, testimony at various hearings on the bill, committee reports, studies, legislative floor debates, executive messages, and other materials generated in this process."

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[6] *Ibid*, p.119:

[7] Murray and DeSanctis, *Supra* Unit 1, note 8, pp. 307, 308

Legislative history is used to monitor the progress of a bill or other action to determine its status (prior enactment into law), and to determine 'legislative intent" - trying to figure out what the legislature meant when they wrote or rewrote the bill (and eventually the law) in a certain way. This is used to further argue an interpretation of the law or to attempt to resolve ambiguities created by the words of a statute.

As a bill is amended and rewritten during the legislative process, each version is reprinted. The theory behind usefulness of legislative history is that these progressive additions, deletions, and alterations in the language are direct evidence of deliberate thinking on the part of the legislators who contributed to the creation of the law. …

The reports generated by committees and conferences, and the floor debates where questions about the statute and explanations of the meaning of the terms are discussed, are also taken to be evidence of legislative intent. …

Legislative history is **not** a source of the law and it is never to be considered primary controlling authority. The terms of the statute itself are the only primary, potentially controlling legal authority regarding the law created by the statute.

However, legislative authority is not simply commentary. It is not simply a secondary persuasive authority, such as a treatise or law review, that discusses the meaning of a statute. It is evidence of legislative intent prior to the fact of enactment that goes beyond the realm of interpretations by third-parties after the fact. Thus, in most instances, it carries more persuasive weight than even the commentary and interpretation of a great legal scholar."

Section 2- Determining claims, remedies, defences, and counterclaims

The pattern in which specific legal questions are answered determines the outcome of a given case. For example in the tasks under the Review Exercises in Unit 2, the area of law that is relevant to the case is law of contracts. The specific area of contract law we will focus on will be 'Non-performance of contract.' The likely plaintiffs in this case can be:

- Shebelle Transport SC against Addis Asqual PLC because it has incurred expenses and damages;
- Addis Asqual PLC against Gift Trading PLC if the latter fails to pay transit service charges and expenses on the ground that the goods have not reached Djibouti for clearance and transit;
- Gift Trading against other parties depending on various facts. …

We will focus on the first possibility to discuss the issue of choice of law. We should note that contracts only bind parties that have concluded them[8] thereby making it impossible for Shebelle to claim damages directly from Gift Trading PLC subject to the possibility that Addis Asqual can involve Gift Trading to cover liabilities that may ensue.[9]

Addis Asqual couldn't load the cargo on the trucks brought to Djibouti by Shebelle Transport Compay as a result of which the latter has been unable to provide its services under the contract. Upon legal investigation Shebelle's lawyer identifes the legal issue/s and the relevant provisions that support the potential claims of its client. The provisions that capture our attention at this stage are Articles 1771 *(et seq.)* of the Civil Code which deal with effects of Non-Performance of contractual obligations.

a) On October 22nd 2001, Shebelle Transport Share Company sent a letter which showed its intentions to claim damages, and it later submitted a formal notice on December 12th 2001 to Addis Asqual Private Limited Company requesting the payment of damages incurred.

[8] Civil Code, Art. 1952(1)
[9] Civil Code, Arts. 1952 (3), 2221, 2222

b) Addis Asqual notified Gift Trading about Shebelle's October 22nd letter, to which Gift Trading replied (on November 8th 2001) by invoking force majeure. Gift Trading also contended that the expenses demanded by Addis Asqual such as the Addis-Djibouti transportation and other expenses incurred by Addis Asqual's General Manager while in Djibouti to follow up the case are not covered under the contract. Gift Trading further disputed the number of trucks claimed to have been sent to Djibouti (by Shebelle Transport) on the ground that no evidence has been submitted that substantiates the number mentioned.

c) In a letter dated December 8th 2001 Addis Asqual notified Gift Trading about the cancellation the contract because the vessel has not reached Djibouti until October 21st and couldn't discharge its transit and transportation obligations. It also noted that it reserves its right to claim expenses incurred while performing its contractual obligations. Gift Trading's letter dated December 10th 2001 agreed to the expiry of the contract period, but evaded the issue of expenses raised by Addis Asqual.

The outcome of the *Shebelle- Addis Asqual- Gift Trading dispute* depends on the analysis of Articles 1792 and 1793 of the Civil Code, and facts that prove or disprove the existence of the elements embodied in the provisions. Article 1792 reads:

a) Force majeure results from an occurrence which the debtor could normally not foresee and which prevents him absolutely from performing the obligations.
b) Force majeure shall not exist where the occurrence could normally have been foreseen by the debtor or where it renders more onerous the performance by the debtor of his obligations.

Task 1

d) Individual Activity: Identify the elements of Article 1792 (1)
e) Pair work: Compare the elements you have identified with the person in the pair.
f) State two secondary sources you can use.

According to Article 1791 any party is liable to pay damages "notwithstanding that he is at fault." The exception to this rule is the existence of force majeure as defined under Article 1792 which has two cumulative requirements. First it must be an occurrence which the debtor could not normally foresee, and second, the occurrence should absolutely prevent the performance of obligations. The commentaries by Rene David [10] and George Krzeczunowicz [11] clearly show that the defence of force majeure should be given a strict interpretation thereby requiring the debtor to prove that the occurrence was not *normally foreseeable*, and *absolutely insurmountable*.

Task 2

a) Individual Activity: Is the damage of the vessel in the Shebelle-Asqual-Gift Trading dispute normally unforeseeable? Is the element of absolute insurmountably satisfied?
b) Pair work: Compare the elements you have identified with the person in the pair.
c) State set of hypothetical facts that would render the occurrence foreseeable and surmountable.

Task 3

Factual Propositions, Inferences and Generalizations

Source: Roger Burridge and Samuel Adelman (Warwick Law School) July 2007

1. Factual outline

   Abebe opened the door of the room where Dr. Getachew was giving a lecture. Tigist was hit by the door and broke her nose.

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[10] Rene David (1971) *Commentary on Contracts in Ethiopia,* (Addis Ababa: HSIU) pp. 69, 70

[11] George Krzeczunowizc (1973) Formation and Effects of Contracts in Ethiopian Law, (Addis Ababa: HSIU) pp. 141, 142.

2. What are the main possible legal consequences that the situations give rise to?

3. Consider the following additional circumstances
    a) Abebe was seen to be running just prior the incident.
    b) Abebe was carrying a pile of books and folders.
    c) Abebe entered Dr. Getachew's lecture at about 10:10.
    d) The door to the lecture room was glass.
    e) Tigist had recently broken off a relationship with Abebe.
    f) Dr. Getachew was known to dislike students being late for lectures.
    g) Abebe had been heard to say three days previously that he was jelous of another student's friendship with Tigist.

4. What further evidence would you look for to establish whether Abebe has been negligent or committed (intentional bodily injury)?

Section 3- Interpretation and Legal Analysis

3.1- Sample principles of statutory interpretation

Legal analysis is necessary to interpret legal provisions and apply them to a given fact situation with a view to solving a legal issue (or a legal problem). There are various rules of interpretation which are beyond the scope of this course. Students are expected to revise the rules of statutory interpretation which they have covered in Introduction to law and other courses. This section highlights the following two principles of interpretation: the *plain rule interpretation* and the principle of *eusdem generis*.

a) The principle of plain rule interpretation

Where the law is clear lawyers do not resort to interpretation. But when two or more meanings are possible, there is the need for interpretation. Ambiguity arises owing to various reasons:

> As a rule …, a statute provides for certain legal consequences to follow certain actions, undertaken by certain actors, in certain circumstances. When the statute is applied to a specific client's facts, there are boundaries to be drawn as to all of these matters: Which actors fall within the statute, and which do not? Which circumstances matter, and which do not? Which consequences follow, and which do not:
>
> Ambiguity in statutory language makes answers to these questions uncertain. Statutory language is ambiguous when more than one meaning is possible. Some statutes are ambiguous because the language is vague or puzzling; others are ambiguous because a point logically related to the statute's topic is omitted.
>
> Statutory ambiguity has several causes. The legislature may have intentionally chosen ambiguous language because legislators were unable to agree on clearer language and were willing to defer the issue to the courts or a later session of the legislature. Or the legislature may have tried but been unable to write less ambiguous language. Or the legislature may not have perceived an ambiguity in is choice of words; one can think of only so much when writing any document. Or new situations may have arisen since the statute's enactment, turning language that once was clear into ambiguous language."[12]

[12] Deborah A. Schmedemann and Christina L. Kunz (1999) *Synthesis: Legal Reading, Reasoning and Writing* (New York: Aspen Law and Business) p. 66

Task 4

In the first paragraph of this section there is a sentence which reads "When the law is clear lawyers do not resort to interpretation." And with regard to interpretation of contractual clauses, Article 1733 of the Civil Code stipulates that "Where the provisions of a contract are clear, the court may not depart from them and determine by way of interpretation the intention of the parties."

a) A driver of a mini-bus taxi saw a sign at a bridge which reads "Not allowed to automobiles." You are at the front seat near the driver, and he asks you whether he can pass because he is driving a minibus and not an automobile.

b) In case you are of the opinion that the driver can't drive on the bridge, is it because the words are not clear? If not, why do you resort to interpretation?

c) The words in the sign are clear. On the other hand they seem to go against the purpose of the notice. Which should prevail? The words or their purpose?

d) Do you agree with the following excerpt:

" … The bridge between the *plain meaning rule* and the *purpose approach* is the *golden rule*. The golden rule instructs lawyers not to honor the wording of a statute when it produces an absurd or unreasonable result, calls for impossible outcome, or yields an unconstitutional result. The meshing of the purpose approach and plain meaning rule is thus left to the sound discretion of the lawyer interpreting the statute.

For example, imagine that the legislature prohibited the drafting of "any document" by a non-lawyer. According to the plain meaning rule, the statute could prohibit government employees from completing birth certificates and coroners from completing death certificates. By contrast, according to the purpose approach, the statute would not be construed to prohibit these actions because these results would not serve the statute's purpose of precluding non-lawyers from engaging in work requiring legal expertise. The golden rule suggests that the latter interpretation is the better one."[13]

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[13] *Ibid*, p. 68

b) The principle of *eusdem generis*

E*usdem generis* in latin means "***of the same class.***" It is translated as 'General terms' under Article 1735 of the Civil Code which reads "A contract shall be deemed to relate to such matters only on which it appears that the parties intended to contract, however general the terms used."

> "… *Ejusdem generis* … takes two forms in the construction of a statute. …(It can mean that) the meaning of a word is limited by the series or words or phrases of which it is a part. (In is second interpretation), "the meaning of a general word or phrase following two or more specific words or phrases is limited to the category or class established by the specific words or phrases. ... For example, if a park regulation allows 'household pets' to run from noon to 4:00 p.m., and the regulation constantly refers to 'dogs and cats' in the context of the term 'household pets', it may be argued that the regulation was intended to be limited to common domestic pets, and not to exotic pets, such as wolves, tigers, pythons, tarantulas, even though some people like to keep these pets in their household."
>
> "If a bankruptcy law provision allows a debtor to keep television, refrigerators, washers, dryers, dishwashers, microwaves, ranges, ovens, and other common household goods" free from execution as part of the homestead exception in the bankruptcy Code, it may be argued that this exception was not meant to cover extremely valuable artwork or an elaborate collection of beer brewing equipment.. Even though these items may be found to be found in the same home, they are not of the same class or category as the goods specifically mentioned in the section."[14]

3.2- Breaking down a rule of law into its parts

Legal analysis requires careful identification of the cumulative and alternative elements in the legal provision under consideration. Some provisions may also have a balancing test whereby the existence of certain elements or factors is balanced against a set if other elements (factors) in order to determine the applicability of a legal provision. Terms such as 'proportionate, disproportionate etc.' in a provision indicate the balancing test.

As Murray and DeSanctis pointed out :

> The first thing to do when you find a rule of law is to break it down into its parts. The elements of a rule are those facts that must be present in the case or the separate factors or conditions that must be considered and satisfied in order for

[14] Murray and DeSanctis, *Supra* Unit 1, note 8, pp.62-63

the rule to be triggered. If the rule requires three facts to be present, it has three elements. If you are an advocate in lawsuit seeking to apply the rule in your client's favour, the elements are the facts that you have to prove in order for your client to prevail. The opponents of the same suit must try to disprove (or prove the absence of) one or more elements that must prevail. [15]

Reading 3

Factual conditions and legal consequences

Source: *Schmedmann & Kunz, Supra* note 10, pp.12-18 (with omissions and adjustments)

Rules can be stated in If/Then form.
IF the required factual conditions exist
THEN the specified legal consequences follow.

The ***IF-clause*** contains words or phrases describing a class of situations law makers wished to address. Typically, the *IF-clause* refers o one or more actors (whether individuals or legal entities such as companies), one or more actions (acts or omissions) and circumstances under which the action occur.

The ***THEN-clause*** identifies the legal consequence that follows when the factual conditions are met. The consequence may be a benefit to or burden on a specified party and it may be multi-faceted. Often a benefit flows to one party, and a burden is imposed on another, as when one is ordered to pay monetary damages to the other.

The analytical task of the lawyer is first to discern the IF/THEN statement from the legal provision, and then determine how the case under consideration fit the factual conditions set our in the IF-clause. Because lawmakers do not always phrase the law according to this pattern, often you will need to distill your own IF/THEN statement.

Some legal rules are stated in complex and wordy sentences. Thus, the next step may be to carefully paraphrase the rule, making sure that you do not remove meaning from the rule, in an effort to make it easier to work with."

a) Rules and exceptions

"Some rules state not only factual conditions necessary for the legal consequence to follow, but also factual conditions that render the legal consequence inapplicable. These rules take the following form:
IF some factual conditions exist
THEN the specified legal consequences follow,
UNLESS other factual conditions exist.

[15] *Ibid*, 6

The UNLESS-clause contains exceptions to the IF-clause. Fortunately, a rule in IF/THEN/UNLESS form can be stated in a simpler IF/THEN form in the following way:

IF some factual conditions exist
and other factual conditions do not exist,
THEN the specified legal consequences follow."

b) Deriving individual elements and consequences

"Some factual conditions in IF-clauses are complex, giving rise to more that one element. *An element is a factual condition that can be analyzed as a unit*. Most elements can be stated in a simple clause, and some have *sub-elements*. Thus, once you have developed your IF/THEN statement, your next goal is to restate the IF-clause so that each element (with or without sub-elements) is stated separately."

3.3- Legal Reasoning

In Task 3 of section 2 the factual outline was that "Abebe opened the door of the room where Dr. Getachew was giving a lecture" and "Tigist was hit by the door and broke her nose." There are three potential legal consequences of liability.

The first potential legal consequence is extra-contractual liability for the physical injury incurred by Tigist.. Article 2067(1) of the Civil Code provides that "A person shall be liable where by his act he inflicts bodily harm on another." The exception is embodied in Article 2067 (2) which reads "No liability shall be incurred where the act causing the harm was ordered by law or was done in legitimate self-defence, or where the harm is due solely to the victim's fault." This provision falls under the Section entitled "Liability in the absence of faulty" and Article 2067 shall apply even if Abebe was not at fault if the elements of the provision apply to the facts in the case.

In the 'IF-Then' form of breaking down elements of provisions, Article 2067 sub-Articles 1 and 2 can be reframed as follows:

IF – a person (through his act or omission)
– causes
– a bodily harm on another
THEN – he shall be extra-contractually liable irrespective of fault

UNLESS, - the act was ordered by law, or

- was done in legitimate self-defence, or
- where the harm is due solely to the victim's fault.

Task 5

1. State whether the following additional circumstances (stated in Task 3, Section 2) are relevant to the issue of Abebe's extra-contratual liability under Article 2067
   a) Abebe was seen to be running just prior the incident.
   b) Abebe was carrying a pile of books and folders.
   c) Abebe entered Dr. Getachew's lecture at about 10:10.
   d) The door to the lecture room was glass.
   e) Tigist had recently broken off a relationship with Abebe.
   f) Dr. Getachew was known to dislike students being late for lectures.
   g) Abebe had been heard to say three days previously that he was jealous of another student's friendship with Tigist.
2. What further evidence would you look for to establish whether Abebe is liable under Article 2067?

After breaking down the relevant provision into its constitutive elements, and after having gathered further evidence, if necessary, the lawyer is expected to reach at a conclusion that resolves the legal issue "whether Abebe is extra-contractually liable under Article 2067." We need to use legal reasoning after we have identified the issue and gathered the relevant facts and laws. The type of reasoning we can use are highlighted in the following reading.

Reading 4

Types of legal reasoning[16]

Rule based reasoning

> **Task 6**
>
> Recall the basic rules of syllogism (that you have studied in '*Introduction to Logic*') and relate them to a reasoning which may be constructed based on facts and rules of law?

Goldblatt [17] noted that "the basic logical structure of most legal arguments is the syllogism whose structure consists of a *major premise*, a *minor premise* and a *conclusion*." He gives the following paragraph as an example:

> "… I (believe that) the Court will acquit my client. Although it is admitted that he killed the deceased it was under such circumstances that the law excuses the (act). Article (78) of the (Criminal) Code provides that any act done under the necessity of self-defense shall not be punished. The deceased broke into the defendant's home and threatened his wife with a revolver. The defendant shot him from the staircase. There cannot be clearer case of self-defense. My client is innocent and (I request that) he be acquitted forthwith."

Goldblatt relates the reasoning in the preceding paragraph with syllogism:

> "…The basic reasoning of the above passage is a simple syllogism. Acts done in self-defense are not punishable (major premise). Defendant's act was done in self-defense (minor premise). Therefore, the defendant's act is not punishable (conclusion). … It is by no means necessary to be able to label parts of an argument with their proper logical names. What is essential is that you understand the function of each part of an argument and understand what, if any, essential portion it relates to."[18]

Murray & DeSanctis [19] (in the excerpt below) elaborate the manner in which elements of a legal rule serve as the framework of legal reasoning in rule based reasoning:

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[16] Legal Research Methods, Module 1, Unit 2 (St. Mary's University College, September 2007); The module was prepared by the author of this course material, and I have thus felt free to make some adjustments.

[17] Goldblatt, *Supra* note 2, § 30

[18] *Ibid*

[19] Murray & DeSanctis *Supra* Unit 1, note 8, pp. 8,9

The answer is X because,
the authorities establish the rule that governs this situation,
and the rule requires certain facts to be present,
and these facts are present,
so the application of the rule to the facts produces X result.

This type of reasoning reflects a simple logical syllogism

The answer is X if there are certain facts present
All the required facts are present
Therefore, the answer is X.

The party who argues that the answer is not X would argue as follows:
The answer is X if there are certain facts present
Not all the required facts are present
Therefore, the answer is not X.

…

The organizational structure in *rule-based reasoning* can be remembered through the starting initials: TREAT.
"T" stands for Thesis
"R" stands for Rule
"E" represents the Explanation of how the rule works in various situations
"A" stands for Application of the rule to the facts of the present situation
"T" represents the Thesis restated as conclusion.

Task 7

Based on the reading here-above write the framework of *rule-based reasoning* for the issue whether Abebe is extracontractually liable for the injury incurred by Tigist

Analogical reasoning

…

This category of reasoning is very often used in common law systems where the reasoning becomes "*the answer is X because this situation is like the situation in prior cases and in those cases X was the answer*." ***Analogical reasoning*** links the case under litigation to other precedents that involved similar facts and issues. "If the court agrees that the cases are similar and that there are no legally significant differences, the court should handle the present case in the same way to produce the same result as in the prior cases." A lawyer may also use ***converse analogical reasoning*** "to argue that a certain case should

not determine the outcome of the case at hand because there are legally significant differences."

Ethiopian law follows the continental law tradition, and case precedents are not in principle binding, although they might have some persuasive impact. However, Article 2/1 of the Federal Courts Proclamation Re-amendment Proclamation No. 454/2005 provides that decisions of a panel of five or more judges of the Federal Supreme Court Cassation Division shall be binding on lower courts with regard to interpretation. Although this is not a law making function, the fact that it provides for a binding interpretation renders *analogical reasoning* or *converse analogical reasoning* relevant in the Ethiopian context under certain circumstances.

It is, however, to be noted that *rule-based reasoning* and *analogical reasoning* are not mutually excusive. In the Ethiopian context, rule-based reasoning is the most frequent. Analogical reasoning is expected to be made to substantiate and reinforce rule-based reasoning or to request a court to follow the interpretation of the Federal Supreme Court Cassation Panel Decision where similar issues of law are involved under similar fact situations.

Policy-based reasoning and narrative reasoning

…

Policy-based reasoning is not as strong as the preceding forms of reasoning. It is used to strengthen arguments that are supported by rule-based reasoning, Under Ethiopian law, rules are the basis or reasoning and as stated earlier, analogical reasoning also presupposes the interpretation of provisions and the creation of legal rules through judicial decisions. Therefore policy-based reasoning becomes effective where there are problems of interpretation due to factors such as ambiguity, inconsistency or absurdity in literal interpretation.

Narrative reasoning is usually used by non-lawyers. Lawyers as well use it to emphasize points of fact and law. "A narrative argument is made by stating your thesis and listing the supporting facts or factors." It substantiates the categories of reasoning stated above, and does in substitute them.

Task 8

Analyze the potential criminal liability of Abebe for Tigist's injury:

a) Identify the elements of Article 556 of the Criminal Code.
b) Identify the elements of Article 559.
c) Is the factual outline enough to hold Abebe criminally liable for common willful injury (Art. 556)?
d) Are the facts given adequate to entail criminal liability for injury cause by negligence under Artcle 557?
e) State which factual circumstances can be relevant for the issue of Abebe's criminal liability:
   - Abebe was seen to be running just prior the incident.
   - Abebe was carrying a pile of books and folders.
   - Abebe entered Dr. Getachew's lecture at about 10:10.
   - The door to the lecture room was glass.
   - Tigist had recently broken off a relationship with Abebe.
   - Dr. Getachew was known to dislike students being late for lectures.
   - Abebe had been heard to say three days previously that he was jealous of another student's friendship with Tigist.

f) What further evidence would you look for to establish whether Abebe is liable under:
   - Article 556 of the Criminal Code?
   - Article 559 of the Criminal Code?

Section 4- Parties in litigation, jurisdiction and Venue

4.1- Parties that can be plaintiff and defendant

The issue of identifying parties in a suit is fundamental because lawyers need to determine whether a client has the right to file a claim at court. According to Article 33 (2) of the Civil Procedure Code "No person may be plaintiff unless he has a vested interest in the subject matter of the suit." R. A. Sedler noted that "the plaintiff must be the real party interest. … The most obvious (reason) is to prevent suits by a person who wants to litigate someone else's claim against the defendant."[20] The defendant should not be subjected to duplicate claims in case the claim has been assigned to another person. In such cases, the plaintiff with vested interest is the assignee. We are expected to have thorough analysis of the law of civil procedure when issues of assignment and substitution are involved. Such details are beyond the scope of this course because they have been addressed in the Law of Civil Procedure.

Lawyers take due precaution in the determination of the defendant in a given suit. Article 33 (3) of the Civil Procedure Code stipulates that "No person may be a defendant unless the plaintiff alleges some claim against him." The plaintiff will thus state not only the relief sought [21] but should also make sure that a claim can be made against the person who will be a defendant in the suit as.

The issue of party plaintiff and party defendant gets complex when there is joinder of plaintiffs [22] joinder of defendants[23] and joinder of causes of action[24] which would enable us to join the claims. Details in this regard fall within the domain of law of Civil Procedure which should be thoroughly examined and analyzed whenever issues of joinder arise.

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[20] Robert Allen Sedler (1968) Ethiopian Civil Procedure (Addis Ababa: HSIU) p. 52
[21] Article 224 of the Civil Procedure Code requires relief to be stated.
[22] Civ. Proc. C., Art. 35
[23] Civ. Proc. C., Art. 36
[24] Civ. Proc. C., Arts. 217 and 218

Save certain violations that are *'predominantly of a private nature,'* [25] criminal charges are filed by the Public Prosecutor irrespective of the victim's complaint because crimes are public wrongs and the society at large has vested interest in ensuring "order, peace and the security of the State, its peoples, and inhabitants for the public good."[26] Being a defendant in a criminal case arises from an act or omission that is prohibited under criminal law. A charge may have one count and one defendant, two or more counts against the same defendant,[27] or two or more defendants who are accused of having participated in an offence.[28] The number of counts and defendants usually enhance the complexity of the procedural and substantive aspects of the case although there are instances where a charge that involves a single count against a defendant may be as complex.

4.2- Jurisdiction and venue

One of the major pretrial tasks is identification of the court that has jurisdiction to adjudicate a case. "Once it has been decided to litigate a case, the first question that the plaintiff must consider is where suit may be brought. A suit can only be brought in a court that has jurisdiction"[29] which includes:

a) judicial jurisdiction, i.e. "the power of the courts of a particular nation or state (having independent system of law) to render a judgment binding on individual or property"[30]
b) material jurisdiction, i.e. the power of a given level of court to hear a kind of case ,[31] and
c) local jurisdiction, i.e. the locality in which the case is to be tried.[32]

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[25] The provisions of the Criminal Code which are qualified by the phrase "upon complaint" such as Articles 613 to 619 require complaint by the victim as a precondition for the institution of a charge. See E.N. Stebek (2006) Ethiopian Criminal Law Digest, Parts I & II (SMUC) pp. 54 -56.
[26] Article 1 of the Criminal Code
[27] Criminal Procedure Code, Article 116
[28] Criminal Code, Articles 32 to 40
[29] Sedler, *supra* note 20, p. 19
[30] *Ibid*
[31] *Ibid*, 27

In disputes that involve a foreign element, lawyers examine whether Ethiopian courts have judicial jurisdiction to adjudicate a case. Once that is determined the lawyer proceeds to the identification of the level of court which has material jurisdiction. Depending on the kind of the case or the amount of claim involved, we are expected to determine the level of court that has material jurisdiction. And thirdly, answering the issue of 'which court, among a given level of courts?' requires careful determination of local jurisdiction. Whenever there is the possibility of instituting a suit in more than one civil court, [33] "the court in which the statement of claim was first filed shall have jurisdiction." [34]

Change of venue is allowed under the circumstances stated under Article 31 of the Civil Procedure Code. The scope of this course material requires focus on basic highlights that can serve as mere refresher for such basic issues which students are required to revise from the various laws and secondary sources relevant to civil procedure, criminal procedure and evidence.

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[32] *Ibid*, 33
[33] Civ. Proc. C., Art. 7 (1)
[34] Civ. Proc. C., Art. Art 7 (2)

Section 5- Reading on Case evaluation and litigation strategy

After having gone through fact and legal investigation, the lawyer can come to a decision whether she has a chance to obtain the relief sought by her client, or at least decides whether she has plausible points of fact and law that can validly be brought forth in a statement of claim or statement of defence.

Reading 5

Case Evaluation and Strategy [35]

Case evaluation requires that you gather enough facts and consider sufficiently the legal issues to decide intelligently whether to take the case. Then, if you decide to take it, the evaluation requires that you devise a realistic, cost-effective litigation plan. …

a) Taking the case

You should take those cases that have factual and legal merit and are economically feasible, and you should usually decline the others. …

First, always check for conflicts of interest with existing and former clients. A lawyer's relationship with a client is based on two key duties: loyalty and confidentiality. Both duties may be breached in the litigation environment if a lawyer represents multiple clients on the same matter if the interests of the clients are directly adverse, or represents a client against a former client on a substantially related matter in which the client's interests are materially adverse to the interests of the former client. …

…

Consider, for example, the common situation in which a driver and passenger in a car, involved in a collision with another car, seek a lawyer to sue the driver of the other car. Since th passenger could potentially sue the driver of the car in which she was riding (if there is any evidence of that driver's negligence), as well as the driver of the other car, a conflict of interest may exist between the passenger and her driver. In this situation, the passenger must be fully informed of her right to sue her own driver and the consequences if she decides not to sue, and must have the opportunity to consult further about the situation. If the passenger waives her right to sue her driver, the conflict disappears, and the lawyer can represent both the passenger and her driver in a lawsuit against the driver of the other car. …

Second, your litigation chart, which sets out the potential legal claims and required elements of proof for each claim … provides the framework from which to analyze the case. … Hence you cannot plead claims, remedies, or defenses that you have not adequately investigated to determine whether they are well grounded.

As a lawyer for a prospective plaintiff, you should take a case only if you can realistically expect to prove a prima facie case on at least one theory of recovery. You

[35] Mauet, *Pretrial*, Supra Unit 2, note 8, pp. 79- 108, with omissions

should at least have some admissible proof for each element of each asserted claim or have a reasonable basis for believing you will get such missing proof (through court order[36]). In addition, the potential recovery must be large enough to justify the work and risks of litigation. Many lawyers, for example, refuse even a simple case on a contingency fee basis unless a realistic recovery is … (in such a range which provides) reasonable compensation for the work and risks involved. …

(A lawyer's acceptance or her decision not to accept) … a case depends on the type of case and the factual and legal issues involved. For example, you might accept a simple automobile collision case not invoking serious injury after interviewing the client and reviewing the police accident report. Sometimes such a limited investigation will be enough to assess whether client 'has a case, whether, economically speaking, the damages are substantial enough to make it worth pursuing, and whether a judgment can actually be collected. In more complex matters, however, such as serious personal injury, medical malpractice, products liability or commercial cases, you may need to do substantial legal research, extensive factual investigation, and have an expert review the case before you can make this decision. The basic question is always the same. Do I know enough from my fact investigation and legal research to conclude that the client has a provable case with substantial damages that can be collected? If the case appears weak on liability or damages, involves a great deal of work, and would be taken on a contingency fee basis, the best time to turn it down is now. Cases rarely look better than when they first walk in the door. Every lawyer has taken cases and later regretted it. The best way to avoid this is by rejecting the marginal cases early.

There are exceptions. First, where a plaintiff is in imminent danger of having an applicable (period of limitation)[37] run, your first obligation is to file a claim to prevent the statute from running, even though you have not had an opportunity to investigate the facts and research the law. Protecting the plaintiff's claim from a limitation bar against must take precedence over other considerations. Second, keep in mind that lawyers frequently take cases for reasons other than income that the case will produce.

If you decide to take a case, you need to enter into an agreement with the client. If you turn down the case, you need to send out a letter declining representation. …

… If the client realizes the case is not defensible on the merits, the client may try to pressure the lawyer to drag out the case or file unfounded defenses, counter claims, or third-party claims. But a defense lawyer has (ethical) obligations. … Such conflicts are best handled at the outset by letting the client know what you can and cannot do in defending the case, and by reaching agreement on how you plan to defend.

b) Establishing the terms of the client-lawyer agreement

The attorney-client relationship should be formally established with a written agreement. There are several reasons for this. First, any contractual relationship is best established by a written instrument. Second, the agreement will prove the existence of an attorney-client relationship for (the purpose of enabling the lawyer to invoke the issue of confidentiality regarding privileged information).[38] Third, it will establish the work to be done, what will

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[36] The original reads "during formal discovery."

[37] The original reads "having an applicable statute of limitation run"

[38] The original reads "for privilege purposes."

be done and the basis for compensation, all of which are necessary for a good working relationship with the client. Fourth, … (it will enable the client to)[39] be informed in writing of how the fee is set and of all the material facts concerning the representation.

… (The client might have) little understanding of the legal work involved in litigaton and the various fee arrangements that can be made. It is in everyone's best interest that the client be (oriented) on these matters. You should discuss how you set your fees, and the expected costs, with the client.

…

c) Declining representation

A lawyer may not always be able to take a case. The matter may not be within the lawyer's expertise. It may no have merit or be large enough to justify a suit, or the defendant may not be able to pay a judgment. The lawyer may be too busy or have a conflict of interest. Or the lawyer may be unable to agree with the client on a fee. …

… If you decide not to represent a party, you nevertheless have an obligation to warn her if a (period) of limitations or other notice statute may run shortly, so that she can get another lawyer in time.

d) Planning the litigation

Assume you have accumulated the facts available …; researched the possible legal claims, remedies, defenses, and counterclaims; put them on your litigation chart; researched other procedural questions; reached an agreement with the client to represent him; and have no timing problems. Now is the time, before filing your initial pleading, to structure a litigation plan.

A litigation plan consists of defining the client's objectives and developing a strategy to achieve those objectives. Once you develop a strategy in broad terms, you can then dvide the strategy into its component chronological parts.

Even if you think a litigation plan can't be developed, your client will think it can, and he's right. Sophisticated commercial clients, such as insurance companies and corporations, usually require a litigation plan before authorizing a lawsuit or, if a defendant, after receiving the complaint. The litigation plan requirements usually include an explanation of what claims, remedies, or defenses you will raise; a description of the basic facts, including the anticipated factual issues; an assessment of settlement possibilities; an assessment of likely trial outcome; and cost projections for each stage of the plan (in the litigation timetable you have developed). …

e) Pre-filing requirements

Are you finally ready to begin drafting the pleadings? Not quite. There are still a few matters you need to consider before plunging ahead. (Some actions require notice before filing suits, or some contracts may require the submission of disputes to mediation or arbitration before suit can be brought. And there are cases that should be brought to administrative procedures before they are brought to court).[40]

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[39] The original reads "Model Rule 1.5 requires that the client)

[40] Summarized from the original (pp. 104, 105)

Unit 5- Pre-trial Negotiation and Settlement

Unit Introduction

Alternative means of dispute settlement are efficient and cost effective. They save time and avoid the cost involved in litigation. Moreover, such conflict resolution schemes significantly reduce case load of courts thereby making it possible for the judiciary to allocate adequate time and attention to cases that are brought to courts.

Both parties can obtain a win-win solution during negotiation and settlement, because the concessions on both sides would enable each party to gain some benefit. This unit does not deal with the various forms of Alternative Dispute Settlement Mechanisms because they belong to the course designed for this particular purpose. It suffices to say that parties steadily lose control over their case as they move towards litigation.

Parties in dispute have the settlement of their case in their own hands at the stage of negotiation because they are free to mutually determine the elements of the settlement. Negotiation is "a consensual bargaining process in which parties attempt to reach agreement on a disputed or potentially disputed matter."[1] Negotiation "differs from other methods of dispute resolution in the degree of autonomy experienced by the disputing parties who are attempting to agreement without intervention of third parties such as judges, arbitrators and mediators."[2]

In mediation, disputing parties "work with a neutral third party, the mediator, to reach a mutually acceptable agreement."[3] The parties still have a considerable

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[1] Jacqueline M. Nolan-Haley (1992) *Alternative Dispute Resolution in a Nutshell* (New York: West Publishing Co.), p.13

[2] *Ibid*

[3] *Ibid*, p. 56

degree of control over the outcome of their dispute. Unlike litigation, where a judicial decision is binding, "no such compulsion exists in mediation" because "the mediator aids the parties in reaching a consensus. It is the parties themselves who shape the agreement."[4]

The parties progressively lose their authority to determine the outcome of the dispute as they move onto arbitration in which parties in private disputes have the option to voluntarily submit their case to a neutral third party after which they shall be bound by its decision. Unlike court litigation, the parties have the authority to choose their arbitrator/s. Analogous to judicial decisions, however, the disputing parties absolutely lose control over the outcome arbitral awards.

This unit focuses on negotiation and settlement, and the following readings and exercises focus on lawyering skills that are required during the negotiation to settle disputes before trial.

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[4] *Ibid*

Section 1- Reading on Negotiation and Settlement

1. Negotiating a Settlement [5] (before trial)

The dynamics of negotiation, in the litigation as well as other fields, has received increasing attention in recent years. This has occurred, in part, because litigation and trial costs have made settlement more desirable, but also because there is a growing awareness that learning negotiation methods can improve a lawyer's ability. The literature on negotiation methods for lawyers is rapidly expanding, and a number of books are particularly useful for litigators. …

Trying a case inherently involves risks since neither party can ever predict (the decision in a given case) with absolute certainty. … Settlements are simply the way in which lawyers eliminate the risks in the litigation process. Since risks are at the core of that process, you need to do whatever you can to minimize them. This requires that you adequately prepare the case for trial since the more you know about the case, the fewer the uncertainties and unknown factors, and hence the less risk. It also requires that you realistically evaluate the case for settlement purposes. The more relative uncertainty there is in your opponent's mind, the more flexible and compromising his position is likely to be. Factors that increase uncertainty in your opponent's mind are your own thorough preparation of the case, your willingness and ability to go to trial if necessary, and your client's willingness and preparedness for trial.

What negotiating approach should you use? Negotiation styles are as varied as lawyers are numerous. Nevertheless, there are two basic approaches that are followed today. The first is *competitive*: the lawyer makes an initial high offer, keeps the pressure on the opponent, and makes as few concessions as possible. The atmosphere is entirely *adversarial*, and the projected attitude is one of strength. This approach, perhaps the traditional way in which settlement negotiations were conducted, has benefits principally that any settlement reached will probably be a good one for the lawyer with the more competitive lawyer. Its drawback is that probably a lower percentage of cases settle under this approach. A possible conclusion to draw is that this approach is effective where you have a strong case and don't need to compromise.

The other approach is *cooperative*: the lawyer emphasizes the parties' shared interests, shows a willingness to make concessions, and makes a more realistic initial offer. The atmosphere is *conciliatory*, and egos are kept on the sidelines. The benefit of this approach is that probably more cases get settled. On the negative side, the settlement may not be as good for your client since the other side may try to take advantage of your attitude. Accordingly, this approach is probably more effective when both parties are equally strong.

The cooperative approach is becoming more accepted, probably because it seems to improve the possibilities of reaching an eventual agreement. While it has several characteristics, the key to the cooperative approach is to avoid taking rigid positions. Instead, the lawyers who are negotiating focus on the mutual interests of their clients, avoid personalizing the conflicts, and expand the possible solutions before objectively

[5] Mauet, *Pretrial*, Supra Unit 2, Note 8, pp. 367 - 369

reviewing the possible solutions to settle on a resolution of the conflict. This approach, by avoiding personalities and rigid posturing, becomes a joint effort to reach solutions.

Your settlement strategy, in addition to determining your negotiation style, also needs to include where and when the meeting will be held, who will make the first settlement overture and first offer, who will be discussed. First, decide where and when the settlement meeting will take place because serious negotiations are usually conducted face-to-face. Most lawyers, of course, prefer to have the meeting in their own offices on the theory that they will have the "home court" advantage. This may be unacceptable to the other side, which may insist on a neutral site. Some lawyers like to start first thing in the morning; others like to start later and run late. These are all details, but they are important and need to be worked out in advance. Most lawyers do not bring their clients to the meeting because the client's presence is usually not conducive to the give and take atmosphere needed to have productive negotiations. However, the lawyers know where their clients can be reached during the meeting in case direct communication becomes necessary.

Decide whether you should make the first settlement overture and the first actual offer. Lawyers traditionally have been reluctant to initiate settlement discussions or to make the actual first offer on the theory that starting the process will be taken as a sign of weakness. Lawyers always want the other side to start the process and make the first offer. In recent years, however, there has been a change, with more lawyers recognizing that starting the process is hardly a sign of weakness, provided that the lawyer has prepared properly and has made a reasonable offer. The more important question is: is this first offer realistic? If so, it will start the negotiation process. If not, the other side will summarily reject it and the process will be ended before it ever starts.

The initial offer should be somewhat higher (if plaintiff) or somewhat lower (if defendant) than that party's best result assessment. This allows for the possibility, although unlikely, that the other side has assessed the case differently and is willing to settle on the basis of that first offer. More commonly, this initial offer gives you leeway during the negotiation process, particularly since the other side will expect you to be flexible.

Decide on the first concession and whether you should make it. Like the first offer, lawyers have traditionally been reluctant to make the first concession on the ground that it signals weakness and an eagerness to settle. In recent years, however, there has been a change here as well, as lawyers realize that it is not the concession itself that conveys a weakness, so long as it is coupled with an insistence that the other side reciprocate with mutual concessions. If only one side is willing to make concessions, that is not a negotiation at all.

Decide on the order in which you plan to take up the smaller issues that need to be negotiated. Most lawyers prefer to tackle the smaller issues first, with the larger or more difficult issues left for later. The idea is that if the parties can resolve the small issues, it sets the groundwork for cooperation and compromise on the more difficult issues.

Settlement negotiation meetings, particularly if both lawyers genuinely cooperate to reach a compromise acceptable to both sides, follow a predictable course. The meeting usually starts off with the polite talk that breaks the ice and establishes an appropriate

atmosphere. After that comes the information exchanging stage, in which the parties try to learn the other side's concerns, needs, and interests. After that comes the position-taking stage, in which the parties stage their own positions and make their offers, justify their positions with supporting facts, and challenge the other side's positions with contradictory facts. It is at this stage that the bartering process takes over, with mutual concessions triggering further compromises until an agreement is reached. Remember that most concessions are made either at the beginning (usually the small concessions) or near the end (usually the major concessions) of the negotiations, as each party realizes that the opponent is becoming resistant to further concessions and the alternative is to try the case. Remember that during the bartering process it is particularly important to watch the other side and listen closely for verbal and non-verbal clues that reveal the opponent's true position and attitude. Just as in playing poker, perception is important.

If an agreement is reached, it must be put in writing. It is important to review the details of the agreement before the meeting comes to an end so that there are no misunderstandings. Always volunteer to draft the actual settlement. If the other side insists, be sure to review the agreement carefully and change any language that does not accurately and fairly reflect the agreement.

Finally, if the parties were unable to reach an agreement at the settlement meeting, this does not mean the negotiations failed. It may have paved the way for future discussions. It may have provided the groundwork for mediation or arbitration. The last offers by each side may be the basis for a high–low agreement if the case goes to trial. And it may have given you some insight into how the other side intends to present its case if it proceeds to trial.

2. Negotiation (during litigaton) [6]

…(T)he court can direct that a conference be held to facilitate a settlement. The court may direct that parties, or representatives with settlement authority, attend the conference …

Settlement conference practices vary widely. Some judges actively promote settlement, others are passive about settlement. ..

…

Finally, be patient. Experienced judges and litigators know that settlements often take time. A settlement may not be reached during the first settlement conference. However, the key concept is to get the parties talking about settlement. Once the ice is broken and the parties are talking, most cases seek their own pace, and most eventually settle.

3. Client Authorization [7]

Before you begin negotiations on behalf of a client, you must have authority to settle. The law in almost all jurisdictions is that an agreement to represent a client does not confer

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[6] *Ibid*, pp. 369 – 371
Most of the reading under this section is omitted because courts in Ethiopia encourage parties to settle their disputes without, however, actively getting involved in a settlement conference.

[7] *Ibid*, pp. 371 - 372

authority to settle. Therefore, the client must expressly authorize his lawyer to settle. A client cannot give a valid consent unless he is fully informed concerning the terms of the proposed settlement, understands the terms and the reasons for them, and expressly consents to them.

Involve the client in the decision-making, and discuss the pros and cons of settlement options. This is best done by keeping the client well informed throughout the litigation and up to date on the status of the case. Schedule a meeting with the client to discuss the upcoming settlement possibilities, give him your best present assessment of the case, and explain what you believe would be a reasonable settlement and the reasons for your evaluation. Listen to the client's questions, and candidly address his concerns. If the client agrees to settle the case on those terms, obtain his written authorization for that settlement. This is best done by sending a letter that recites the terms of the settlement proposal to the client. He should sign and return a copy of the letter acknowledging and approving its terms. When time is short, authorization by phone will suffice, but this should be followed up with a letter reciting the details of the authorization …

Section 2- Reading on Conflict Resolution Skills

Skills for Conducting a Conflict Resolution Process [8]

(The purpose of the following reading is to) introduce skills that are essential to the conflict resolution process: separating interest from position and negotiation.

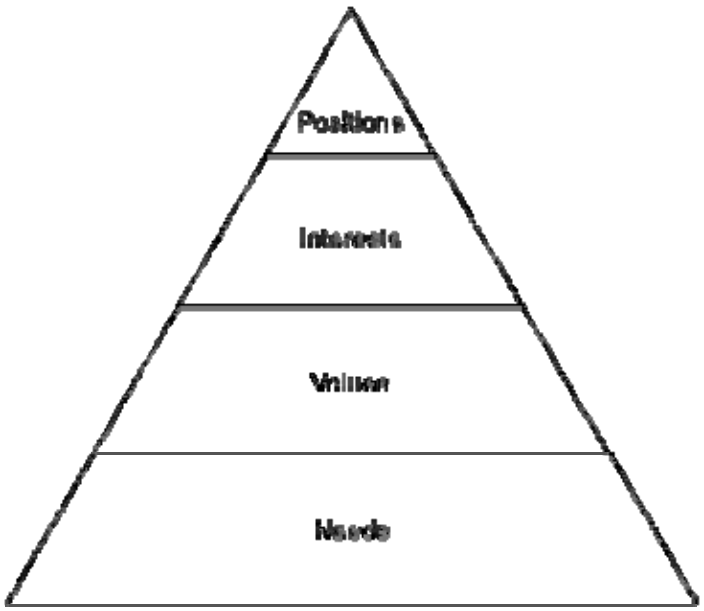
Learning Objectives

- Differentiate between interest and position
- Describe the basic principles of negotiation
- Identify the principles of a win-win strategy
- Apply the information covered today to analyze a conflict.

Interests and Positions

Interests:
The needs, concerns, and values that motivate each person.

Positions:
The responses or actions a person will take to meet his/her needs



[8] http://preventiontraining.samhsa.gov/ctw06/mod5pm.htm (Accessed: December 29, 2008)

Separating Interest from Position

For each position listed, identify the interest of the speaker

- **Position:** I was very angry about the last meeting. I will not come again.
- **Interest:**

- **Position:** If you continue to be negative about everything, then I suggest you skip these meetings.
- **Interest:**

- **Position:** This committee isn't accomplishing anything; I'm dropping out.
- **Interest:**

- **Position:** These people did not fulfill their promises to attend the meeting; therefore we cannot trust them again.
- **Interest:**

- **Position:** If you put me down one more time, I'll have to ask that one of us be taken off this assignment.
- **Interest:**

- **Position:** You do not have to do everything in this organization; otherwise you will soon burn out.
- **Interest:**

- **Position:**
- **Interest:**

- **Position:**
- **Interest:**

Negotiation

Negotiation is a process in which conflicting parties share ideas, information, and options, seeking a mutually acceptable outcome.

It is also an essential part of other conflict resolution processes:

- Mediation
- Problem solving.

Principles of Negotiation

Negotiation is a process in which two or more parties share ideas, information, and options, seeking a mutually acceptable outcome. Negotiation in itself is a conflict

resolution process; however, it is also an essential part of other conflict resolution processes, such as mediation (assisted negotiation) and problem solving.

Six principles form a theoretical framework for understanding negotiating practices:

- Distinguish "people" problems from the merits of the problem.
- Focus on interests, not on positions.
- Invent options for mutual gain.
- Search for criteria of evaluation. Look for and examine several criteria for each option.
- Know the best alternative to a negotiated agreement **(BATNA)**: The alternative to be selected if an agreement is not reached between the negotiating parties.
- Analyze your bargaining power carefully.

These principles are further described below.

- Divide people problems from the merits and work on each separately and simultaneously. People problems may include:
- Emotions
- Miscommunication
- Misperceptions.
- Focus on interests, not on positions:
- Don't bargain over positions.
- Arguing over positions is inefficient.
- Arguing over positions endangers an ongoing relationship.
- Positional bargaining is worse when in multiparty conflict.
- Neither the hard nor the easy (soft) positional bargaining is efficient.
- Invent options for mutual gain.
- Use shared understanding of the basic interests of both sides to generate (brainstorm) options that will satisfy those interests to the maximum extent possible.
- Search for criteria of evaluation. Look for and examine several criteria or standards by which to judge the fairness or wisdom of each option.
- Know the best alternative to a negotiated agreement (BATNA). This is the alternative to be selected if an agreement is <u>not</u> reached between the negotiating parties. Analyze carefully the benefits and costs of the best alternative.
- Use the BATNA as your bottom line or price. It is an excellent standard for judging whether a proposed option is an acceptable solution. Modifying or improving the BATNA according to your interest during the negotiation increases

your bargaining power and may add to the other side's motivation to arrive at a negotiated agreement.

- The purpose of negotiation is to produce an outcome that is preferable to any of the outcomes possible without negotiation. The results that you can achieve or obtain without negotiation is your BATNA.
- Your BATNA is the best protection from accepting an agreement that you should reject. The better your BATNA, the more power you have in negotiation because the relative power relation in negotiation is the degree to which an agreement is attractive to one party in comparison to its BATNA.

How to develop possible BATNAs:

- Invent a list of actions you might conceivably take if agreement is not reached.
- Improve some of the promising ideas and convert them into practical options.
- Select, tentatively, the one option that seems best for you.

In negotiation context: Remember always to consider the other side's BATNA.

 Analyze your bargaining power carefully. Bargaining power traditionally is defined as: "the ability and power to hurt the other side or the power of superior resources."

But in this context bargaining power should be evaluated according to your:

- Skill and knowledge
- Good working relationship
- Good BATNA
- Good options
- Legitimacy
- Commitment

Other principles that can assist you in negotiation are:

- Focus on and prepare what you want, not what you fear.
- Structure your interaction (relationships, processes, and issues) to clarify what you are doing at any one time.
- Jointly analyze, communicate, create, and decide.
- Assess your power relative to the power of others.
- Remain aware of the real external environment.

Principles of a Win-Win Strategy

- Participants are problem solvers.
- The goal is a wise outcome reached efficiently and amicably.
- Separate the problem from people.
- Be soft on the people, hard on the problem.
- Proceed independent of trust.
- Focus on interests, not on positions.
- Explore interests; avoid having a bottom line.
- Invent options for mutual gain.
- Develop multiple options to chose from; decide later.
- Use objective criteria.
- Try to reach results based on standards independent of will.
- Reason and be open to reason; yield to principles, not to pressure.

Don't Bargain Over Positions

Problem Positional Bargaining: Which Game Should You Play?		**Solution** Change the Game-Negotiate on the Merits
Soft What? Participants are friends. The goal is agreement. Make concessions to cultivate the relationship. Be soft on the people and the problem. Trust others. Change your position easily. Make offers. Disclose your bottom line. Accept one-sided losses to reach agreement. Search for the single answer: the one they will accept. Insist on agreement. Try to avoid a contest of will. Yield to pressure.	**Hard What?** Participants are adversaries. The goal is victory. Demand concessions as a condition of the relationship. Be hard on the problem and the people. Distrust others. Dig in to your position. Make threats. Mislead as to your bottom line. Demand one-sided gains as the price of agreement. Search for the single answer: the one you will accept. Insist on your position. Try to win a contest of will. Apply pressure.	**Principled What?** Participants are problem solvers. The goal is a wise outcome reached efficiently and amicably. **Separate the people from the problem.** Be soft on the people, hard on the problem. Proceed independent of trust. **Focus on Interests, not positions.** Explore interests. Avoid having a bottom line. **Invent options for mutual gain.** Develop multiple options to choose from; decide later. **Use objective criteria.** Try to reach a result based on standards independent of will. Reason and be open to reason; yield to principle, not pressure.

Based on: *Getting to Yes,* 1981. Fisher and Ury.

A ROLE FOR DR. JONES-UGLI ORANGE CASE

You are Dr. J.W. Jones, a biological research scientist employed by a pharmaceutical firm. You have recently developed a synthetic chemical useful for curing and preventing Rudosen. Rudosen is a disease contracted by pregnant women. If not caught in the first 4 weeks of pregnancy, the disease causes serious brain, eye, and ear damage to the unborn child. Recently, there has been an outbreak of Rudosen in your State and several thousand women have contracted the disease. You have found, with volunteer victims, that your recently developed synthetic serum cures Rudosen in its early stages. Unfortunately, the serum is made from the juice of the Ugli orange, which is a very rare fruit. Only a small quantity (approximately 4,000) of these oranges were produced last season. No additional Ugli oranges will be available until next season, which will be too late to cure the present Rudosen victims.

You have demonstrated that your synthetic serum is in no way harmful to pregnant women. Consequently, there are no side effects. The Food and Drug Administration has approved the production and distribution of the serum as a cure for Rudosen.

Unfortunately, the present outbreak was unexpected and your firm had not planned on having the compound serum available for 6 months. Your firm holds the patent on the synthetic serum and it is expected to be a highly profitable product when it is generally available to the public

You have been recently informed, on good evidence, that R.H. Cardoza, a South American fruit exporter, is in possession of 3,000 Ugli oranges in good condition. If you would obtain the juice of the 3,000, you would be able to both cure the present victims and provide sufficient inoculation for the remaining pregnant women in the State. No other State currently has a Rudosen threat.

You have recently been informed that Dr. P.W. Roland is also urgently seeking Ugli oranges and is also aware of Cardoza's possession of the 3,000 available. Dr. Roland is employed by a competing pharmaceutical firm. S/He has been working on biological warfare research for the past several years. There is a great deal of industrial espionage in the pharmaceutical industry. Over the past several years, Dr. Roland's firm and your firm have sued each other for infringement of patent rights and espionage law violations several times.

You have been authorized by your firm to approach Cardoza to purchase the 3,000 Ugli oranges. You have been told s/he will sell them to the highest bidder. Your firm has authorized you to bid as high as $250,000 to obtain the juice of the 3,000 available oranges.

Before approaching Cardoza, you have decided to talk with Dr. Roland so that you will not be prevented from purchasing the oranges.

A ROLE FOR DR. ROLAND-UGLI ORANGE CASE

You are Dr. P.W. Roland, a biologist for a pharmaceutical firm. The firm is under contract with the government to do research on methods to combat enemy uses of biological warfare.

Recently, several World War II experimental nerve gas bombs were moved from the U.S. to a small island just off the U.S coast in the Pacific. In the process of transporting them, two of the bombs developed a leak. The leak is presently controlled, but government scientists believe that the gas will permeate the bomb chambers within 2 weeks. They know of no method of preventing the gas from getting into the atmosphere and spreading to the other islands, and very likely to the West coast as well.

You have developed a synthetic vapor that will neutralize the nerve gas if it is injected into the bomb chamber before the gas leaks out. The vapor is made with a chemical taken from the rind of the Ugli orange, a very rare fruit. Unfortunately, only 4,000 of these oranges were produced this season.

You have been recently informed, on good evidence, that R.H.Cardoza, a South American fruit exporter, is in possession of 3,000 Ugli oranges. The chemical from the rinds of this number of oranges would be sufficient to neutralize the gas if the serum is developed and injected efficiently. You have also been informed that the rinds of these oranges are in good condition.

You have also been informed that Dr. J.W. Jones is also urgently seeking to purchase Ugli oranges and s/he is also aware of Cardoza's possession of the 3,000 available. Dr. Jones works for a firm with which your firm is highly competitive. There is a great deal of industrial espionage in the pharmaceutical industry. Over the years, Dr. Jones' firm and your firm have sued each other for infringement of patent rights and espionage law violations several times. Litigation of two suits is still in process.

The Federal Government has asked your firm for assistance. You have been authorized by your firm to approach Cardoza to purchase the 3,000 Ugli oranges. You have been told s/he will sell them to the highest bidder. Your firm has authorized you to bid as high as $250,000 to obtain the rinds of the 3,000 available oranges.

Before approaching Cardoza, you have decided to talk with Dr. Jones so that you will not be prevented from purchasing the oranges.

MOSELEY AND THE BANK

Burb County established an Office of Human Rights (OHR) about 10 years ago to investigate and redress claims of discrimination based on race, age, religion, gender, and national origin. A long-time county resident, Mrs. Jewel Moseley, has called OHR to find out how to file a discrimination complaint. She believes that she has been denied a loan to

buy a house for an unfounded reason; as far as she knows her credit is fine. In addition, she is able to provide a sizable down payment.

Mrs. Moseley feels that Mr. Fred Hofman, the loan officer at Burb Savings and Loan (BS&L), did not take her application seriously; he never seemed to have time to discuss it with her fully. During the brief discussion they did have, he would not look her in the eye and he acted as though there were other things he'd much rather be doing.

Mrs. Moseley wasn't sure he was treating her that way because she was a woman, unmarried (a widow), Jewish, or older (72). She was particularly offended because she had been banking at BS&L for many years, had contributed to the community in many ways, and knew the community could benefit from her investment.

When Mrs. Moseley called OHR to find out how to file a complaint, she spoke with Mr. Paul Kendrick, a case officer there. Mr. Kendrick discouraged her from coming in to file a complaint, telling her she needed to have clear and convincing evidence that a particular type of discrimination had occurred. Mrs. Moseley couldn't believe her legal protection was so thin and became argumentative over the phone with Mr. Kendrick who eventually hung up on her.

Mrs. Moseley called her attorney, Mrs. Michele Carmeli, Esq., to ask if it was possible to file complaints against both OHR and BS&L. When Mrs. Carmeli agreed to look into it, Mrs. Moseley was pleased, but as an afterthought asked if Mrs. Carmeli would have her partner, Dave Mayer, handle this particular job, because the men at OHR and BS&L would more likely listen to a male lawyer.

Although Mrs. Carmeli valued Mrs. Moseley's business very much, Mrs. Carmeli had heard this line of thinking one too many times and coolly replied that if Mrs. Moseley wished the services of the firm of Carmeli and Mayer, it was Carmeli who was available to her.

CONFLICT ANALYSIS

Answer the following questions, based on the information you've just read.

1. Who are the main parties in this story?
2. What are the relationships between these people?
3. Are there any conflicts between them? If yes, what is the nature of each conflict (data? relationship? interest? value? structure?)
4. What do you think Mrs. Moseley's conflict style might be?
5. Identify two communication styles described in this story.
6. List three communication barriers that the parties might be experiencing.
7. List a position statement for two of the parties.
8. According to the information you have here, list the underlying interest for each position statement.

Review Exercises

Task 1

1. In the *Shebelle-Addis Asqual-Gift Trading* dispute (discussed in Units 2 and 4) form a team of lawyers who represent Shebelle Transport Share Company and Addis Asqual PLC and come up with terms of offer for negotiation.

2. Draft a legal opinion to the General Manager of your company about the offer you intend to make during the negotiations.

3. Conduct negotiations

4. Draft a settlement if the dispute is resolved through negotiation.

Task 2

5. Write a legal opinion to the General Manager of Gift Trading PLC based on the progress in the negotiation between Shebelle Transport and Addis Asqual.

6. Conduct negotiations between Addis Asqual and Gift Trading.

Unit 6- Pleadings

Unit Introduction

Preparation of pleadings marks the last phase of pretrial lawyering and is a prelude to trial advocacy. After the completion of fact investigation and research on the legal issues involved, and after having exhausted efforts to settle the dispute through negotiation, the lawyer resorts to filing her case at court.

Pleadings are "formal written statements made to the court by the parties to a suit of their respective claims and defenses as to the suit."[1] According to Article 80(1) of the Civil Procedure Code pleading refers to "a statement of claim, statement of defence, counterclaim, memorandum of appeal, application of petition and any other document organizing proceedings or filed in reply thereto." This seems description than definition. Appeals are beyond the scope of this course. The words 'suit, plaintiff and defendant' shall respectively be replaced by 'appeal, appellant and respondent'[2] although the provisions under Book III of the Civil Procedure Code are applicable to appeals as well.

This unit forwards introductory concepts relevant to pleading requirements after which the preparation of statement of claim, statement of defence, criminal charges, etc. are highlighted. These skills are deepened in the process of performing the tasks, and are steadily enhanced in the course of experience. This course material highlights some basic concepts in the preparation of pleadings.

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[1] C. Clark in Sedler, *Supra* Unit 4, note 20, p. 120
[2] Civ. Pro. C., Art. 79(2)

Section 1- Initial steps in the preparation of pleadings

In pleadings "each party sets forth the facts, his version of what happened."[3] As Sedler noted:

> The primary purpose of the pleading and pretrial stage is to determine the issues that must be resolved at trial. Issues may be defined as the points on which the parties disagree.[4] There are many possible issues that could arise in a case, and the purpose of the pleading and pretrial stage is to determine just what those issues are. The trial will be limited to a resolution of those issues, so the court and the parties do not have to waste time on matters that are not really in dispute.[5]

Sedler further states the need to distinguish between facts and evidence:

> … Suppose that the plaintiff alleges facts showing that the goods were defective and the defendant alleges facts showing the goods were not defective. There is then the *issue* as to whether the goods were defective, and this issue will be resolved at the trial. At the trial the plaintiff will introduce *evidence* to support the allegation that the goods are defective, ad the defendant will introduce evidence to support the allegation that the goods were not defective. It is important to distinguish between allegation of fact and evidence. … Thus a statement that 'Ato X examined the tomatoes and saw that they were rotten' would be evidence, since this supports the plaintiff's allegation that the tomatoes were rotten. In other words, during the pleading stage a party sets forth the allegations of fact; during the trial stage he introduces evident to support the allegations of fact set forth in the pleadings.[6]

Moreover, pleadings are confined to concise material facts, and do not include legal arguments because Article 80 (2) provides that pleading shall "contain only a statement in a *concise form of the material facts* on which the party relies for his claim or defence and shall be in a form as near as may be to the appropriate Form in the First Schedule" of the Civil Procedure Code. "If a party wishes to present legal arguments to the court, he should do so in a separate document, i.e. a memorandum of law."[7]

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[3] Sedler, *Supra* Unit 4, note 20, p. 121
[4] See Civ. Pro. C., Article 247
[5] Sedler, *Supra* Unit 4, note 20, p. 121
[6] *Ibid*, 122
[7] *Ibid*

The initial step in drafting a pleading is jotting down the core outline based on the elements of the legal provision to be invoked in the claim, remedy, defense or counterclaim. These elements give a roadmap, structure and coherence to the pleading. However, certain suits may depend purely on contracts which according to Article 1731 of the Civil Code are binding between the parties "as though they were law."

In cases of suits that arise from non-performance of a contractual obligation, the plaintiff is required to put the party in default by giving notice[8] save the circumstances where notice becomes unnecessary.[9] Thereafter, the plaintiff files a suit which need not state a legal provision nor use the elements of a legal provision to prepare outline of the material facts in the pleading.

a) Material facts in contractual claims

Assume that you are employed in the Legal Department of Ethiopian Telecommunications Corporation. If a client fails to pay telephone service bills and is in default after having received notice, the structure of the pleading is dictated by the facts. The core elements of the claim emanate from the case under consideration:

Point 1- Concise statement of the contractual obligation (date of contract, obligation of the client under the contract, issues related to validity of contract where necessary);

Point 2- Concise statement of non-performance of *Obligation A* (Failure to pay telephone bills, the duration for which the failure to pay applies, sum not paid, and other facts where necessary;

Point 3- Concise statement of non-performance of *Obligation B* (e.g. returning the telephone apparatus, and value of apparatus …)

[8] Civ. Pro. C., Arts, 1772 - 1774
[9] Civ. Pro. C., Art. Art. 1775

Point 4- Concise statement about notice and the defendant's being in default (date of notice, etc)

The points here-above constitute the material facts of the suit. The pleading further includes the elements that are required to be incorporated under the Civil Procedure Code. These include *first*, the preliminary portion (date, name of the court, parties, title of action), *second*, introductory statements (jurisdiction, representation if any, modalities of servicing pleading to defendant, etc), *third*, material facts of the pleading, *fourth,* remedies (relief sought from the court) and the last part which includes signature, verification of pleading in accordance with Article 92 of the Civil Procedure Code, etc.

b) Material facts in claims based on provisions

Claims and rights emanate from agreements and the law. In the latter case, the material facts target at the constitutive elements of the provision. For example, a lawyer who invokes Article 1149 of the Civil Code and drafts a legal action in favour of a client whose possession has been interfered is expected to use the elements of the legal provision itself as the basis for her outline. Article 1149(1) Provides:

> "The possessor or holder who is deprived of his possession or whose possession is interfered with may require the restoration of the thing or cessation of the interference and claim compensation for damages."

<u>Step 1</u>-

We need to identify elements and consequences of Article 1149 (1)

a) Elements that should exist cumulatively:

Element 1- Being a possessor, or
Being a holder
-plus-
Element 2- Being deprived of possession, or
Possession interfered with.

b) Consequences

Consequence 1- Restoration of the thing, or
Cessation of interference

Consequence 2- Compensation for damages

Step 2-

Outline of material facts to be developed:

1. Possession or status as holder

-plus-

2. Deprivation of possession (or interference)

Remedies

Restoration (or cessation of interference); Damages

Step 3-

Relate the outline developed to the fact situation and develop an outline which becomes the material facts of the pleading and the relief sought:

1. Statement that your client is the possessor of a thing (possessor of the thing)
2. Statement that the defendant has deprived your client of his possession (or has interfered in your client's possession)
3. The remedies stated here-above.

Step 4-

Incorporate supplementary procedural elements (in a statement of claim, statement of defence, criminal charge, etc.) that are required in the relevant legal provision/s of the Civil Procedure Code, Criminal Procedure Code, etc.

Section 2- Statement of claim and statement of defence

The example stated in section 1(b) above briefly shows how we can use the constitutive elements of a legal provision in the preparation of the core outline of claims and remedies in a pleading. Moreover, the statement of claim incorporates the procedural elements required under the relevant legal provision.

Article 222(1) of the Civil Procedure Code provides:

> Every statement of claim shall contain:
> a) the name and place of the court in which the action is brought;
> b) the title of the action;
> c) the name, description, place of residence and address for service of, the plaintiff and defendant;
> d) where the plaintiff or defendant is a person under disability, a statement to that effect;
> e) where the plaintiff is suing in a representative capacity, a statement showing the capacity in which he is suing;
> f) the facts constituting the cause of action, and when and where it arose;
> g) the facts showing that the court has jurisdiction ;
> h) the facts showing that the defendant is or claims to be interested in the subject-matter and is liable to be called upon to answer the claim;
> i) where appropriate, a statement of the value of the subject-matter of the action.

Moreover, Article 225 requires the express statement of relief and identification of subject matter where the claim relates to a specific thing and a sufficient description if it relates to immovable property. The requirements related to particulars as to amount of claim[10], claims relating to periodical dues[11] and claims that seek to establish, enforce or terminate rights[12] require indication of the value stated in the relevant provisions. This gives specificity to the claim and is crucial to determine whether the court has jurisdiction to adjudicate the case. It is to be noted that Article 223 of the Civil Procedure Code requires the plaintiff to attach list of witnesses to be called at the hearing, and state documents and other evidence on which the claim relies.

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[10] Civ. Pro. C., Art. 226
[11] Civ. Pro. C., Art. 227
[12] Civ. Pro. C., Art. 228

Task 1

Use the relevant legal provisions in answering the following:

a) Define 'possessor'
b) Contrast 'owner, possessor and holder'
c) Can owners invoke Article 1149? Why or why not?
d) Can a possessor of a house invoke Article 1149 against an owner?
e) Can a holder of a house invoke Article 1149 against a possessor?

Task 2

a) Look for a statement of claim and mark 'a' to 'h' beside the various components to show which entries match with the requirements in Article 222/1(a) to 222/1(h).
b) Forward your comments on its form and content

Task 3

a) Write hypothetical facts and determine the relevant legal provisions
b) Draft a statement of claim by using a sample submitted to a court and by checking samples attached as schedules to the Civil Procedure Code

The concepts and principles discussed above also apply to statement of defence because the latter is prepared in response to the points of fact and law alleged in a statement of claim. In the example stated in Section 1(b) of this Unit, the defense counsel is expected to focus on the constitutive elements of Article 1149(1) of the Civil Code and forward material facts that refute:

a) the plaintiff's claim that he is the possessor (or holder) of the thing; and/or
b) the allegation that the defendant has deprived the plaintiff of his possession (or interfered in his possession).

The remedies sought in statements of defence are obviously request for dismissal of the case and payment of damages incurred due to the litigation. In addition to the elements embodied in the provision that is invoked by the plaintiff, a statement of defence is required to include the contents prescribed under the Civil Procedure Code.

Article 234 (1) requires the following:

> Every statement of defence, to which there shall be attached the annexes mentioned in Article 223, shall contain:
>
> a) the name and place of the court in which the defence is filed;
> b) the number of the suit;
> c) the facts, if any, showing that the claim is inadmissible on grounds of want of capacity or jurisdiction, or limitation;
> d) a concise statement of the material facts on which the defendant relies for his defence and generally of any ground of defence which if not raised, would be likely to take the opposite party by surprise or, to raise issues of fact not arising out of the statement of claim;
> e) a specific denial of any fact stated in the statement of claim which is not admitted;
> f) precise details of the counter-claim, if any, in which case the provisions of Article 224 shall apply by analogy.

Statement of defence must specifically respond to every allegation;[13] or else every omission or evasion shall be considered as admission. The statement of defence can raise negative defences (i.e. denial of alleged facts)[14] or affirmative defences (as in the case of admitting the conclusion of a contract but invoking facts that may justify its invalidation). This course material focuses on the skills of writing pleadings and not on the procedural issues related to pleadings. Students are thus required to revise their lessons and readings on counterclaims, cross-claims, interpleading, etc. while they were taking a course on Law of Civil Procedure.

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[13] Civ. Pro. C., Art. 235
[14] Civ. Pro. C., Art. 84

Section 3- The criminal charge

In civil cases, pleadings are referred to as statement of claim and statement of defence. In criminal cases, on the other hand, the Public Prosecutor [15] "files a formal 'accusation' with the appropriate court. That 'accusation,' the pleading to be tried by the court, is known in Ethiopia as the charge; In Anglo-American law it is sometimes called an *indictment* or *information*. The response of the accused to the charge is known as his *plea*. [16]

Criminal charges are drafted based on the elements of the offence and the contents required under the Criminal Procedure Code. For example, Article 580 of the 2004 Criminal Code is titled 'intimidation' and provides:

> "Whoever threatens another with danger or injury so serious as to induce in him a state of alarm or agitation is punishable upon complaint
> is punishable upon complaint, with fine not exceeding five hundred Birr, or with simple imprisonment not exceeding six months. …"

A charge based on this provision is required to include the elements of:

- the act of threatening another person with danger (or injury)
- so serious to induce a sate of alarm (or agitation).

The charge further embodies the elements required under Articles 111 and 112 of the Criminal Procedure Code. The latter provision provides that "Each charge shall describe the offence and its circumstances so as to enable the accused to know exactly what charge he has to answer. Such descriptions shall follow as close as may be the words of the law creating the offence." Accordingly, a charge under Article 580 is expected to follow the words of the provision and blend the facts of the case with the elements of Article 580.

Article 111(1) of the Criminal Procedure Code requires:

- date and signature
- name of the accused

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[15] Private prosecution can be authorized under the circumstances stated in the Criminal Procedure Code. (Articles 108. 44, 47, 150-153)

[16] Stanley Z. Fisher (1969) Ethiopian Criminal Procedure (Addis Ababa: HSIU) p. 206

- the offence with which the accused is charged
- the legal and material ingredients of the offence
- the time and place of the offence
- where appropriate, the person against whom or the property in respect to which the offence was committed, and
- the criminal law provision which has been violated.

According to Article 111(2) the charge shall be in the form set out in the Second Schedule of the Criminal Procedure Code or to "conform thereto as nearly as possible." The schedule further provides samples of concurrent charges (i.e. charges that have two or more counts) and alternative charges that can be filed where "it is doubtful which of the … offences the facts that can be proved will constitute …"[17]

Task 4

1. Assuming that you are a public prosecutor, draft a hypothetical charge and compare it with a charge of a different offence which you can obtain from a court, the public prosecutor's office or from a defence counsel.

2. Write hypothetical facts of intimidation and draft a charge based on Article 580 of the Criminal Code.

3. Draft a criminal charge based on the following facts:
   Type of offence: Theft
   Relevant provision …
   Name of accused: …
   Time ….
   Place …
   Description of item stolen: Cell phone (Nokia, brand ….)
   Name of owner: …
   Mental element of the offence: Intentional

[17] Crim. Pro. C., Art. 113

Part II- Trial Advocacy

The word 'advocacy' in its wider meaning involves speaking out and promoting a position, interest, claims or a course of action. However, the qualifying term 'trial' restricts our point of focus to the courtroom where litigants argue their respective claims and points of defence. As Mauet noted:

> "Trials are a re-creation of reality – an event or transaction that happened in the past. In trials, there are usually three versions of reality: your side's reality, the other side's reality and the (court's) reality.[1] Each party firmly believes that its version of reality is correct and tries to persuade the (court) to accept its version. However, the only reality that ultimately matters is the (court's) reality – what the (court) believes actually happened – because that reality controls (its) verdict.
>
> … Which side's version of reality will the (court) accept as its own? This depends largely on which side is more persuasive in presenting the version during the course of the trial. If neither side is persuasive, the jury will construct a version of reality entirely on its own. …" [2]

The strength of the claim, accusation or defence in terms of proof and legal authority determine the outcome of the trial provided that they are clearly, effectively and persuasively presented to a court. The latter factor of effective advocacy is instrumental to the ultimate outcome of a case although it cannot on its own enable a party to win a case. A trial lawyer cannot win a case that is not supported by facts and the law. It is equally important to note that lack of skills in trial advocacy may cause miscarriage of justice because a case can be lost owing to a lawyer's failure to effectively communicate pertinent merits of fact and points of law in the trial process.

Part II this course material includes introductory readings regarding the adjudication process including adjudication without trial (under Unit 7), witness examination (Unit 8) and trial simulations (Unit 9). The latter unit enables students will get hands on simulations particularly in producing witnesses, direct examination and cross examinations.

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[1] The original reads "the jury's reality."

[2] Thomas A. Mauet (2002) *Trial Techniques*, 6th Edition (New York: Aspen Publishers) p. 13

During the weeks of preparation for mock trials, students are expected to watch trials and submit a "Trial Watching Report' during opening arguments, witness examination and closing arguments. They are expected to write down notes of the courtroom events, i.e. a narrative profile regarding the initial statement of the judges before opening statements, the procedures as to how witnesses are affirmed and sworn [3], and most important, opening statements, witness examination, objections and the court's ruling on the objections.

Keen observation of trials helps students during simulations (as counsel for plaintiff and defendant), and it will be substantiated by hands on practice, feedback from other students and the instructor. The learning process will continue through sustained observation of weaknesses and best practices in the course of the mock trials.

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[3] For oath of witnesses see Crim. Pro. C., Art. 136(2), Civ. Pro. C., Art. 261(1) and Schedule Three, No. 33 of the Civil Procedure Code

Unit 7- The Adjudication Process: An Overview

Unit Introduction

The trial involves processes stated in the laws of procedure. Details of these processes have been addressed in the courses of civil procedure and criminal procedure, and students are expected to revise them. The trial process in both civil and criminal cases has certain common features and many distinct details that are peculiar to the categories. The full understanding of the various phases involved in trial lawyerig is crucial because the activities involved and the skills required thereof have impact on the ultimate outcome of the case.

Understanding the trial process in context requires relating the trial phase to the ones that precede it and with the series of activities that unfold after trial. In the preceding unit, the pleading stage was highlighted and preparation of pleadings will serve as the basis for trial advocacy. Defective pleading has adverse consequences subject to the chances of amendments as envisaged, for example, under Article 91 of the Civil Procedure Code.

Pleadings are followed by the phase of serving summons, first hearing, and possibly adjudication without trial where there is no issue in dispute (in civil cases) or the accused pleads guilty in a manner acceptable by the court (in criminal cases). The trial comes after these stages of the adjudication process. And after the conclusion of trial there are issues that deserve attention, such as execution of judgment, review of judgment upon discovery of new facts, appeal and cassation.

This Unit includes brief readings on the adjudication process in civil cases, adjudication without trial in civil cases, and the criminal justice process.

Section 1- Reading on the adjudication process in civil cases: Roadmap sketch [4]

Berhanu Taye, May 2006 (Class handout, SMUC)

1. The Pleading stage:

- Civil Procedure Code Arts 222-240, 80-93;
- Appeal 323-330;
- Execution 378.
- Format of pleadings: Schedule One pp. 4-24 (at the back of the Civil Pr. Code)

Content of statement of claim (Art 222)

Rules:- Brief statements of all and only the material facts;
- No statement and arguments on the law and evidence;
- State sums in both figures and words;
- Indicate non Ethiopian calendar in Ethiopian calendar as well;
- Avoid contradictory pleadings;
- Use formal language;
- Arrange statements numerically.

Statement of Defense (Art.234)

Rules - Deal with each and every factual allegation in the statement of Claim;
- Raise all affirmative and negative defenses
- Raise no new fact except by way of affirmative defense and counter-claim/ set off.

The annex - (Art 223)

Effects of failure to plead or defective pleading
- No second chance
- Variance
- Admission

The purpose of amendment (Art. 91)

2. Servicing- Hierarchy

- Personal (102, 96,97)
- Constructive (103)
- Post (106)
- Substituted (105)

[4] The purpose of this reading is to help students recall the issues they are aware of after having taken Law of Civil Procedure. Students are expected to consider the various tasks in this unit within a wider framework of the adjudication process.

- Failure to comply with servicing and its effects:- *ex-parte*, strike out, default judgment/dismissal

3. First Hearing- Examination of parties (Arts 241-256)

- Identification of points of disagreement (*issues*) and agreement;
- Tasks: Examination of parties, oral litigation, issue identification;
- Art 241: The Court examines party based allegations that are denied directly or by necessary implication;
- After examination
  a) No issue – judgment without trial;
  b) Partly denied ;
  c) Disagreement on all points.
- Issues may be framed by the court or by the parties;
- The trial continues based on issues framed at the first haring.

4. Adjudication without trial

- Agreement on issue (Art 252);
- Parties not at issue, facts admitted or no real defense;
- Issue of law or issue of fact of a common knowledge or no evidence is submitted under Art 223;
- Based on preliminary objections (Arts 244 and 245);
- Before the date of first appearance (Art 231);
- At any stage of the proceedings (Art 9/2).

5. The Trial

- The trial involves introduction of evidence.
- Types of evidence: Oral, Documentary and Real.
- Examination of witnesses (Arts 111 -121, 122-136, 137-146, 257-273): No evidence may be introduced unless it has been stated in the annex, except Arts. 256 and 264(2)
- Order of the trial (Art 259)
- Non- appearance of witness/persons possessing evidence Arts. 118(2) (b), 267, 480-482.
- Power to examine witnesses: The Proponent, the opponent, the court.
- The procedure to be pursued in case some witnesses appear and some others do not.

The Post trial stage

- Execution
- Review – Newly discovered fact/evidence (Art-6)
- Irregularities (71,74,78,207,-208)
- Appeal (Arts 325 ff.)
- Cassation.

Section 2- Adjudication without trial in civil cases

a) First hearing and judgment on admissions

Where the statement of claim and defence are in the appropriate form, the court "shall verify the identity of the parties if they appear in person."[5] After examination of parties, the court "shall read the pleadings and ascertain form each party or the pleader whether he admits or denies such allegations of fact as are made in the statement of the other party."[6]

In case the defendant admits (in whole or in part) the material facts alleged by the plaintiff, or the vice versa, the other party is entitled to "apply to the court for such judgment or order as he may be entitled to upon such admissions"[7] and "the court may thereupon make such order or give such judgment as it thinks fit."[8] In other words, the court may give judgment where there is admission of all the material facts stated in the pleading, or give an order on the facts that have been partially admitted.

b) Preliminary objections

Before statement of admission or denial, the defendant may submit preliminary objections on the grounds stated in Article 244 of the Civil Procedure Code. "A preliminary objection may be defined as an objection not going to the merits of the case, that is, not involving the question of whether the defendant is liable to the plaintiff under the substantive law."[9]

Where preliminary objections are submitted, the court shall hear the other party and may order that evidence be produced where necessary, based on which it

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[5] Civ. Pro. C., Art. 241 (1)
[6] *Ibid*
[7] Civ. Pro. C., Art. 242
[8] *Ibid*
[9] Sedler, *Supra* Unit 4, note 20, p. 173

would make the necessary decision.[10] The decision of the court may be dismissal or striking out of the suit, or the court may make decisions as it thinks fit.[11] Article 245(2) makes a distinction between *dismissal* (due to *res judicata* [12] or period of limitation [13]) and *striking out* of a suit, and the latter shall not preclude the plaintiff from instituting a fresh suit with respect to the same cause of action.[14]

c) Framing of issues

After the court's decision regarding preliminary objections, if any, the court will identify points of variance between the parties with regard to the material propositions of fact or of law and "shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend."[15] The Civil Procedure Code defines issues as a material proposition of fact or of law or which is "affirmed by one party and denied by the other."[16]

Each point of dispute constitutes a distinct issue.[17] However, where issues of fact and law arise in the same suit, and if the court is "of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been settled."[18] The materials from which issues may be framed are allegations made in the pleadings, contents of documents produced by parties, and allegations made in the course of examination held under Article 241 of the Civil Procedure Code. [19]

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[10] Civ. Pro. C., Art. 245(1)
[11] Civ. Pro. C., Art. 245 (2)
[12] Civ. Pro. C., Artts.244/2(b) *cum* Art. 5
[13] Civ. Pro. C., Art. 244/2(f)
[14] Civ. Pro. C., Art. 245 (3)
[15] Civ. Pro. C., Art. 246(1)
[16] Civ. Pro. C., Art. 247 (1)
[17] Civ. Pro. C., Art. 247(3)
[18] Civ. Pro. C., Art. 247(4)
[19] Civ. Pro. C., Art. 248.

d) Adjudication without trial

Article 254(1) of the Civil Procedure Code provides that in case "the parties are not at issue on any question of law or of fact, the court may at once pronounce judgment." In case the suit involves two or more defendants, the court may "at once pronounce judgment for or against" a defendant who "is not at issue with the plaintiff on any question of law or of fact."[20]

There are thus various instances of judgment before the trial. The first event may be during the first hearing (based on Article 242) in case the defendant admits the material facts of the suit, and the second event can be based on the court's decision on preliminary objections. Thirdly the court (in accordance with Article 254) may discover, after its decision on preliminary objections, that parties are not at issue while it frames issues of law and/or fact that are in dispute. Fourth, the court may render judgment without trial if it "is satisfied that no further argument or evidence than the parties can at once adduce is required … for the decision of the suit, and that no injustice will result from proceeding with the suit forthwith."[21] And finally, failure to produce evidence (as required under Articles 137 and 249) while they should and could have been produced,[22] and loss of negotiable instruments under the circumstances stated under Article 256 (2) could lead to judgment without trial.

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[20] Civ. Pro. C., Art. 254(2)
[21] Civ. Pro. C., Art., 255
[22] Civ. Pro. C., Art. 256(1)

Section 3- Synopsis of the criminal justice process

a) Setting criminal justice in motion until preliminary inquiry

The criminal justice is set in motion from the very moment an offence is reported, accusation is made or a complaint has been filed.[23] In cases of offences which can be set in motion irrespective of complaint, the police and the public prosecutor respectively pursue the investigation and institution of charges on the basis of report or accusation made by any person without the need for receipt of complaint from the victim because such offences are considered as public wrongs.

Arrest warrant is required in all non-flagrant offences (save the exception embodied in Article 51 of the Criminal Procedure Code).[24] However, the accused may be arrested (without the need for court warrant) [25] in offences that are flagrant,[26] quasi flagrant [27] or assimilated cases.[28] The arrest may then lead to remand in custody[29] or release on bail.[30]

Police investigation involves recording accusation or complaint, [31] summoning the accused[32], arrest (under the circumstances stated in the law)[33], interrogation of the accused,[34] release on bond,[35] bringing the accused to court,[36] examination of witnesses,[37] searches and seizures,[38] physical examination,[39] having confessions

[23] Crim. Pro. C., Arts. 11-18.
[24] Crim. Pro. C., Arts. 49 -58
[25] Crim. Pro. C., Art. 21 *cum* Art. 50
[26] Crim. Pro. C., Art. 17(a)
[27] Crim. Pro. C., Art. 17(b)
[28] Crim. Pro. C., Art 20
[29] Crim. Pro. C., Arts. 59-62
[30] Crim. Pro. C., Arts 63-79
[31] Crim. Pro. C., Art. 24 cum 14
[32] Crim. Pro. C., Art. 25
[33] Crim. Pro. C.,, Art. 26
[34] Crim. Pro. C.,Art. 27
[35] Crim. Pro. C., Art. 28
[36] Crim. Pro. C., Art. 29
[37] Crim. Pro. C., Arts. 30, 31
[38] Crim. Pro. C., Arts. 32, 33
[39] Crim. Pro. C., Art. 34

recorded in court (where necessary),[40] keeping diary of investigation[41] and report to the public prosecutor[42] within the time prescribed by law and without violating the right to speedy trial enshrined in Article 19/4 of the Ethiopian Constitution.

Articles 19, 20 and 21 of the Constitution respectively deal with rights of arrested persons, accused persons and rights of persons held in custody and convicted prisoners. Apparently, the provisions of the Constitution, as the supreme law of Ethiopia,[43] prevail over all other laws including the Criminal Procedure Code.

After receipt of Police Report, the Public Prosecutor has the options of prosecuting the case, order preliminary inquiry, order further investigation, refuse prosecution, or close the file based on the merits of the case.[44] Where the public prosecutor decides to conduct preliminary inquiry at court owing to the gravity of the offences specifically identified in Article 80 of the Criminal Procedure Code and due to the need to secure recorded evidence while the facts are still fresh in the minds of witnesses, evidence is recorded in accordance with Articles 83 to 88. The preliminary inquiry does not constitute a trial, and the court shall commit the accused for trial without, however, specifying the charge or charges.[45]

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[40] Crim. Pro. C., Art. 35
[41] Crim. Pro. C., Art. 36
[42] Crim. Pro. C., Art. 37
[43] The Constitution of the Federal Democratic Republic of Ethiopia, Article 9 (1)
[44] Crim. Pro. C., Arts 38-44
[45] Crim. Pro. C., Arts. 89, 93

b) Reading on the judicial process in criminal cases

Source: Simeneh Kiros Assefa, "Notes on the Ideal Process in the Ethiopian Criminal Procedure," *Mizan Law Review*, Vol. 1, No. 1, pp. 158-161(§15- 29) (Paragraph numbers have been omitted, and subtitles are inserted)

The charge and preliminary objections

1. Where the public prosecutor believes that there is sufficient evidence, it shall frame a charge [46] and file it before the court, having jurisdiction. The charge serves two purposes: judicially informing the accused what charges he has to answer to and to initiate the trial. Formally, a charge has four parts: the caption, the statement of the offence, the particulars of the offence and the list of evidence. In terms of content the emphasis in placed on the particulars of the offence. It should contain the name of the accused, the offence with which the accused is charged and its legal, moral and material elements, the time and place of the offence, the law and the article which is said to have been violated and where appropriate the person against whom or the thing in respect of which the offence has been committed. As mere description of the dry facts is found to be insufficient to inform the accused what charges he has to answer to, the circumstances under which the offence is said to have been committed shall be described.

2. The court may order the public prosecutor, on its own motion or upon the application of the parties, to alter the misstatement or add the omitted fact or to frame a new charge as the case may be where there is any error in stating any of these things or omission, and if such omission is substantial or misleads the accused or is likely to defeat justice.

3. In order to prepare and file the charge, the public prosecutor needs to know whether Ethiopian courts have jurisdiction over the matter and if so, which level and which locality court has jurisdiction over that particular offence. The question whether Ethiopian courts have jurisdiction over an offence or judicial jurisdiction is not in issue almost in all cases. But which level of court and in which locality a court has jurisdiction over a particular offence are the questions that always bother the public prosecutor.

4. In the existing federal structure of courts, criminal jurisdiction may be exercised both by federal and regional (state) courts. However, as no state has legislated criminal law so far, it is only the federal criminal law that is still in operation. Thus criminal matters are at present the jurisdiction of federal courts only. However, as there are no federal courts all over the country, the jurisdictions of the Federal First Instant and Federal High Courts are delegated to the State High Courts and State Supreme Courts in localities where there are no federal courts. Thus jurisdiction over offences is

[46] The charge may be simple charge (one count against one accused) or complex where an accused is charged with two or more counts (joinder of offences), or where there is joinder of charges against persons who have participated in an offence. (Footnote added)

distributed among Federal First Instance, High and Supreme Court and State High and Supreme Courts. State First Instant Courts do not have jurisdiction over criminal matters today under the existing law.

5. After determining which tier of court have jurisdiction over the offence the public prosecutor shall determine which local court has jurisdiction. Normally it is the court within the local limits of whose jurisdiction the offence has been committed which has jurisdiction over the offence. If there are several local areas that are involved in the case, the courts in each local area, which is involved in the case, has jurisdiction over the matter. However, having regard to cost and convenience the public prosecutor has discretion to determine before which court to institute the charge.

6. Upon filing the charge, the evidence pertaining to those allegations in the charge are to be deposited in the registry where the accused or his counsel can (have access to them and) see whether they are reliable or not and to prepare their defense. A copy of the charge accompanied by list of evidence and if preliminary inquiry has been conducted, a copy of such record, shall be sent to the accused.

7. Upon receipt of the charge the court fixes the date and the hour for the hearing. On such fixed day the charge is read over and explained to the accused where after he shall be asked if he has any objection to the charge. His objection may be related to the form or content of the charge or the case is pending in another court, or has been seen and decided finally or it is subject to amnesty or pardon or any other objection that substantially affects the outcome of the case.

8. The accused my submit his preliminary objections on the grounds of form and contents of the charge (Art. 130/1) in which case the court might order alteration of the charge (Art. 119 *et seq*). Or, preliminary objections may relate to the grounds stated under Article 130(2), because the case is pending in another court, or previous acquittal or conviction on the same charge, or, period of limitations, pardon or amnesty, and the other grounds embodied in the provision. The court shall decide on the objection before it proceeds to the trial.[47]

The trial

1. If the accused does not have any objection or his objection is not sustained, the court shall then (read out and explain the charge[48]) and ask the accused whether he pleads guilty. If the accused admits the commission of the offence in the terms stated in the charge or he admits all the elements that constitute the offence with which he is charged, he is said to have pleaded guilty and the plea of guilty shall be entered. There is a possibility, however, to amend the plea of guilty to one of the plea of not guilty later in the proceeding before judgment is entered. Again even when the accused pleads guilty, the court may demand the public prosecutor to corroborate the plea with evidence depending on the seriousness of the offence and its conviction.

[47] No. 8 has been supplemented by the author of this course material

[48] The words in parenthesis have been supplemented based on Art. 132 /1)

2. Where the accused denies the charge or the public prosecutor is ordered to corroborate the plea of the accused, the court shall call upon the public prosecutor to produce evidence whatever the nature of that evidence may be. If it is testimonial evidence, the public prosecutor as a proponent shall conduct the examination-in-chief and the accused or his counsel may conduct the cross-examination if he wishes and the public prosecutor again conducts the re-examination if there is any cross-examination and if the public prosecutor wishes too. The scope and purpose of each type of examination is different.

3. After going through all the evidence (including documentary evidence and exhibits, if there are any) the court makes its ruling depending on its conviction. If the court is not convinced that the prosecution has proved his case to the required degree of proof, it shall acquit the accused without calling him to enter his defense and if he is in custody the court shall also order the release of the person. If the prosecutor proves his case, however, the court calls up on the accused to enter his defense. Such ruling may be made by the court forthwith after the conclusion of the case for the prosecution or on the next adjournment depending on the complexity of the case and the evidence produced thereto.

4. As to the production of and examination of evidence in the defense proceeding, the parties follow the same procedure as in the prosecution proceeding. The examination-in-chief is to be conducted by the accused or his counsel, the cross-examination by the public prosecutor and the re-examination by the accused or his counsel again.

Ruling of the court and appeal

1. Finally, the two parties may make final address to the court based on issues of law and issues of fact relating to evidence. In any case the accused has the final word. If there are more than one accused, the court determines in which order the accused persons shall make their final address.[49] After the conclusion of the case for the defense the court shall make a final ruling on the guilt of the accused: conviction or acquittal. If the court is satisfied that the accused/his counsel rebutted the case for the prosecution[50], the court shall acquit the accused and if he is in custody, it shall order his release. Should the court convict him, however, the court shall call upon the prosecutor to produce evidence relating to the antecedents of the accused that are relevant to either aggravate or mitigate the penalty. … The accused shall (also) have the right to be heard (regarding mitigation of penalty) and he may reply (to the prosecutor's request for aggravation).

2. The court in writing its judgment should consider all the relevant facts that were alleged by both parties. It frames the issue and addresses the same in the judgment. It

[49] Sequence of sentences in the paragraph has been modified.

[50] It is not written under any branch of Ethiopian law that a case has to be proved beyond reasonable doubt but the reading of many of the judgments particularly the old judgments indicates that that is the standard of proof in criminal matters. This can also be inferred from some of the provisions of the Anti-corruption special procedure and evidence law. If proof to beyond reasonable doubt degree by the prosecution is required to convict the accused, it stands to reason that the defense need not defy all the proof by the prosecution but lower the degree of proof of the prosecution within the reasonable doubt degree.

shall consider the evidence that were produced for and against the prosecution. It shall also state the reasons why a certain item of evidence is admitted or rejected and state what weight has been attached to each item of evidence. Whatever conclusion the court has made by way of inference from those proved facts is a judgment.

3. If both or either of the parties is not satisfied with the decision of the court, they may, as of a right, lodge an appeal to the next higher court for review. Normally appeal is one. If the appellate court confirms the decision of the lower court that decision of the higher court is final. If the appellate court reverses or varies the decision in some way, however, a second appeal lies to the other next higher court. Such is the case with cases that are tried by the Federal First Instance Courts.

4. If the judgment is a final one from which appeal does not lie or if appeal has been exhausted and there is a fundamental error of law, a party may lodge a petition to the Federal Supreme Court to have his case reviewed in cassation. With that a party goes to execution of judgment.

Review Exercises

1. "The court (without trial) decides in favour of the plantiff in all civil cases where the defendant admits in whole the material facts alleged in the statement of claim." Do you agree with this statement? Do you hold the same opinion in case of criminal charges? State your reasons based on the relevant legal provision/s.
2. What is the rationale of preliminary objections? Contrast "*dismissal*" and "*striking out*" of a suit and give examples.
3. State the purpose of preliminary inquiry in criminal cases.
4. An "*issue*" refers to a point of "variance between the parties with regard to material propositions of fact or of law." Explain and give examples.

Unit 8- Witness examination

Unit Introduction

Witness examination constitutes the core activity in trial lawyering in both civil and criminal cases. It is the forum which enables lawyers to submit the results of fact examination though witnesses, expert review, documents, demonstrative evidence. Equally important, witness examination allows a litigator to challenge the validity and reliability of the witnesses and other evidence produced by the other party. Article 20(4) of the FDRE Constitution provides that:

> "Accused persons have the right to full access to any evidence presented against them, to examine witnesses testifying against them, to adduce or to have evidence produced in their own defence and to obtain the attendance of and examination of witnesses on their behalf before the court."

As Stanley Fisher noted:

> "Essentially a criminal trial is a procedure by which the truth or falsity of the charge is determined. … (The issue of guilt is determined) rationally – by considering factual evidence of the crime presented by the prosecution in light of any evidence the accused may to offer. If the prosecution proves the accused's guilt of the crime charged by empirical evidence demonstrated at the trial, conviction results. Otherwise, he is acquitted.
>
> In Ethiopian law … (the accused) has the right to a compulsory process to obtain witnesses in his favor, and to confront the witnesses against him. The prosecution has the burden of proving him guilty of the offence charged, and he has the privilege of remaining silent throughout the trial. …[1]

This unit addresses witness examination in both civil and criminal cases with particular focus on the examination-in-chief and cross-examination. Students are expected to pay attention to the various conceptual inputs that can be obtained from the readings which are meant to be used as refresher for materials that had already been covered during courses on procedure.

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[1] Stanley Z. Fisher (1969) Ethiopian Criminal Procedure (Addis Ababa: HSIU), p. 293

Section 1- Factual Propositions

Identifying material facts which are relevant to the legal elements involved in a case is required before a lawyer makes an opening statement and before she presents evidence. Litigation is made with a purpose, and witness examination and submission of documentary or real evidence targets at proving the material facts that are pertinent in the decision of a given case.

In the possessory action stated under Unit 6, Section 1 the material facts the ought to be established to prove a claim under Article 1149 of the Civil Cold are:

a) The fact that the plaintiff is a possessor (or holder)
b) The fact that the plaintiff (holder) has been dispossessed or the fact that his possession has been interfered with.

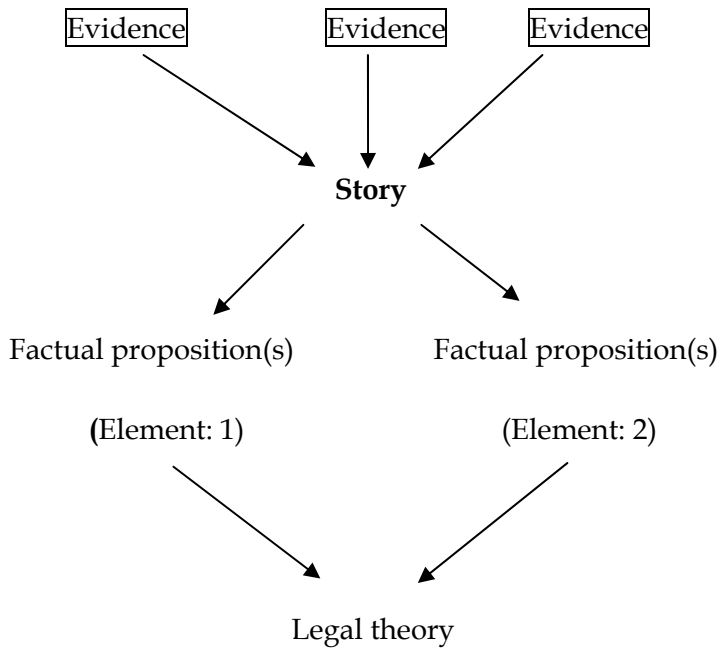
These factual propositions remain mere assertions unless they are supported by evidence. The purpose of witness examination or submission of other evidence is thus to prove the factual propositions that are made in the statement of claim, statement of defence, criminal charge or other pleadings.

Reading on the definition of factual propositions

1. Factual propositions Defined [2]

Factual propositions bridge the gap between stories and legal rules. Stories describe concrete happenings, and are largely devoid of large concepts. Legal rules and their constituent elements are abstractions, devoid of concrete factual content. This is hardly surprising. Elements have to be stated in broad abstract terms if laws are to cover a wide variety of possible conduct. But as a result of this reality, a fact finder has to see the connection between concrete stories and abstract rules. Factual propositions establish the connection by restating abstract legal elements in case specific factual terms. In chart form, the fact finder's tasks look like this:

[2] Paul Bergman (1997) *Trial Advocacy in a Nutshell*, West Group, pp. 16,17



This diagram (based on an off-tackle play developed by the 1938 Chicago Bears) emphasizes that a factfinder constructs a story based on the evidence that a factfinder sees and hears. A fact finder then has to make a mental connection between a story and legal rules.

Consider these examples of factual propositions.

- In a breach of contract action, a factual proposition satisfying the element "not of merchantable quality" would be, "the bicycle had square wheels."
- In a tort action, a factual proposition satisfying the legal element "breach of care" would be, "the contractor used roof supports made out of balsa wood."
- In a murder prosecution, a factual proposition satisfying the legal element of "identity" would be, "Johnson fired the gun."

Since defendants often proffer evidence to support defence versions of events, defence attorneys too formulate factual propositions. Defence counterparts to the above propositions would be:

- "The bicycle had round wheels" or "the bicycles met all contract specifications."
- "The roof supports were made of solid oak."
- "Johnson was asleep at home at the time of the murder."

2. Need for Factual Propositions [3]

Factual propositions are an important intermediate step between stories and legal elements. By identifying factual propositions:

[3] *Ibid*, 18

- Representing a plaintiff, you make sure that a story has at least one material fact for each required element.
- Representing a defendant, you target the element or elements you hope to disprove. (Defendants relying on affirmative defences also make sure that a story has at least one material fact for each element of affirmative defence.)
- You identify the actual testimony whose accuracy you will try to establish. Generally, witnesses cannot testify using the abstract language of elements. For example, a witness cannot testify that, "the collision was the proximate cause of my hearing loss," or that "Eric committed waste all over the premises." However, witnesses often can testify to material facts: "Sanna backed out of her driveway at a speed of 85 m.p.h." (This would be a material fact for "breach of duty" in a negligent action.)
- You create a map of the evidence you will emphasize and the inferences you will try to communicate to a fact finder throughout trial, including opening statement, direct and cross examination and final summation.

Section 2- Reading on Trial and Production of Evidence

The Production of Evidence [4]

Evidence consists primarily of the testimony of witnesses and documents and other physical proof.[5] … When a party files his pleading, he includes a list of the witnesses and the purpose for which they are being called.[6]

… (T)he court has broad powers to compel the attendance of witnesses ad the production of documents and generally to obtain evidence that it considers necessary to enable it to decide the issues in the suit. Primary responsibility for the attendance of witnesses and the production of documents rests with the parties, but the parties' inaction will not prevent the court from obtaining evidence when the court desires to do so.

The Conduct of the Trial [7]

1. Order of Proceeding

At the trial … each party introduces the oral and documentary evidence necessary to support his side of the issue: if the issue is whether there was a contract, the plaintiff introduces his evidence to show the existence of a contract, and the defendant introduces his evidence showing that there was no contract. …

The order of the proceeding depends on the nature of the issues that are involved in the case. The plaintiff is entitled to begin unless the defendants has admitted the allegations of the statement of claim and has raised … affirmative defences[8], in which case the defendant is entitled to begin. This reflects the general rule that the party who has burden of proof has the right to begin. The plaintiff has the burden of proving that he has cause of action, and the defendant has the burden of proof on the question of whether he has a valid defence. It is provided that "the party who demands performance of an obligation shall prove its existence, and the party who alleges that an obligations is void, has been varied or is extinguished shall prove the facts causing the nullity, variation or extinction."[9] So in a suit to recover damages for breach of contract, the plaintiff would have to prove the existence of a contract, the breach by the defendant, and the resulting damages: these are the essential elements of his cause of action. If the defendant admitted that there was a contract which he did not perform, but contended that the contract was voidable or that his performance was excused, he would have the burden of proof on these issues. Whenever the plaintiff has the burden of proof in one of the issues in the case, he has the right to begin. If for example, there is an issue as to the existence of

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[4] Seder, *Supra*, Unit 4, note 20, pp, 194-199

[5] Proof other that oral testimony is called real proof. It consists of written documents and what is called demonstrative evidence. Photographs, recordings, and any tangible object would be classified as real proof, as would experiments made in or out of court. …

[6] Civ. Proc. C. Arts. 223 (1)(A), 234(1)

[7] Seder, *Supra*, Unit 4, note 20, pp, 199-204 (Some explanatory footnotes are omitted)

[8] Under *affirmative defences*, the defendant, as stated in Article258 (1), "admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant, the plaintiff is not entitled to any part of the relief which he seeks." (*Footnote added*)

[9] Civ. C., Art. 2001. See also Civ. C. Art. 2141

the contact and an issue as to force majeure, the plaintiff has the right to begin, since he has the burden of proof on one of the issues in the case. However, if the defendant admitted the existence of a contract, his non-performance and the damages claimed, but contended that his non-performance was excused by force majeure, he would have the right to begin, since he has the burden of proof on the only issue in the case.

We see then that the right to begin follows the burden of proof. In a sense, this "right" also entails an "obligation" since if the party having the burden of proof fails to establish his claim or defence by the evidence he has presented, the court can terminate the litigation at that time without calling upon the other party to rebut the evidence. If in a suit for breach of contract, the plaintiff fails to make out a case showing that there was a contract, there is no reason to proceed further: the burden is on the plaintiff to show that there was a contract, and not on the defendant to show that there was no contract. Since the plaintiff has not satisfied his burden, that is, he has not introduced sufficient evidence, which if believed, would justify a finding in his favor on that issue, the court would render a judgment for the defendant at that time. Thus the party entitled to begin must state his case and produce his evidence in support of the issue or issues which he is bound to prove.[10] … Assuming that the party having the right to begin has introduced sufficient evidence, or, as it is sometimes said, has made out a *prima facie case* or defence, the other party states his case, produces his evidence and addresses the court generally on the whole case.[11] …

There will frequently be more than one issue in the case, and where the plaintiff has the burden of proof on one of these issues, … he … must produce his evidence on the issues as to which he has the burden of proof. However, he also has the option to produce his evidence on the issues as to which the defendant has the burden of proof. If he does not wish to do so, he may reserve the evidence on the latter issues until the defendant has produced his evidence on those issues.[12] … If the plaintiff has not reserved the option to produce evidence, he may not introduce rebuttal evidence after the defendant has presented his case. …

It is clearly to the plaintiff's advantage to reserve evidence on the issues, as to which the defendant has the burden of proof. If the defendant does not produce sufficient evidence to justify a finding in his favor on those issues, the plaintiff will not have to introduce any rebuttal evidence. Moreover, if the plaintiff has not reserved evidence, he will have introduced his evidence on those issues without knowing precisely what evidence the defendant will introduce. …

2. Production of Evidence by the Parties

The primary responsibility for the examination of witnesses rests with the parties, though … the court is also given broad powers with respect to the examination of witnesses. There are three stages to the examination of witnesses: (1) the examination-in-chief; (2) the

[10] Civ. Pro. C., Art. 259(1)
[11] Civ. Pro. C., Art. 259(2)
[12] Civ. Pro. C. Art. 260(1)

cross-examination; and (3) the re-examination.[13] In order to understand these stages, ti is necessary to review the theory behind the adversary system of litigation, which is followed in Ethiopia. The witnesses are ordinarily called by each party, and as to the witnesses he calls the party is the proponent. He tries to bring out the evidence that will support his version of the case and that evidence only. The opponent then tries to 'destroy' the testimony of the witness, and the proponent tries to 'rehabilitate' that testimony. The theory is that as a result of the process (which may be supplemented by questions from the court), everything the witness knows about the case will be brought to the attention of the court, and the court will be in a better position to determine whether or not the witness is telling the truth that if he merely testified in narrative form. Thus during the examination-in chief the proponent tries to develop the testimony of the witness in the light most favorable to him; during cross-examination the opponent tries to discredit that testimony, and during re-examination the proponent tries to minimize the effect of the cross-examination. …

The proponent calls his witness for the examination-in-chief. It should be noted that if a party wishes to testify, he must do so before calling his other witness, and for all practical purposes, he is deemed to be a witness. [14] The witness takes the oath in the form provided in the Third Schedule to the Code, and proceeds to answer the questions propounded by the proponent or his advocate.[15] The questions put in the examination-in-chief must relate only to facts that are relevant to the issues to be decided and only to such facts of which the witness has direct or indirect knowledge.[16] The Evidence Code will set forth rules of relevancy and in all probability, will define what is meant by "direct or indirect knowledge." The point to remember is that the opponent is entitled to object on the ground that the evidence sought to be adduced by the question is irrelevant or that it is incompetent, i.e., the witness does not have direct or indirect knowledge of the facts as to which he is testifying.

The most important point to note in regard to the examination-in-chief is that the proponent or his advocate cannot ordinarily ask what are called leading questions.[17] The Evidence Code no doubt will elaborate on what constitutes a leading question, but as a general proposition, we can say that a leading question is one suggesting the answer which the person putting it wishes to receive.[18] The purpose of the rule forbidding leading questions on the examination-in-chief (and by implication, on re-direct examination) is to prevent a witness who is quick to adopt the suggestion of the examiner from saying something that he would not say otherwise. The testimony must be that of the witness and not that of the examiner; the examiner cannot "put words into the mouth of the witness," so to speak. In other words, the examiner cannot suggest the answer he wants to receive and try to get that answer from the witness. Remember that the witness is being called by the proponent, and that the proponent is trying to prove his case through the testimony of that witness. It is, therefore, necessary to limit the proponent in

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[13] There is obviously a printing error I the text of Art. 261(1), which does not appear in the corrigenda. Ther is an omission of "and cross examined by the other party." See Crim. Pro. C., Art. 136(3) which parallels this provision.
[14] Civ. Pro. C. Art. 261(2)
[15] Civ. Pro. C. Art. 261(1)
[16] Civ. Pro. C. Art. 263(1)
[17] Civ. Pro. C. Art. 263(2)
[18] See Indian Evidence Act, Sec. 141

his examination of the witness and insure that the testimony is genuinely that of the witness.

It is not possible to lay down hard and fast rules as to what constitutes a leading question. Often this depends on the way in which the question is asked: does the form of the question and the tone of voice of the examiner suggest the answer that the examiner wishes to receive? Obviously, the examiner hopes that the witness will answer the question in a particular way. This has nothing to do with whether the question is leading. The leading nature of the question is determined by the form of the question and the tone in which it is asked – it is only where the question itself suggests the answer which the examiner wishes to receive that it is considered to be leading.

The most common example of a leading question is one where the examiner concludes with a positive suggestion such as "didn't you" or "weren't you." For example, a question, "you were attacked by the defendant, weren't you," is clearly leading. The 'weren't you" suggests that the answer must be yes, or at least, that this is the answer the examiner wishes to receive. The question should be expressed in the neutral form, and if it is then it is not considered leading, even though the answer will be either "yes" or "no" …

The court may at times permit the asking of leading questions,[19] and there are two situations where it should do so. One is when the witness is being examines as to what are called "introductory matters." The evidence of each witness shall start with his name, age, occupation and address,[20] and to save time, the examiner can simply state that your name is …, isn't it?" Obviously this is not objectionable, since the substance of the witness's testimony is not involved. The other situation is where the witness cannot remember some or all of the matters as to which his testimony is sought. The Evidence Code no doubt, will contain questions as one method of doing so. Leading questions may also be used to assist child witnesses who have difficulty in testifying. But, except in these situations, leading questions may not be asked by the proponent.

… Article 263(3) of the Civil Procedure Code … provides that "questions put in cross-examination shall tend to show what is erroneous, doubtful or untrue in the answers given in the examination-in-chief. Leading questions may be put in cross-examination, and frequently, cross-examination consists of almost entirely of leading questions. Every effort is made to show that the witness has omitted facts or is not relating the facts correctly. There are also recognized methods of showing that the witness is not likely to be telling the truth. … Some of the recognized methods are (1) showing that the witness is biased in favor of the proponent or against the opponent, (2) that he has made prior statements inconsistent with his testimony in court, (3) that he has a poor reputation for telling the truth, (4) that he has been convicted of certain criminal offences reflecting on his trustworthiness. [21] The primary purpose of cross-examination is to discredit the testimony of the witness and persuade the court that it should not believe such testimony.

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[19] Civ. Pro. C. Art. 263(3)
[20] Civ. Pro. C. Art. 269(1)
[21] See generally Indian Evidence Act. Sections 146, 155, and the discussion in C. McCormick, Evidence (1954), pp. 62-111

The re-examination is limited to "clarifying the matters which have been raised in cross-examination.[22] The proponent does not examine the witness all over again, but tries to "rehabilitate" him in the sense that he tries to show that the original testimony is to be believed – to rebut the unfavorable evidence brought out on cross-examination. The court must make sure that the re-examination is kept within proper bounds and is limited to clarifying the matters raised by the opponent in the cross-examination.

During the presentation of his case, the party will presumably seek to introduce into evidence the documents on which he is relying. Previously we saw that each party had to present his documents to the court, and there are no express provisions of the Civil Procedure Code governing the introduction of the documents into evidence. The court may "at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible,"[23] so the court could reject the document when filed with the statement of claim or presented at the first hearing. The court might rule on the admissibility of the documents at the first hearing, but it is more likely that it will wait until the trial. At the trial the proponent will seek to introduce his document into evidence, and any objection to the admissibility of the document can be considered at that time. Note that the court has the duty to exclude an inadmissible document even if no objection is made. Where a document has been admitted, it forms part of the record; if it is not admitted, it does not form part of the record and is to be returned to the person who produced it.[24]

3. *Powers of the court*

The court is given broad powers with respect to the examination of witnesses and the production of documents at the trial. Although Ethiopia is committed to the adversary system of litigation and the principle of party representation, this is modified by giving the judge a potential degree of control over the conduct of the litigation. … The court may at any time put a question to a witness:[25] it may do so while he is being examined by the parties or at the conclusion of his testimony or at both times. It may call as a witness any person present in court, even though he has not been called by the parties and may order any such person to produce any document that he has with him.[26] As we have seen, where the court considers it necessary to examine any other person who is not present at the trial or to obtain a document, it may issue a summons requiring that person to give testimony or produce a document.[27] If it considers that such person should have been called as a witness by a party, it may require that party to pay the expenses of the witness.[28] For example, the plaintiff contends that the defendant signed a particular document. It appears that an employee of the plaintiff saw him sign it, but the plaintiff did not call that employee as a witness. Since his testimony would be favorable to the plaintiff and he is the plaintiff's employee, the plaintiff should be required to produce him

[22] Civ. Pro. C. Art. 263(4)
[23] Civ. Pro. C. Art. 138
[24] Civ. Pro. C. Art. 142. If the court considers it necessary to impound the document, it is not returned. Civ. Pro. C. Art. 143.
[25] Civ. Pro. C. Art. 261(4)
[26] Civ. Pro. C. Art. 264(1). Although this is not specifically provided, it would seem that the parties should also be permitted to examine the witness.
[27] Civ. Pro. C. Art. 264(2)
[28] Civ. Pro. C. Art. 264(3). It may make any other order regarding costs as it thinks fit.

or be responsible for the expenses attendant upon summoning him if the court concludes that his testimony is necessary.

The court may provide that the evidence of a particular witness is to be taken immediately, even before the hearing.[29] Suppose that Ato A is a key witness for the plaintiff and he has been ordered to leave for military service. Upon application by either Ato A or the plaintiff, the court may take the evidence, that is, the plaintiff will examine him ad the defendant will be able to cross-examine him in the presence of the court. The evidence will then be read at the trial. The court may also recall any witness who has been examined and may put to him such questions as it thinks fit.[30] Note that under this last provision only the court examines the witness and the parties do not have a further opportunity to question him although they may request that he be called. Where a party, without lawful excuse, refuses to give evidence or produce a document in his power when required to do so by the court, the court may pronounce judgment against him.[31] However, the court may decide not to take such a step and may issue the same kind of order as it would against any recalcitrant witness.[32]

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[29] Civ. Pro. C. Art. 265
[30] Civ. Pro. C. Art. 266
[31] Civ. Pro. C. Art. 267. This is also true if he fails to do so at the first hearing. Civ. Pro. C. Art. 256.
[32] Civ. Pro. C. Art. 268 …

Section 3- Reading on Examination-in-chief

Direct Examination

Source: Steven Lubet, *Modern Trial Advocacy: Analysis and Practice*, National Institute for Trial Advocacy, 2nd Edition, 1997 (Chapter Four, pp. 45-78) Footnotes that make further reference to Federal Rules of Evidence are omitted

I. The role of direct examination

Cases are won as a consequence of direct examination. Direct examination is your opportunity to present the substance of your case. It is the time to offer the evidence available to establish the facts that you need to prevail. Having planed your persuasive story, you must now prove the facts up on which it rests by eliciting the testimony of witnesses.

Direct examination, then, is the heart of your case. It is the fulcrum of the trial - the aspect upon which all else turns. Every other aspect of the trial is derivative of direct examination. Opening statements and final arguments are simply the lawyer's opportunity to comment upon what the witnesses have to say; cross examination exists solely to allow the direct to be challenged or controverted. While we could easily imagine a reasonably fair trial systems consisting solely of direct examinations, it is impossible to conceive of any thing resembling accurate fact finder in their absence.

Direct examinations should be designed to accomplish one or more of the following basic goals.

A. Introduce Undisputed Facts

In most trials there will be many important facts that are not in dispute. Nonetheless, such facts cannot be considered by the judge and will not be part of the record on appeal, until and unless they have been placed in evidence through a witness's testimony. Undisputed facts will often be necessary to establish an element of your case. Thus, failing to include them in direct examination could lead to an unfavorable verdict or reversal on appeal.

Assume, for example, that you represent the plaintiff in a case involving damage to the exterior of a building, and that the defense in the case is consent. Even if the question of ownership of the premises is not in dispute, it is still an element your cause of action. Thus, you must present proof that your client had a possessor or ownership interest in the building, or run the risk of a directed verdict in favor of the defendant.

B. Enhance the Likelihood of disputed facts

The most important facts in a trial will normally be those in dispute. Direct examination is your opportunity to put forward your client's version of the disputed facts. Furthermore, you must not only introduce evidence on disputed points, you must do so persuasively.

The true art of direct examination consists in large part of establishing the certainty of facts that the other side claims are uncertain or untrue.

C. Lay Foundations for the introduction of exhibits

Documents, photographs, writings, tangible objects, and other forms of real evidence will often be central to your case. With some exceptions, it is necessary to lay the foundation for the admission of such an exhibit through the direct testimony of a witness. This is the case whether or not the reliability of the exhibit is in dispute.

It is not unusual for a witness to be called only for the purpose of introducing an exhibit. The "records custodian" at a hospital or bank may know absolutely nothing about the contents of a particular report, but nonetheless may be examined solely in order to qualify the document as a business record.

D. Reflect up on the credibility of witnesses

The credibility of a witness is always in issue. Thus, every direct examination, whatever its ultimate purpose, must also attend to the credibility of the witness's own testimony. For this reason, most direct examination begins with some background information about the witness. What does she do for a living? Where did she go to school? How long has she lived in the community? Even if the witness's credibility will not be challenged, this sort of information helps to humanize her and therefore, adds weight to what she has to say.

You can expect the credibility of some witnesses to be attacked on cross examination. In these situations you can blunt the assault by bolstering the witness's believability during direct examination. You can strengthen a witness by eliciting the basis of her knowledge, her ability to observe, or her lack of bias or interests in the outcome of the case.

You may also call a witness to reflect adversely on the credibility of the testimony of another. Direct examination may be used, for example, to introduce negative character or reputation evidence concerning another witness. Alternatively, you may call a witness to provide direct evidence of bias or motive, to lay the foundation for an impeaching document, or simply to contradict other testimony.

E. Hold the Attention of the Trier of fact

No matter which of the above purposes predominates in any particular direct examination, it must be conducted in a manner that holds the attention the judge ... In addition to being the heart of your case, direct examination also has the highest potential for dissolving into boredom, inattention, and routine. Since it has none of the inherent drama or tension of cross examination, you must take extreme care to prepare your direct examination so as to maximize its impact.

II. The Law of direct Examination

The rules of evidence govern the content of all direct examinations. Evidence offered on direct must be relevant, authentic, … and otherwise admissible. In addition, there is a fairly specific "law of direct examination" that governs the manner and means in which testimony may be presented.

A. Competence of witnesses

Every witness called to testify on direct examination must be legally "competent" to do so. This is generally taken to mean that the witness possesses personal knowledge of some matter at issue in the case, is able to perceive and relate information, is capable of recognizing the difference between truth and falsity, and understands the seriousness of testifying under oath or on affirmation.

In the absence of evidence or other indications to the contrary, all persons called to the stand are presumed competent to testify. If the competence of a witness is reasonably disputed, it may be necessary to conduct a preliminary examination in order to qualify the witness. Such inquires are usually conducted by the direct examiner but may also be conducted by the trial judge. In either case, the examination must be directed toward that aspect of competence that has been called in to question.

…

B. Non-leading questions

The principal rule of direct examination is that the attorney may not "lead" the witness. A leading question is one that contains or suggests its own answer. Since the party calling a witness to the stand is presumed to have conducted an interview and to know what the testimony will be, leading questions are disallowed in order to insure that the testimony will come in the witness's own words.

Whether a certain question is leading is frequently an issue of tone or delivery, as much as one of form. The distinction moreover is, often finely drawn. For example, there is no doubt that this question is leading:

> **Question**: Of course, you crossed the street, didn't you?
>
> Not only does the question contain its own answer, its format also virtually requires that it be answered in the affirmative.
>
> On the other hand, this question is not leading:
>
> **Question**: Did you cross the street?
>
> Although the question is highly specific and calls for a "yes or no" answer, it does not control the witness's response.
>
> Finally this question falls in the middle:
>
> **Question:** Didn't you cross the street**?**

If the examiner's tone of voice and inflection indicate that this is meant as a true query, the question probably will not be considered leading. If the question is stated more as an assertion, however, it will violate the leading question rule.

There are, in any event numerous exceptions to the rule against leading questions on direct examination. A lawyer is generally permitted to lead a witness on preliminary matters, on issues that are not in dispute, in order to direct the witness's attention to a specific topic, in order to expedite the testimony on nonessential points, and, in some jurisdiction, to refresh a witness's recollection. In addition, it is usually permissible to lead witnesses who are very young, extremely old, infirm, confused, or frightened. Finally, it is always with in the trial judge's discretion to permit leading questions in order to make the examination effective for the ascertainment of the truth, avoid needless consumption of time, protection the witness from undue embarrassment, or as is otherwise necessary to develop the testimony.

In the absence of extreme provocation or abuse, most lawyers will not object to the occasional use of leading questions on direct. It is most common to object to leading questions that are directed to the central issues of the case or that are being used to substitute the testimony of counsel for that of the witness.

C. Narratives

Another general rule is that witnesses on direct examination may not testify in "narrative" form. The term narrative has no precise definition, but it is usually taken to mean an answer that goes beyond responding to a single specific question. Questions that invite a lengthy or run-on reply are said to "call for a narrative answer."

An example of a non-narrative question is, "What did you do next?" The objectionable, narrative version would be, "tell us every thing that you did that day."

As with leading questions, the trial judge has wide discretion to permit narrative testimony. Narratives are often allowed, indeed encouraged, when the witness has been qualified as an expert.[33]

D. The non-opinion rule

Witnesses are expected to testify as to their sensory observations. What did the witness see, hear, smell, touch, test, or do? Witnesses other than experts generally are not allowed to offer opinions that are "rationally based up on the perception of the witness." Thus, witnesses will usually be permitted to draw conclusion on issues such as speed, distance, volume, time, weight, temperature and weather conditions. Similarly, lay witnesses may characterize the behavior of others as angry, drunken, affectionate, busy, or even insane.

[33] Many lawyers prefer to present expert testimony in narrative form, but this often interferes with effective communication. ..

E. Refreshing recollection

Although witnesses are expected to testify in their own words, they are not expected to have perfect recall. The courtroom can be an unfamiliar and intimidating place for all but the most "professional" witnesses, and witnesses can suffer memory lapses due to stress, fatigue, discomfort, or simple forgetfulness. Under this circumstance it is permissible for the direct examiner to "refresh" the witness's recollection. It is most common to rekindle a witness's memory through the use of a document such as her prior deposition or report. It may also be permissible to use a photograph, an object, or even a leading question.

In order to refresh recollection with a document, you must first establish that the witness's memory is exhausted concerning a specific issue or event. You must then determine that her memory might be refreshed by reference to certain writing. Next, show the writing to the witness, allow her time to examine it, and inquire as to whether her memory has returned. If the answer is yes, remove the document and request the witness to continue her testimony. Note that in this situation the testimony must ultimately come from the witness's own restored memory; the document may not be offered as a substitute.

III. Planning Direct examination

There are three fundamental aspects to every direct examination plan: content, organization, and technique.

Your principal tool in presenting a persuasive direct examination is, of course, the knowledge of the witness. If the underlying content of the examination is not accurate and believable, the lawyer's technique is unlikely to make any noticeable difference. Your primary concern, then, must be content – the existence of the facts that you intend to prove.

The content of a direct examination can be enhanced through the use of organization, language, focus …[34] and rapport. Effective organization requires sequencing an examination in a manner that provides for logical development, while emphasizing important points and minimizing damaging ones. Questions should be asked in language that directs the progress of the examination without putting words in the witness's mouth. A direct examination uses focus to underscore and expand upon the most crucial issues, rather than allow them to be lost in a welter of meaningless details. … Finally, the positive rapport of the direct examiner with the witness is essential to establish the witness's overall trustworthiness and believability.

A. Content

Content – what the witness has to say– must be the driving force of every direct examination. Recall that direct examination provides your best opportunity to prove your case. It is not meant merely as a showcase for the witness's attractiveness or for your own forensic skills. The examination must have a central purpose. It must either establish some

[34] The word 'pacing' is omitted

aspect of your theory, or it must contribute to the persuasiveness of your theme. Preferably, it will do both.

Begin by asking yourself, "why am I calling this witness?" which elements of your claims or defenses will the witness address? How can the witness bolster or detract from the credibility of others who will testify? How can the witness add moral strength to the presentation of the case, or appeal to the (court's)[35] sense of justice?

Since a witness might be called for any or all of the above reasons, you must exhaustively determine all of the possible useful information. List every conceivable thing that the witness might say to explain or help your case.

Now you must begin to prioritize and discard. This is a ruthless process. In direct examination, length is your enemy. You must work to eliminate all nonessential facts that are questionable, subject to impeachment, cumulative, distasteful, implausible, distracting, or just plain boring.

1. What to include

First, go through a process of inclusion. List the witness's facts that are necessary to the establishment of your theory. What is the single most important thing that the witness has to say? What are the witness's collateral facts that will make the central information more plausible? What is the next most important part of the potential testimony? What secondary facts make that testimony more believable? Continue this process for every element of your case.

For example, assume that … you have located a witness who saw the defendant driver at an automobile repair shop just a few days before the accident. The witness told you that the defendant was advised that this brake were in poor repair, but that he left without having them fixed. This is a fact of central importance, and you will no doubt present it in the direct examination. Collateral or supportive facts will include corroborative details such as the time of day, the witness's reason for being in the auto shop, the witness's location during the crucial conversation about the brakes, the reason that the witness can remember the exact language used, and why the witness can identify the defendant. These details, while not strictly relevant to your theory, give weight and believability to the crucial testimony.

You must also be sure to include those "thematic" facts that give your case moral appeal. Returning to the intersection case, perhaps you have an additional witness who will testify that at the time of collision the defendant was already late for an important meeting. Your theme might be that the defendant was "too busy to be careful." How can this theme be developed in the testimony of the auto shop witness? The answer is to look for supportive details. Was the defendant curt or abrupt with the repairperson? Was he constantly looking at his watch? Was he trying to read "important –looking papers" while discussing the brakes? Did the defendant rush out of the shop? In other words, search for

[35] Originally "jury's"

details that support your image of the defendant as busy, preoccupied, and unconcerned with safety.

In addition to central facts and supporting details, your "content checklist" should include consideration of the following sorts of information:

Reasons. Recall that stories are more persuasive when they include reasons for the way people act. A direct examination usually should include the reasons for the witness's own actions. Some witnesses can also provide reasons for the action of another.

Explanations. When a witness's testimony is not self explanatory, or where it raises obvious questions, simply ask the witness to explain. In the above "repair shop" scenario it may not be immediately apparent that a casual observer would recall the defendant's actions in such detail. Ask for an explanation:

Question: How is it that you can remember seeing and hearing what the defendant did that morning?

Answer: I was at the shop to have my brakes fixed, and it really made an impression on me that he was leaving without taking care of his.

Credibility. The credibility of a witness is always in issue. Some part of every direct examination should be devoted to establishing the credibility of the witness. You can enhance credibility in numerous ways. Show that the witness is neutral and disinterested. Demonstrate that the witness had an adequate opportunity to observe. Allow the witness to deny any expected charges of bias or misconduct. Elicit the witness's personal background of probity and honesty.

2. What to exclude

Having identified the facts that most support your theory and most strengthen your theme, you may now begin the process of elimination. It should go without saying that you must omit those facts that are "untrue". While you are not required to assure yourself beyond reasonable doubt of the probity of each witness, neither may you knowingly elicit testimony that you believe to be false. By the time you are preparing your direct examinations you certainly will have abandoned any legal or factual theory that rests up on evidence of this sort.

More realistically, unless you have an extraordinarily compelling reason to include them, you will need to consider discarding facts that fall in to the fallowing categories.

Clutter. This may be the single greatest vice in direct examination. Details are essential to the corroboration of important evidence, and they are worse than useless virtually everywhere else. Aimless detail will detract from your true corroboration. In the "auto shop" example, for instance, the witness's proximity to the service counter is an essential detail. The color of the paint in the waiting room is not.

How do you determine whether or not a certain fact is clutter? Ask what it contributes to the persuasiveness of your story. Does it supply a reason for the way that someone acted? Does it make an important fact more or less likely? Does it affect the credibility or

authority of a witness? Does it enhance the moral value of your story? If all of the answers are negative, you're looking at clutter.

Unprovables. These are facts that can successfully be disputed. While not "false," they may be subjected to such vigorous and effective dispute as to make them unusable. Is the witness the only person who claims to have observed a certain event, while many other credible witnesses swear to the precise contrary? Is the witness herself less than certain? Is the testimony contradicted by credible documentary evidence? It is usually better to pass up a line of inquiry than to pursue it and ultimately have it rejected. This is not, however, a hard and fast rule. Many true facts will be disputed by the other side, and your case will virtually always turn up on your ability to persuade the trier of fact that your version is correct. Sometimes your case will depend entirely upon the testimony of a single witness who, though certain and truthful, will come under massive attack. Still, you must be willing to evaluate all of the potential testimony against the standards of provability and need. If you can't prove it, don't use it. Especially don't need it.

Implausibles. Some facts need not be disputed in order to collapse under their own weight. They might be true, they might be useful, they might be free from possible contradiction, but they still just won't fly. Return to the "auto shop" witness and assume that she informed you that she recognized the defendant because they had once ridden in the same elevator fifteen years previously. You may have no reason to disbelieve the witness, and it is certainly unlikely that anyone could contradict or disprove her testimony. The testimony might even add some support to your theme, say, if the defendant rushed out of the elevator in an obvious hurry to get to work. Nonetheless, the testimony is simply too far-fetched. If offered, it will give the trier of fact something unnecessary to worry about; it will inject a reason to doubt the other testimony of the witness.

Note, however, that implausibility must be weighed against importance. If the case involved a disputed identification of the defendant, then proof of an earlier encounter might be of sufficient value to risk its introduction.

Impeachables. These are statements open to contradiction by the witness's own prior statements. By the time of trial many witnesses will have given oral and/or written statements in the form of interviews, reports and depositions. Many also will have signed or authored documents, and other writings. With some limitations, the witnesses' previous words may be used to cast doubt upon their credibility; this is called impeachment by a prior inconsistent statement. The demonstration that a witness has previously made statements that contradict her trial testimony is often one of the most dramatic, and damning, aspects of cross examination. Unless you can provide an extremely good explanation of why the witness has changed, or seems to have changed, her story, it is usually best to omit "impeachables" from direct testimony.

Door openers. Some direct testimony is said to "open the door" for inquiry on cross examination that otherwise would not be allowed. The theory here is that fairness requires that the cross examiner be allowed to explore any topic that was deliberately introduced on direct. For example, … the defendant … (might) not be allowed to introduce the fact that the plaintiff had been under the care of a psychiatrist. On the other hand, assume the plaintiff testified on direct that the accident had forced her to miss an important appointment with her doctor, and that the appointment could not be

rescheduled for a week due to the nature of the doctor's schedule. In these circumstances the door would be opened, at a minimum, to cross examination that covered the nature of the appointment and the reason that it could not be rescheduled; that the plaintiff was on her way to see her psychiatrist.

Another common door opener is the misconceived "defensive" direct examination. It is considered a truism in many quarters that the direct examiner should defuse the cross by preemptively bringing out all of the bad facts. The danger, however, is that you will "defensively" bring out facts that would have been inadmissible on cross examination. Assume, for example, that your client has a prior juvenile conviction for theft. While, you might ordinarily want to raise a prior crime yourself in order to explain it or otherwise soften the impact of the evidence, juvenile convictions are almost never admissible. Thus, a defensive direct examination would not only introduce otherwise excluded information, it could very well open the door to further exploitation of those facts on cross. You cannot always avoid door openers, but you must learn to recognize them.

B. Organization and structure

Organization is the tool through which you translate the witness's memory of events into a coherent and persuasive story. This requires idiom, art, poetry. An artist does not paint everything that she sees. Rather, she organizes shapes, colors, light, and impasto to present her own image of a landscape. In the same manner, a trial lawyer does not simply ask a witness to "tell everything you know," but instead uses the placement and sequence of the information to heighten and clarify its value.

The keys to this process are primacy, apposition, duration, and repetition.

Primacy and recency refer to the widely accepted phenomenon that people tend to remember those things that they hear first and last. Following this principle, the important parts of a direct examination should be brought out at its beginning and again at its end. Less important information should be "sandwiched "in the middle. …(T)he presence of the fire truck may well be the most important part of the plaintiff's testimony. It should therefore be introduced early in her direct examination and perhaps alluded to again at the end.

Apposition is the placement or juxtaposition of important facts in a manner that emphasizes their relationship. …(A) strictly chronological direct examination might have the plaintiff begin by explaining where she was headed on the morning of the accident. Assume now that she was going to an art exhibit that would not open for another hour. The importance and value of these seemingly innocuous facts can be heightened tremendously by "apposing" it to the conduct of the defendant immediately following the accident. Imagine the impact of contracting the plaintiff's unhurried trip with the following information about the defendant:

Question: Where were you going on the morning of the accident?

Answer: I was going to the art institute.

Question: Were you in hurry to get there?

Answer: It wasn't going to open for an hour, so I was in no hurry at all

Question: What did you do immediately after the accident?

Answer: I asked the defendant if he was all right.

Question: What did the defendant do immediately following the accident?

Answer: He jumped out of his car and run to a pay telephone. He shouted that he would talk to me later, but first he had to cancel an important appointment.

Duration refers to the relative amount of time that you spend on the various aspects the direct examination. As a general rule you should dwell on the more important points, using the very length of coverage to emphasize the significance of the topic. Less important matters should consume less of the direct examination. …

Question: What did you see as you drove south on Sheridan Road?

Answer: I saw a fire truck

Question: Describe it, please?

Answer: It was your basic fire truck. It was red, and it had firefighters riding on it. It had lights and a bell.

Question: Were the lights flashing?

Answer: Yes, and it was sounding its siren.

Question: How far away were you when you first noticed the fire truck?

Answer: I would say almost a block away

Repetition is a corollary of duration. Important points should be repeated, preferably throughout the direct examination, to increase the likelihood that they will be retained and relied upon by the trier of fact.

Even applying these principles, there is no correct way to paint a landscape. The following guidelines, however, will always be useful.

a) Start strong and end strong: The overall Examination

Every direct examination, no matter how else it is organized, should strive to begin and end on strong points. The definition of a strong point will differ from trial to trial. It may be the most gripping and dramatic aspect of the entire examination; It may be the single matter on which the witness expresses the greatest certainty; it may be the case's mostly disputed issue; or it may be a crucial predicate for other testimony. Whatever the specifics, the strong points of your overall examination should have some or all of these features.

***Admissibility*:** There is little worse than having an objection sustained right at the beginning, or end, of a direct examination. You must be absolutely certain of the admissibility of your opening and closing points.

Theory value: The very definition of a strong point is that it makes a significant contribution to your theory. What does the witness have to say that is most central to the proof your case?

***Thematic Value*:** Ideally, your strongest points will reinforce the moral weight of your case. Try to phrase them in the same language you use to invoke your theme.

Dramatic impact: Dramatic impact at the beginning of an examination will keep the judge listening. Dramatic impact at the end of the examination will help fix the testimony in their memories.

Undeniablity: choose strong points in the hope that they will be vividly remembered. It will do you little good if they are remembered as being questionable or controverted.

In most cases, of course, it will be necessary to use the opening part of the direct examination to introduce the witness and establish some of her background. Thus, the actual "beginning" of the examination should be understood as the beginning of the substantive testimony.

b) Start strong and end strong:- The sub examinations

Each full direct examination is actually a combination of many smaller sub-examinations. As you move from topic to topic you are constantly concluding and reinitiating the sub parts of the direct testimony. The "start strong/ end strong" rule should not be applied only to the organization of the full direct; it should also be used to structure its individual components.

In our intersection case you might wish to begin and end the substantive part of the plaintiff's examination with evidence about the fire truck. In between, however, you will cover many other issues, including the plaintiff's background, the scene of the collision, and the plaintiff's damages. Each of these component parts of the direct should, if possible, begin and end on a strong point.

In something as simple as setting the scene, consider what elements of the description are most important to your case. Then begin with one end with another. In the intersection case you might want to lead off with the clarity of the weather conditions in order to establish visibility. Perhaps you would then conclude the scene-setting portion of the examination with this description of the traffic:

Question: Of all of the cars that were present, how many stopped for the fire truck?

Answer: All of them, except the defendant.

c) Use topical Organization

Chronology is almost always the easiest form of organization. What could be more obvious than beginning at the beginning and ending at the end? In trial advocacy, however, easiest is not always best. In many cases it will be preferable to utilize a topical or thematic form of organization. In this way, you can arrange various components of the witness's testimony to reinforce each other, you can isolate weak points, and you can develop your theory in the most persuasive manner. The order in which events occurred is usually fortuitous. Your duty, as an advocate is to rearrange the telling so that the story has maximum logical force.

Assume that you are the prosecutor in a burglary case. Your first witness is the police officer who conducted a stakeout and arrested the defendant on the bases of a description that she received from a superior officer. A strict chronology in such a case could be

confused and counterproductive. The witness would have to begin with the morning of the arrest, perhaps explaining the time that she came on duty, the other matters that she worked on that day, and her instructions in conducting the stakeout. She no doubt would have received the description somewhere in the middle of all this activity. Even if relevant, the importance of the surrounding details is not likely to be well understood at the outset of the examination. The officer, sticking to chronological order, would then describe the people she saw at the stakeout location whom she did not arrest. Finally, the witness would come to the defendant's arrival on the scene. Assume, however, that she did not immediately arrest him. Rather, she observed him for some time, perhaps; he even left the scene (and returned) once or twice before the eventual arrest.

In plain chronological order, all of this can be added up to a rather diffuse story. The officer's reasons for conducting the stakeout are separated from the activity itself; the receipt of the description has no immediate relationship to the apprehension of the suspect. The trier of fact is required to reflect both forward and back on the significance of the data.

A topical organization, however, could provide a framework that adds clarity and direction to the story. A structure based upon the description of the defendant, rather than chronology, would begin with a description of the arrest itself; then:

Question: Officer, Why did you arrest the defendant?

Answer: Because he fit a description that I had been given earlier of a wanted burglar.

Question: Did you arrest him as soon as you saw him?

Answer: No. I wanted to make sure that he fit the description completely, so I waited until he was standing directly below a street light.

Question: Was there any one else in the vicinity at that time?

Answer: There had been a few people, but nobody who matched the description.

Question: Officer, please go back and tell us how you received the description that led to the arrest of the defendant.

Even in a matter as simple as our automobile collision case, a strictly chronological direct examination of the plaintiff could fail to be either dramatic or persuasive. Imagine beginning the examination with the time that the plaintiff left home that morning. State her destination and her estimated travel time. Describe the weather and traffic conditions. Trace her route from street to street until she arrives at the fateful intersection. Describe the appearance of the fire truck, the plaintiff's reaction, and finally the collision. After slogging through a series of details, some important and some not, the direct examination finally arrives at the most important event - the accident itself.

It would be more dramatic to (1) begin with the collision, (2) explain why the plaintiff had stopped her car, (3) describe the fire truck, (4) describe the response of the surrounding traffic, and (5) contrast that with the actions of the defendant.

d) Do not Interrupt The action

Every direct examination is likely to involve one, two or more key events or occurrences. The witness may describe physical activity such as an automobile accident, an arrest, the failure of a piece of equipment, or a surgical procedure. Alternatively, the witness may testify about something less tangible, such as the formation of a contract, the effect of an insult, the making of a threat, the breach of a promise, or the existence of pain following an injury. Whatever the precise subject, it will always be possible to divide the testimony into "action" on the one hand and supporting details and descriptions on the other.

A cardinal rule for the organization of direct examination is never to interrupt the action. Do not disrupt the dramatic flow of your story, the description of the crucial events, in order to fill in minor details. There can be no more jarring or dissatisfying an experience during trial than when the witness, who has just testified to the sound of a gunshot or the screech of automobile tires, is then calmly asked the location of the nearest street light. The lighting conditions may be important, but they cannot possibly be important enough to justify the discontinuity created by fracturing the natural flow of occurrence testimony.

Many lawyers subscribe to the theory that you should "set the scene" before proceeding to the activity. Following this approach in our automobile case, you would first have the witness describe the intersection, the surrounding traffic, the condition of the streets, and the location of her car, all before proceeding to the events of the collision. This approach is based on the concept that the trier of fact can then place the activities within the framework that you have created.

An alternative approach is first to describe the events themselves and then to go back and redescribe them while filling in the details of the scene. Assume that the plaintiff in the automobile case has already testified about the events of the accident. You can now go back to set the scene, effectively telling the story a second time: What were the weather conditions when you entered the block where the collusion occurred? How much traffic was there when you first saw the fire truck? What direction were you traveling when the defendant's car struck yours?

e) Give separate attention to the details

We have seen that details add strength and veracity to a witness's testimony. Unfortunately, they can also detract from the flow of events. It is therefore often best to give separate attention to the details, an approach that also allows you to explain their importance.

Assume, for example, that you are presenting the testimony of a robbery victim and that the central issue in the case is the identification of the defendant. You know that you don't want to detract from the action, so you will present the events of the robbery without interruption. Then you will go back to supply the details that support the witness's ability to identify the defendant:

Question: How far was the defendant from you when you first noticed him?

Answer: About twelve or fifteen feet.

Question: How much closer did he come?

Answer: He came right up to me. His face wasn't more than a foot from mine.

Question: Did you look at his face?

Answer: Yes, absolutely. He stared right at me.

Question: For how long?

Answer: It was at least a minute.

Question: Was it still light out?

Answer: Yes, it was.

Question: Could you see the color of his clothing?

There will be dozens of details available to support the witness's identification. Dispersing them throughout the description of events would both disrupt the testimony and diminish their cumulative importance. The remedy for this problem is to give the details separate attention.

f) Try not to Scatter Circumstantial Evidence

Circumstantial evidence is usually defined as indirect proof of a proposition, event, or occurrence. The identity of a burglar, for example, could be proven directly through eyewitness testimony. It could also be proven indirectly through the accumulation of circumstantial evidence such as the following: The defendant was seen near the scene of the burglary on the evening of the crime; her scarf was found in the doorway of the burglarized house; she had been heard complaining about her need for a new radio; two days after the crime she was found in possession of a radio that had been taken in the burglary.

None of the above facts taken individually amount to direct proof, that the defendant committed the crime. There could be a perfectly innocent explanation for each one. In combination, however, they raise an extremely compelling inference of guilt. In other words, the indirect circumstances accumulate to establish the likelihood of the prosecution's case.

Inferential evidence is at its strongest when a series of circumstances can be combined to lead to the desired conclusion. It is therefore effective to present all of the related circumstantial evidence at a single point in the direct examination, rather than scatter it throughout. This will not always be possible. The logic of a witness's testimony may require that items of circumstantial evidence be elicited at different points in the testimony. Chronological organization will dictate introducing the circumstances in the order that they occurred or were discovered. Even topical organization may require assigning individual circumstances to separate topics. In the burglary case, for example, a topical approach might divide the testimony into areas such as "condition of the premises" and "apprehension of the defendant." The discovery of the scarf and the recovery of the radio would consequently be separated in the testimony.

Nonetheless, it is a good idea to attempt to cluster your circumstantial evidence. Abandon this technique only when you have settled upon another that you believe will be more effective.

g) Defensive Direct examination

From time to time it may be advisable to bring out potentially harmful or embarrassing facts on direct in order to blunt their impact on cross examination. The theory of such "defensive" direct examination is that the bad information will have fewer stings if the witness offers it herself and, conversely, that it will be all the more damning if the witness is seen as having tried to hide the bad facts. As we noted above, you should conduct a defensive direct examination only when you are sure that the information is known to the other side and will be admissible on cross examination.

Assuming that you have determined to bring out certain damaging information, be sure not to do it at either the beginning or end of the direct examination. Remember the principle of primacy and recency. By definition, bad facts cannot possibly be the strong points of your case, so you will always want to bury them in the middle of the direct examination.

…

h) Affirmation Before Refutation

Witnesses are often called both to offer affirmative evidence of their own and to refute the testimony of others. In such cases it is usually best to offer the affirmative evidence before proceeding to refutation. In this manner you will accentuate the positive aspects of your case and avoid making the witness appear to be a scold.

As with all principles, this one should not be followed slavishly. Some witnesses are called solely for refutation. Others are far more important for what they negate than for their affirmative information. As a general organizing principle it is useful to think about building your own case before destroying the opposition's.

i) Get to the point

A direct examination is not a treasure hunt or murder mystery; there is seldom a reason to keep the trier of fact in suspense. The best form of organization is often to explain exactly where the testimony is headed and then to go directly there.

j) End with a clincher

Every examination should end with a clincher, a single fact that capsulizes your trial theory or them. To qualify as a clincher a fact must be (1) absolutely admissible, (2) reasonably dramatic, (3) simple and memorable (4) stated with certainty depending upon the nature of the evidence and the theory on which you are proceeding, the final question to the plaintiff in our automobile case might be any of the following:

Question: How long was the fire engine visible before the defendant's car struck yours?

Answer: It was visible for at least ten seconds because I had already seen it and stopped for a while when the defendant ran into me.

Or,

Question: Did the defendant run to the telephone before or after he checked on your injuries?

Answer: He ran straight to the telephone without even looking at me. Or,

Question: Do you know whether you will ever be able to walk again without pain?

Answer: The doctors say that they can't do anything more for me, but I am still praying.

k) Ignore any rule when necessary

By now you will no doubt have noticed that the above principles are not completely consistent with one another. In any given case you will probably be unable to start strong, organize topically, and separate the details, while still getting to the point without interrupting the action. Which rules should you follow? The answer lies in your own good judgment and can only be arrived at in the context of a specific case. If you need another principle to help interpret the others, it is this: Apply the rules that best advance your theory and theme.

IV. Questioning Technique

Since content is the motive force behind every direct examination, you must use questioning technique to focus attention on the witness and the testimony. It is the witness's story that is central to the direct examination; the style and manner of your questioning should underscore and support the credibility and veracity of that story. The following questioning techniques can help you to achieve that goal.

A. Use short, open questions

You want the witness to tell the story. You want the witness to be the centre of attention. You want the witness to be appreciated and believed. None of these things can happen if you do all of the talking. Therefore, ask short questions.

Using short questions will help you to refrain from talking, but not every short question will get the witness talking. To do that, you will need open questions.

Don't ask a witness, "Did you go to the bank?" The answer to that short question will probably be an even shorter "Yes." Instead, as much of your direct examination as possible should consist of questions that invite the witness to describe, explain, and illuminate the events of her testimony. Ask questions such as:

Question: Where did you go that day?

Question: What happened after that?

Question: Tell us who was there?

Question: What else happened?

Question: Describe where you were?

Your witness will almost always be more memorable and believable if you can obtain most of her information in her own words. Short, open questions will advance that goal.

B. Use directive and Transitional Questions

You cannot use open questions to begin an examination or to move from one area of the examination to another. To do so you would have to start with "When were you born?" and proceed to ask "What happened next?" in almost endless repetition.

A better approach is to use directive and transitional questions. Directive questions, quite simply, direct the witness's attention to the topic that you want to cover. Suppose that you want the witness to address the issue of damages. Ask,

Question: Were you in any pain after the accident?

Having directed the witness's attention, you can now revert to your short, open questions:

Question: Please describe how you felt.

Question: Where else did you hurt?

Question: How has this affected your life?

You may need to use more than one directive question during any particular line of testimony. To fill out the subject of damages, for example, you may need to ask additional questions such as,

Question: Do you currently suffer any physical disabilities?

Or,

Question: Did you ever have such pains before the accident?

Remember that the purpose of a directive question is to direct the witness's attention, not to divert the (court's).

Another problem with short, open questions is that they are not very good at underscoring the relationship between one fact and another. The best way to do this is through "transitional" questions that utilize one fact as the predicate, or introduction, to another. Here are some examples of transitional questions:

Question: After you saw the fire truck, what did you do?

Question: Do you know what the defendant did as the other traffic slowed to a stop?

Question: Once the defendant's car hit yours, did you see him do anything?

Note that directive and transitional questions will tend to be leading. As a technical matter, however, these questions are permissible so long as they are used to orient the witness, expedite the testimony, or introduce a new area of the examination. As a practical matter, objections to directive and transitional questions are not likely to be sustained so long as they are used relatively sparingly and are not asked in a tone that seems to insist upon a certain answer. It is unethical to abuse transitional or directive questions in a way that substitutes your testimony for that of the witness.

C. Reinitiate primacy

The doctrine of primacy tells us that the trier of fact will pay maximum attention to the witness at the very beginning of the testimony. You can make further use of this principle

by continuously "re-beginning" the examination. That is, every time you seem to start anew, you will refocus the attention of the judge … . This technique can be called reinitiating primacy, and there are several ways to achieve it. [36]

…

D. Use incremental questions

Information usually can be obtained in either large or small pieces. Incremental questions break the "whole" into its component pieces so that the testimony can be delivered in greater, and therefore more persuasive detail.

A large non-incremental question might be,

Question: What did the robber look like?

Even a well-prepared witness will probably answer this question with a fairly general description. A common response might be:

Answer: He was a white male, about twenty or twenty-five years old, may be six feet tall.

You might be able to go back to supply any omitted information, but in doing so you will risk giving the unfortunate impression of doing just that – filling in gaps in the witness's testimony. Furthermore, at some point in the backtracking a judge might sustain an objection on the ground that the question – "Describe the robber" – had been asked and answered.

An incremental approach to the issue of identification, on the other hand, would be built upon a set of questions such as these:

Question: Were you able to get a good look at the robber?

Answer: Yes, I was able to see him clearly.

Question: How tall was he?

Answer: About six feet tall.

Question: How heavy was he?

Answer: He was heavy, almost fat, over 200 pounds.

Question: What race was he?

Answer: He was white.

Question: And his complexion?

Answer: He was very fair, with freckles.

Question: What color was his hair?

[36] The details include, using headline questions (i.e. dividing the direct into series of smaller examinations through the use of verbal headlines), and explaining the direction of the cross-examination (e.g. "Let's talk about the aftermath of the accident").

Answer: He was blond.

Question: How was his hair cut?

Answer: It wasn't really cut at all – just sort of long and stingy.

Question: Did he have any facial hair?

Answer: A small mustache.

Question: Could you see his eyes?

Answer: Yes, he came right up to me.

Question: What color were they?

Answer: Blue.

Question: Was he wearing glasses?

Answer: Yes, he was.

Question: What sort of frame?

Answer: Round wire rims.

Question: Did he have any scars or marks?

Answer: Yes, he had a birthmark on his forehead.

Question: Was he wearing a jacket?

Answer: He had on a Philadelphia Flyers jacket.

…

The incremental question should be used sparingly. It will not work as an overall principle since the unrestricted use of details will quickly overwhelm the trier of fact. Use it only where the details are available, significant and convincing. …

E. Reflect time, distance and intensity

The very best direct examinations virtually re-create the incidents they describe, drawing verbal images that all but place the trier of fact at the scene of the event. Your pace and manner of questioning are essential in this process.

The timing or duration of an event, for example, is often crucial in a trial; one side claims that things happened quickly and the other asserts that they were drawn out. It is possible to use the pace of questioning to support your particular theory. Assume that you represent the defendant in or fire truck case. His defense is that the fire engine appeared only a moment before the collision, and that he just didn't have enough time to stop his car. The goal of the defendant's direct examination must be to recreate the scene by collapsing the time available to react to the fire truck. Hence, you will ask only a few, fast-paced questions:

Question: When did the fire truck first become visible?

Answer: It approached the intersection just as I did.

Question: What was the very first action that you took?

Answer: I slammed on my brakes.

Question: How much time did it take?

Answer: Less than a second.

Note that the direct examination proceeds quickly emphasizing both shortness of time and immediacy of response. This result will be enhanced if you fire off the questions, and if the witness doesn't pause before answering. …

F. Repeat important points

In every direct examination there will be several essential ideas that stand out as far more important than the rest. Do not be satisfied to elicit those points only once. Repeat them. Restate them. … (Y)ou will ned to employ your lawyer's creativity to fashion numerous slightly different questions, each stressing the same point. Repetition is the parent of retention. And your most important points should arise again and again throughout the testimony, to insure that they are retained by the trier of fact.

The corollary to this principle is that less important points should not be repeated in like manner. Increased attention should be used to make key subjects stand out. If too many points are given this treatment, they will all be made to seem equally important. How do you decide which facts are sufficiently important to bear repetition? The answer is to consider your theory and theme. You will want to repeat those facts that are basic to your logical theory, and those that best evoke your moral theme. …

Thematic repetition may be more elusive or subtle. If the plaintiff's theme is that the defendant was "too busy to be careful, you will want to use repetition to emphasize how unbusy the plaintiff was. …

G. Use visual aids

… Always consider whether the witness's testimony can be illustrated. … Demonstrations can also serve as visual aids. Ask the witness to re-enact crucial events or to re-create important sounds. "Please show the (court) exactly how the defendant raised his hand before he struck you." …

Demonstrations must be carefully planned. They have an inevitable tendency to backfire when ill-prepared. Be certain that your expectations are realistic. …

H. Avoid negative, lawyerly, and complex questions

For reasons unknown and unknowable, many lawyers think that it makes them sound more professional when they phrase questions in the negative:

Question: Did you then not go to the telephone?

… (O)n direct examination your goal typically is to establish an affirmative case. It is therefore beneficial to phrase your questions so that your witnesses can answer them affirmatively. Do not use negative questions.

You must also avoid "lawyer talk." Many … witnesses will not understand lawyerese and virtually all will resent it. On the other hand, everyone, including judges, will appreciate plain language. Do not ask,

> **Question**: As what point in time did you alight from your vehicle?

Ask instead,

> **Question**: When did you get out of your car?

Do not ask,

> **Question**: What was your subsequent activity, conduct, or response with regard to the negotiation of an offer and acceptance?

Opt for,

> **Question**: What did you agree next?

Finally, do not pose questions that call for more than a single item or category of information. Although a witness may be able to sort through a fairly simple compound question – such as, "Where did you go and what did you do? – many will become confused, and more will simply fail to answer the second part. Truly complex questions will almost certainly fail to elicit the answer that you seek.

V. Adverse and Hostile Witnesses

From time to time it may be necessary to call a witness, such as the opposing party, who will be hostile to your case. Because unfriendly witness cannot be expected to cooperate in preparation, most jurisdictions allow the use of leading questions for the direct examination of such witness. They fall into two broad categories: adverse and hostile witnesses.

A. Adverse witnesses

Adverse witnesses include the opposing party and those identified with the opposing party. Examples of witnesses identified with the opposing party include employees, close relatives, business partners, and others who share a community of interest. It is within the court's discretion to determine whether any particular witness is sufficiently identified with the opposition as to allow leading questions on direct examination.

It is important to alert the court to the fact that you are calling an adverse witness, lest the judge sustain objections to leading questions. In the case of the opposing party, counsel's right to ask leading questions on direct will be obvious. Nonetheless, there is no harm in stating that the witness is being called "as an adverse witness …

In the case of a non-party adverse witness, it will usually be necessary at the outset to lay a foundation that establishes the witness's identification with the opposition. It may be as simple as in this example:

Question: Please state your name

Answer: My name is Andrew Connor

Question: Mr. Connor, are you employed by the defendant, South Suburban Country Club?

Answer: Yes, I am.

…

B. Hostile witnesses

A hostile witness is one who, while not technically adverse, displays actual hostility to the direct examiner or her client. The necessary characteristic may be manifested either through expressed antagonism or evident reluctance to testify. Actually, a witness may be treated as hostile if his testimony legitimately surprises the lawyer who called him to the stand. Whatever the circumstances, it is generally necessary to have the court declare a witness to be hostile before proceeding with leading questions.

C. Strategy

There are limited situations in which it may be profitable to call an adverse witness The first is where the adverse witness is the only person who can supply an essential element of your case. Thus the witness will have to be called in order to prevent a directed verdict. For the same reason, an adverse witness might also be called to authenticate a necessary document or to lay the foundation for some other exhibit. Finally, and most perilously, an adverse or hostile witness might be called solely for the purpose of making a bad impression on the trier of fact. Needless to say, this tactic has a strong potential to backfire.

In general, adverse (and potentially hostile) witness should not be called unless it is clearly necessary. As noted in the introduction to this section, direct examination provides counsel with n opportunity to build a case. There is therefore great risk involved in calling a witness who will be troublesome, uncooperative, or worse. Moreover, calling an adverse witness allows opposing counsel to conduct, in the midst of your case, a "cross-examination" that is very likely to resemble a final argument for the other side. The scope of adverse testimony should therefore be made as narrow as possible.

…

Section 4- Reading on Cross Examination

Cross Examination

Source: Thomas A. Mauet (2002) *Trial Techniques*, 6th Edition, (New York: Aspen Publishers) pp. 217-239

Cross–examination. The term itself commands respect and even generates fear among seasoned trial lawyers. Certainly, as far as the novice is concerned, no other area of trial work generates as much uncertainty and mystery. How many times, at the conclusion of a direct examination, has the thought flashed through every cross-examiner's mind: "My God! What do I do now?"

That countless writers have called cross-examination an art or intuitive skill hardly helps. Copying a model cross-examination from a "how to" text rarely helps, because every witness, in the context of a particular trial, is unique and must be treated as such. …

Should you cross-examine?

The decision to cross-examine cannot be intelligently made unless you have prepared the cross-examination in advance and have a realistic understanding of what you can expect to achieve during the cross-examination of any given witness. The key, as always, is thorough preparation before trial. You know what your opponent's theory of the case will probably be. …You (might) know what the witness will probably testify to at trial. You know your theory of he case, themes, and labels, and you know what the key disputed facts and issues are. Therefore, you can decide on your purposes in a cross-examination, then plan it and organize it in advance.

… [T]he need for thorough preparation to achieve an effective cross-examination has been greatly increased. The days of "let's see what he says on direct" are over, and a "wait–and –see" attitude will usually guarantee failure.

Although you have prepared your cross-examination in advance, this does not invariably mean that you will undertake it at trial. No one is required to cross-examine every witness who testifies at trial. Whenever you get up to cross-examine, the [court][37] assumes that the witness has hurt you. When this is not the case, simply telling the judge, "Your Honor, we have no questions for this witness, "or "no cross, your Honor," sends confident massages. Ask yourself the following questions whenever a witness has finished his direct testimony, before automatically rising to being your cross-examination.

1. Has the witness hurt your case?

Not every witness will have a devastating impact at trial. Some witnesses may only establish a required technical element of a claim or defense, or provide the foundation for exhibits not in dispute. Others will simply be corroborative witnesses, and you have already established your points with earlier ones. Where the witness has not damaged your position, cross-examining him is not essential.

[37] "Jury" in the original is replaced by 'court' throughout this reading.

2. Is the witness important?

Keep in mind that [judges][38] have certain preconceived notions about trials, which include the notion that every witness can and will be cross-examined by the opposing counsel. You must acknowledge and accommodate the (court's) expectations. Where the witness has a significant role in the trial, this ordinarily means that you should undertake some type of cross-examination. Failure to do so may generate negative impressions for the [court] and invite negative comments from opposing counsel during closing arguments.

3. Was the witness' testimony credible?

Sometimes a witness will not "come off right" and his testimony is not believable. Other times a witness will be substantially contradicted by other witnesses. In those situations the damage has been done before you can do anything, so leaving well enough may be the soundest approach.

4. Did the witness give less than expected on direct?

Has the witness (or his lawyer) omitted an important part of his testimony? If so, conducting a cross-examination may give the witness (or his lawyer) time to realize the mistake and attempt to repair it on redirect. Don't give the opposition a second chance.

Do you think the witness has intentionally withheld a damaging part of his testimony on direct, hoping you will pursue it on cross? In other words, is the witness (or his lawyer) "sandbagging"? Remember that damaging testimony is twice as damaging if elicited during the cross-examination. Where you think the opposition is sandbagging on an important point, consider foregoing cross-examination, in whole or in part.

5. What are your realistic expectation on cross?

Do you have any real ammunition to use during cross-examination? If the witness is credible and your ammunition is weak, consider avoiding cross-examination altogether or conducting a cursory cross on a peripheral point. Remember that during cross-examinations, where a witness has made a reasonable impression on direct, the [court] will side with the witness. The [court] sees the lawyer as sharp, crafty, and battle-tested, the witness as inexperienced, frightened, and in need of protection. While these attitudes may not always accurately reflect the true situation, they result in the same conclusion by the [court]: in the cross-examination game, ties go to the witness. Accordingly, unless you can realistically expect to score points during your cross-examination, avoid it or conduct a cursory inquiry.

6. What risk do you need to take?

Trial lawyers always dream of taking to trial an invincible case, one where witness upon witness simply overwhelms the opposition. This rarely happens, because perfect cases, if they exist at all, are usually settled. Consequently, trials invariably involve calculated risks. The number and extent of the risk depend on how good your case is. If your case is solid and you can reasonably expect to win, keep your risks to a minimum. If, however, your case is a probable loser that cannot be settled, you can cast caution to the winds and conduct a risky cross that searches for the break that might turn the case around. If, as is

[38] "Jurors" in the original has been replaced by 'judges' throughout the extract.

likely, that never occurs, your case will hardly be worse off than before. Accordingly, "safe" cross-examinations should always be utilized in those cases where the facts are close or favor your side. However, where your facts are bad and, barring luck, you can confidently expect to lose, conducting "risky" cross-examinations is something you can consider.

Purposes and order of cross-examinations

There are two basic purposes of cross-examinations:

a. *Eliciting favorable testimony (the first purpose).* This involves getting the witness to admit those facts that support your case in chief and are consistent with your theory of the case, themes, and labels.

b. *Conducting a destructive cross (the second purpose).* This involves asking the kinds of questions that will discredit the witness or his testimony so that the (court) will minimize or even disregard them.

Understanding these two basic broad purposes, and their order of use, is essential to conducting effective cross–examinations. While you may utilize only one of the approaches with some witnesses, you should always consider eliciting favorable testimony form the witness before you attempt a destructive cross-examination.

Why this order? At the end of the direct examination, most witnesses will have testified in a plausible fashion and their credibility will be high. This is the time to extract favorable admissions and information from the witness, since the witness' credibility will enhance the impact of the admissions. Such admissions will have less impact, and be less likely to occur, if you have previously attacked the witness.

Should you always undertake a destructive cross-examination? Not necessarily. Remember that a destructive cross is one that attempts to discredit a witness or his testimony so that the [court] will minimize or even disregard what the witness has stated. If you have been successful in obtaining significant admissions, you may well decide to omit any discrediting cross at all. Remember that trials make it difficult to have your cake and eat it too. [Judges] will be understandably skeptical if you arguer that a witness' favorable testimony should be believed, while that part of the testimony you attacked should be disbelieved. Accordingly, where the witness' admissions have been helpful, thereafter conducting a destructive cross-examination will only undermine the admissions. Discretion is often the better part of valor in such situations.

Elements of cross-examinations

1. Structure

Successful cross-examination follows a preconceived structure that gives the examination a logical and persuasive order. That structure is based principally on the following considerations.

a) Have your cross-examination establish as few basic points as possible

Your cross should preferably have no more than three or four points that support your theory of the case, themes, and labels. Why no more? Always remember the [court's] finite capacity to retain information. The [court] receives facts aurally, and it often

receives them only once. Attempting too much on cross-examination creates two problems: the impact of your strong points will be diluted, and the less significant points will be forgotten entirely by the time the [court] deliberates on its verdict. Therefore, stick with the strongest ammunition and avoid the peripheral material. Always ask yourself: what will I say about this witness during closing arguments? Is this point one I will discuss during closing arguments? If the point is not important enough to make during close arguments, it is probably not worth raising during the cross-examination either.

b) Make your strongest points at the beginning and end of your cross-examination.

Open with a flourish and end with a bang. Why? Again, the nature of the [court)] dictates this approach. [Judges] remember best what they hear first and last. These are the principles of "primacy" and "recency." Their first and last impressions made during the cross-examination will be the lasting ones. Try to use your themes and labels at the beginning and end of the cross-examination.

c) Vary the order of your topics

Successful cross-examinations are sometimes based on *indirection* – the ability to establish points without the witness perceiving your purpose or becoming aware of the point until it has been established. Varying the order of your topics from the direct examination will make it less likely that the witness will anticipate the purpose of a given line of questions. After all, the direct examination was organized to be clear and persuasive. Why automatically adopt that organization for your cross-examination? On the other hand, constantly jumping from point to point is ineffective, since usually the [court] and you become more confused than the witness.

d) Don't repeat the direct examination!

This may be the most commonly violated maxim of good cross-examinations. Many are the lawyers whose standard approach is to have the witness "tell it again," in the groundless hope that the witness' testimony will somehow fall apart during the second telling. This approach almost invariably fails. It has merit only in the rare situations where the witness' testimony appears memorized, or where major parts of the direct examination support your theory of the case.

2. Rules for cross-examination

Your changes of conducting successful cross-examinations improve when you follow certain rules that have withstood the test of time. While these, like any other rules, can be ignored or violated in appropriate situations, following them is usually the safest approach. These rules include the following.

a) Start and end crisply

The first minute sends messages! When you start your cross-examination, the [court] expects you to do something noteworthy. If you don't, the [court] would quickly conclude that your cross-examination will add nothing to what they already learned from the witness. Accordingly, don't start your cross with useless introductory comments. … Start immediately with something that grabs … attention. … The same psychology

applies to your last point: Make it an important point, make it interesting, and make it crisp.

b) Know the probable answer to your questions before you ask the question

Play it safe. Many witnesses will seize every opportunity to hurt you. … This is not a time to fish for interesting information or to satisfy your curiosity. Its sole purpose is to elicit favorable facts or minimize the impact of the direct testimony. Accordingly, your cross-examination should tread on safe ground. Ask questions that you know the witness should answer a certain way, or, because he might not give exactly the expected answer, questions that you know you can handle his response to.

c) Listen to the witness' answers

This may appear to state the obvious, but te fact remains that lawyers often forget to do just that. Witnesses constantly surprise you. Unless you are watching and listening, you will miss nuances and gradations in the witness' testimony. Reluctance and hesitation in answering will be overlooked. Don't bury your fact in your notes, worrying about the next questions while the witness is answering the last one. Organize your notes into cross-examination topics, then formulate your actual questions spontaneously. This way you can watch the witness as he listens and answers, gauge the witness' reaction to your question and the tone of his answer, and intelligently formulate follow-up questions. …

d) Don't argue with the witness

Cross examination can be frustrating. The answers will often not be to your liking. The temptation, therefore, to argue with the witness is always present. Resist the temptation. … Lawyers who succumb to this weakness are usually those who conduct cross-examinations like fishing expeditions. Repeatedly getting bad answers, they begin to argue with the witness. The possibility of this happening can be substantially reduced simply by carefully organizing and structuring your cross-examinations in advance.

e) Don't ask the witness to explain

Open-ended questions are inappropriate on cross-examination. Hostile witnesses are always looking for an opening to slip in a damaging answer. Questions that ask "what," "how," or "why" or elicit explanations of any kind invite disaster. These kinds of questions are best avoided altogether on cross-examination. They're the kind of questions the redirect examination should ask.

f) Don't ask the one-question-too-many

The traditional approach in cross-examinations was to make all your points during the cross-examination itself. The modern approach has an entirely different emphasis and level of subtlety. You ask only enough questions on cross-examination to establish the points you intend to make during your closing argument. This means that you will avoid asking the last question that explicitly drives home your point. Instead, your cross will merely suggest the point. During the closing argument you will rhetorically pose that last question and answer it the way you want it answered when the witness is not around to give you a bad answer.

Example:

You want to establish that the witness did not see the collision until *after* the initial impact and therefore really doesn't know how the accident happened.

Q. You weren't expecting a collision at the intersection, were you?

A. No.

Q. You'd gone through that corner many times without any collisions occurring, hadn't you?

A. Yes.

Q. The weather was good?

A. Yes.

Q. The traffic was normal?

A. Yes.

Q. As you approached the corner you were talking with your passenger, isn't that right?

A. Yes.

Q. The first unusual thing you heard was the sound of a crash, wasn't it?

A. Yes.

Q. And that's when you noticed that a crash had just occurred, isn't that true?

A. Yes.

At this point, stop! You've made your point. Don't ask the last obvious question: "so you didn't really see the cars before the crash occurred, did you? The witness will always give you a bad answer. Instead, save it for your closing argument:

Example:

Remember what Mr. Doe said on cross-examination? He testified that the first unusual sound he heard was the crash, and then he noticed that a crash between the two cars had just happened. Did he see the crash itself? Of course not. Did he see where the cars were before the crash? Of course not.

The problem is always recognizing what that last question you shouldn't ask is, before you inadvertently ask it. Perhaps the best safeguard against doing this is to ask yourself: what's the final point about this witness that I'll want to make during closing arguments? When you decide on the point, make sure you don't ask it as a question during the cross –examination.

g) Stop when finished

Cross-examination continuously tempts you to keep going on. There is always one more question you could ask. There is always one more point that you might be able to establish. Resist this natural temptation to fish for additional points. It's dangerous. Moreover, the [court] has a limited attention span and can maintain a high level of

concentration for only 15 to 20 minutes. Stick with your game plan and get to your last big point before the [court] gets restless or bored. Make your point, stop, and sit down.

3. Questioning Style

Cross-examination requires a different attitude and verbal approach by the lawyer from those on direct examination. Effective direct examinations normally require you to assume a secondary role, remain in the background, and ask open–ended questions that let the witness dominate the [court's] attention. Cross-examination, in terms of the lawyer's position and manner of questioning, is the mirror opposite of direct examinations. Accordingly, you should follow certain rules when conducting cross-examinations.

a) Make your question leading

This is an oft-violated rule. Questions like "what's the next thing you did? And "Describe what the intersection looked like" have little place on cross, particularly where important testimony is involved. A leading question is one that suggests the answer and is the basic form you should use for cross-examinations. Inexperienced trial lawyers usually make two interrelated mistakes: they lead too much on direct and too little on cross. The best way to cure such mistakes is to consciously avoid them before they become an irreversible habit.

Example (proper leading forms):

Q. Mr. Doe, on December 13, 2000, you owned a car, didn't you?

Q. You left that intersection before the police arrived, isn't that correct?

Q. You had two drinks in the hour before the collision, right?

These are all obviously leading questions. Another approach is to make the question leading, not through your language, but through your intonation and attitude, which make it obvious to the witness what answers you are expecting. The advantage of this approach is that the questions are simpler, making it effective when you want to establish a series of related points.

Example:

Q. Ms. Jones, the robbery happened around 9:00 PM.?

A. Yes.

Q. It was dark?

A. It was nighttime?

Q. The sun was down?

A. Yes.

Q. Stores were closed?

A. Yes.

Q. Not many cars driving around?

A. Not many.

Q. You said there were lights form the street lights?

A. Yes.

Q. And they were at the street corners?

A. Yes.

Q. But there weren't any street lights in the middle of the block?

A. No.

Q. And that's where the robbery happened, didn't it?

A. Yes

The only time you can safely ignore the rule is when the answer is not important – you know that the witness must give a certain answer because he has been previously committed to that answer by prior statements –or because any other answer will defy common sense or other evidence. You can then safely ask a nonleading question, because you can effectively impeach any unexpected answer.

Asking nonleading questions can break up the monotony of constantly leading questions. However, you get near important, contested matters; the leading form is the only safe questioning method.

b) Make a statement of fact and have the witness agree to it

During cross-examination you are the person who should make the principal assertion and statements of facts. The witness should simply be asked to agree with each of your statements. In a sense, you testify, the witness ratifies. By phrasing your questions narrowly, asking only one specific fact in each question, you should be able to get "yes," "no," or short answers to each question. Keep in mind that whenever the witness is given the chance to give a long, self-serving answer, he will.

c) Use short, clear questions, bit by bit

Cross-examination is in part the art of slowly making mountains out of molehills. Don't make you big points in one question. Lead up to each point with a series of short, precise questions that establish each point bit by bit.

Example:

The cross-examiner wants to establish that the witness did not actually see pedestrian get hit by a car. Don't ask: "you didn't really see the pedestrian get hit by the car, did you?" this is the classic "one-question-too-many." It's the point you will argue later in closings. The witness will always give you an unfavorable answer, and it's much better to lead up to that point by several short questions.

Q. You're familiar with the intersection of North and Clark?

A. Yes.

Q. In fact, you've driven through that intersection over the past five years, haven't you?

A. Yes.

Q. You usually go through the intersection on your way to and from work?

A. Yes.

Q. So over the past five years, you've driven through the intersection over a thousand times?

A. Probably.

Q. You never saw a pedestrian hit by a car there before, did you?

A. No.

Q. On December 13, 2000, the weather was clear and dry?

A. Yes.

Q. The traffic was pretty much the way it always is at that time of day, wasn't it?

A. Yes, I'd say so.

Q. Nothing was going on that made you pay more than your usual attention to the road?

A. No.

Q. In fact, just before the accident you were thinking about what you were going to do at work that morning, weren't you?

A. I might have been.

Q. So the first unusual thing that you noticed that morning was the sound of the crash, wasn't it?

A. Yes.

Q. And that's when you saw that someone had been hit by a car wasn't it.?

A. Yes.

Notice that by a series of interrelated, progressive questions you have demonstrated that the witness was not expecting a crash and really did not notice anything until after hearing the sound of the crash. You have made your point by indirection. Notice that what would be a last question, "so you didn't really see the pedestrian before the crash, did you?" was not asked. The witness will invariably say "yes," or something even more damaging. As noted above, that is the question you want to save and answer in your closing argument.

d) keep control over the witness

Control comes in large part by asking precisely phrased leading questions that never give the witness an opening to hurt you. But it has another facet. Control means forcing the witness to obey evidentially rules, particularly those involving nonresponsive answers. When the witness continuously gives such answers, a common approach is to move to strike the answer and, if warranted, ask the court to admonish the witness.

Example:

Q. You recognized the driver of the car, didn't you?

A. Yes.

Q. It was Frank Jones, wasn't it?

A. Yes. He was weaving and looked drunk.

Q. Objection, your Honor, we ask that the answer after "yes" be struck as nonresponsive, and the [court] be instructed to disregard it.

Court: The answer will be stricken. The [court] will disregard it.

Of course the [court] cannot disregard it, since you cannot "unring a bell." However, it does serve a valuable purpose by letting the (court) know that the witness' conduct is improper, adversely affecting the witness's credibility. If the witness repeatedly gives nonresponsive answers, consider asking the court to admonish him.

Example:

Q. Your Honor, could the witness be admonished to answer the question and only the question?

Court: Yes Mr. Smith, you will only answer the questions asked. This is not the place for speeches.

If after such an admonition the witness continues to volunteer answers, the [court] will realize how biased and partial the witness is and judge his testimony accordingly.

The disadvantage of moving to strike and disregard is the message it sends the [court] about you, the cross-examiner. The subliminal message the [court] gets is that you are incapable of handling a problem witness and need to run to the judge for help. For that reason, many lawyers choose not to move to strike and disregard unresponsive and other improper answers unless doing so is necessary to preserve an important point as error on appeal.

A more effective approach to controlling problem witnesses is to let the witness know that you will not be deterred by an unresponsive answer and will insist on a proper one. If the witness then gives a proper answer, you have made your point. If the witness refuses to give a proper answer, you have demonstrated to the [court] that the witness is being evasive or unfair, and you have again scored pints by discrediting the witness. You can do this simply by repeating the same question, or rephrasing it slightly. If the other side objects that your question is repetitive, your response will be that the witness has yet to answer it properly.

Example:

Q. Mr. Jones, between 8:00 and 9:00 P.M., you drank five bottles of beer in the tavern, didn't you?

A. Well, we were all drinking.

Q. Mr. Jones, my question is, you drank five bottles of beer during that hour, didn't you?

A. I guess so.

Another method of control is to let the witness know that you have total command of the facts and will immediately know if the witness is telling you anything less than the total truth.

Example:

Q. Mr. Jones, there were three other persons sitting at your table in the tavern, weren't there?

A. Yes.

Q. They were Jimmy Smith, James Oliver, and Wilbur Franklin, correct?

A. Yes.

Q. Wilbur was sitting across from you?

A. Yes.

Q. And he's tall, thin, and has a deep voice, isn't that right?

A. Yes.

Q. And it was during that time in the tavern that you told Wilbur and the others, "I ditched the stolen car in the parking lot," isn't that right?

A. I guess so.

By demonstrating to the witness, before asking the important question, that you know the facts – because you probably talked to the other persons present in the tavern – you have a much lesser risk that the witness will give you an inaccurate or altogether false answer under the mistaken impression that you don't really know the true facts.

e) Project a confident, take-charge attitude

On cross-examination, you should be the center of attention. Consistent with proper procedure and good taste, act the role. Ask questions in a voice and manner that projects confidence, both to the [court] and the witness. Let the [court] know your attitude about the facts. On direct examination, how you ask a question is as important as the question itself. Projecting humor, incredulity, and sarcasm are all a proper part of cross-examination. Use them in appropriate situations. Above all, make sure the witness understands and feels your attitude about the facts of the case and your expectations in your questioning. Projecting that attitude usually has a significant impact in obtaining the answers you want.

Projecting confidence, however, is different from being unnecessarily hard on the witness. Cross-examination does not require examining crossly. The [court] will react negatively if you sound and act tough on the witness without a good reason for your attitude.

f) Be a good actor

Every cross-examiner, no matter how experienced, careful, and talented, will get bad answers to questions. When this happens, a good poker face is invaluable. [Courts], when

they hear what appears to be a devastating answer, will look around the courtroom and gauge the reaction of the judge, lawyers, and spectators. When the witness does drop a bomb, don't react to it. Simply go on as if nothing really happened. If you refuse to make anything of the answer, you have minimized its impact, and the [court] may well conclude that the answer was not as damaging as it first appeared to be.

g) Use a natural style

While trying cases requires you to conform your conduct as a lawyer to certain rules, there is a great deal of latitude that permits the personalities of the lawyers to come out. As in other phases of trial work, there are many styles with which you can conduct cross-examinations. However, there is only one solid rule you should follow: use the style that in natural to you, that you feel comfortable with. [Courts] will immediately spot and lawyer who is attempting to copy someone else's style. The style that is natural for you will invariably be the one that is the most effective as well.

…

Section 5- Reading on Redirect Examination

Redirect Examination and Rehabilitation

Source: Steven Lubet, *Modern Trial Advocacy: Analysis and Practice*, National Institute for Trial Advocacy, 2nd Edition, 1997 (Chapter Seven, pp. 209-214) Footnotes that make further reference to Federal Rules of Evidence are omitted

I Purpose of Redirect

Redirect Examination, which allows counsel an opportunity to respond to the cross examination, may be used for a number of purposes. The witness may be asked to explain points that were explored during the cross, to untangle seeming inconsistencies, to correct errors or misstatements, or to rebut new charges or inferences. In other words, the purpose of redirect is to minimize or undo the damage, if any, that was effected during the cross examination.

…

II Law of Procedure

A. Scope

Because redirect is allowed for counteracting or responding to the cross examination, the material that can be covered on redirect is technically limited to the scope of the cross. … Almost all courts … insist that counsel is not free to introduce a wholly new matter on redirect. The redirect must always have some reasonable relationship to the cross examination. …

B. Rules of Evidence

All the rules of direct examination apply equally to redirect examination. Leading questions are prohibited, witnesses may not testify in narrative form, testimony must come from personal knowledge, lay opinions are limited to sensory perceptions, and the proper foundation must be laid to refresh recollections.

…

III Planned Redirect

Most redirect examinations cannot be thoroughly planned, since each must be closely responsive to the preceding cross examination. Nonetheless, it is possible to anticipate that certain areas will have to be covered on redirect and to prepare accordingly.

It is not always possible to know which lines of cross examination will actually be pursued. Counsel would not want to use the direct examination to explain away a cross that might never materialize. Thus, an explanation may be best reserved for redirect in the event that the cross examination ultimately probes that particular area. It is both possible and necessary to plan for such contingencies.

For example, a witness may have given a prior statement that is arguably impeaching. While there may be a perfectly reasonable response to any apparent inconsistency, it would undermine the witness to bring up the earlier statement during the direct. An explanation would only make sense once the cross examiner actually effected the

impeachment. Consequently, the best approach in this situation is probably to defer the explanation until the redirect.

… (in such situations)… it is possible to plan a segment of the redirect. … Note, however, that … (the) technique of withholding testimony until redirect is not recommended for affirmative evidence or elements of your case.

IV Waiving Redirect

Redirect examination is (sometimes not) necessary. As with all witness examinations, redirect should only be pursues if it will contribute to your theory of the case.

There is no need to ask additional questions if the witness was not appreciably hurt by the cross examination. Additionally, some damage cannot be repaired; it is a mistake to engage in redirect examination if the situation cannot be improved. The worst miscalculation, however, is to surprise the witness with a redirect examination. Do not ask for an explanation unless you are certain that the witness has one.

… Finally, an unnecessary redirect risks repeating, and therefore reemphasizing the cross examination. It can also trivialize the effect of the direct by rehashing minor points.

V Conducting Redirect

Content is the most important aspect of redirect examination. The redirect should concentrate on a few significant points that definitely can be developed. As noted above, these can typically include explanations, clarifications, or responses.

A. Explanations

Explanations are best obtained by asking for them. Focus the witness's attention on the pertinent area of the cross examination and then simply ask he to proceed:

> Question: Defense counsel pointed out that you did not visit your doctor immediately following your camping trip at Eagle River Falls. Why didn't you go to the doctor right away?

This approach can also be used to bring out clarifying facts, made relevant by the cross-examination:

> Question: How soon after the camping trip did you visit the doctor?

A witness may have been frustrated by the control exerted by the cross examiner. If the level of control seemed unfair or unjustified this can be pointed out during the redirect. Consider:

> Question: Defense counsel seemed very concerned that you did not go to the doctor immediately after your camping trip, but she didn't ask you for an explanation. Would you like to explain?

Or,

> Question: I noticed that the defense counsel cut you off when you tried to continue your answer about the camping trip. What was it that you wanted to say?

Or,

Question: There was a lot of cross examination about your camping trip, but counsel didn't ask you anything about what your doctor eventually prescribed for you. What treatment did you get?

While the introductions in the above examples are arguably leading, they are probably permissible efforts to direct the witness's attention. Nonetheless, preambles of this sort, should not be overused. They are likely to be effective only where the cross examination truly was overbearing and oppressive.

B. Rehabilitation

Redirect can be used specifically for rehabilitation of a witness who has been impeached with a prior inconsistent statement.

1. Technique

The technique of rehabilitation is similar to that used for any other explanation. Direct the witness's attention to the supposed impeachment and request for clarification. It may be that the alleged inconsistency can be easily resolved or that the earlier statement was the product of a misunderstanding or misinterpretation. Whatever the explanation, it is important to conclude the rehabilitation with an affirmative statement of the witness's current testimony.

In the following example the plaintiff in the fire truck case testified on direct examination that the fire engine had been sounding its siren and flashing its lights. On cross examination she was impeached with her deposition in which she stated that the fire truck "had not been using all of its warning devices." She might be rehabilitated on redirect as follows:

Question: In your deposition you said that the fire truck was not using all its warning signals. Can you explain how that fits in with your testimony today about the lights and the siren?

Answer: When I answered the deposition question I was thinking about the horn as an additional warning signal, and as far as I can recall the fire truck was not sounding its horn.

Question: Which warning devices was the fire truck using?

Answer: It was definitely sounding its siren and flashing all of its red lights.

2. Prior consistent statements

A witness can also be rehabilitated through the introduction of a prior consistent statement. Although a witness's own previous out-of-court account would ordinarily be hearsay, a prior consistent statement is admissible to "rebut an express or implied charge … of recent fabrication or improper influence or motive,"

Accordingly, once the cross examiner suggests that the witness has changed her story, the direct examiner may show that the witness's testimony is consistent with an earlier report or other statement. …

Review Exercises

(Students are advised to give names to X and Y, and specify time and places)

Task 1

You are a public prosecutor. A police report is submitted to your office. You want to draft a charge against Ato X (an accountant in a bank) who, while driving, has causes injury on Ato Y's left leg in the Wollo Sefer road. Medical evidence shows that the victim has lost 20% of his capacity to work as a guard, a job he had until the date of the injury. You want to charge Ato X with negligent bodily injury.

a) Draft a charge

b) Attach list of evidence and state the *factual proposition/s* to be proved by each witness, document or real evidence.

Task 2 (Alternative to Task 1)

You are an attorney. Ato X, the person accused of having caused bodily injury through negligent driving, has come to your office. He gave you copy of the charge which invokes Article 559/2 of the 2004 Criminal Code. Ato X swears to you that the victim came into the road unexpectedly although it was part of the street marked for pedestrian pass.

a) Can you invoke accident based on Article 57 of the Criminal Code?

b) Do you think that Article 559/1 should have been invoked in the charge instead of Article 559/2?

c) List down potential sources of proof and state the *factual propositions* to be proved by each witness, document or real evidence.

Unit 9- Trial Simulations

Unit Introduction

The ninth unit of this course material is designed to help students in their efforts to participate in trial court simulations. Each student is expected to do trial court watching and then participate in simulations of direct examination, cross-examination and re-examination of witnesses. The instructor facilitates the mock trials in which students produce evidence based on pleadings they have submitted during the preceding sessions. For each mock trial session, three judges will be assigned (among students) by the instructor based on nominations from students, and one student will serve as bailiff. The mock trial is expected to be conducted in the law school's moot court room.

There are basic readings that have been incorporated in Unit 9 because they are crucial during mock trials. Section 1 has a reading on fundamental tasks during the final phases of preparation for trial. The counsel is required to devise a coherent and clear theory of the case, and prepare outline for direct examination. Other pertinent issues of concern include witness list, exhibit selection and preparation, the order in which proof can be produced and preparation for cross-examination.

Section 2 of this Unit highlights opening statements and closing statements which mark the beginning and culminating points of trial lawyering. Moreover, this section includes a reading on objections because prompt and valid objections in the course of the trial are crucial. And finally, Section 3 requires hands-on practice in trial lawyering, and adequate time ought to be allocated for the trial simulations required to be conducted. As students are preparing for these mock trials, they are expected to revise the readings and notes in all the units of this course material

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Section 1- Reading on the final phases of trial preparation

(Source: Thomas A. Mauet (2002) *Trial Techniques*, 6th Edition (New York: Aspen Publishers), pp. 507- 526 with omissions)

Theory of the case

What is a "theory of the case"? Your theory of the case is simply a logical, persuasive story of "what really happened." It must be consistent with the credible evidence and with the (court's)[1] perception of how life works. Your theory of the case must combine your undisputed evidence and your version of the disputed evidence. …

How do you go about developing a theory of the case? This requires several steps. First, review the elements of each claim (or defense) in the case … Second, analyze how you intend to prove (or disprove) each of those elements through admissible testimony and exhibits. Third, analyze the contradictory facts that your opponent has available to determine the key issues that will be disputed at trial, and what witnesses and exhibits your opponent will probably use to prove his side of those issues at trial. These steps should already have been completed by preparing your trial chart. Fourth, research all possible evidentiary issues that may arise to all of the likely proof so that your can realistically determine what will be admissible at trial. Finally, review all the admissible evidence you and your opponent have on the key disputed issues to identify each side's strengths and weaknesses. This is where the critical contests during the trial will be. You must then plan how you can bolster any weaknesses you have and how your can persuasively attack your opponent's weaknesses.

… (The) process of developing logical, consistent positions on disputed facts and integrating them harmoniously with the undisputed facts to create a persuasive story of what actually happened is what trial lawyers call developing theory of the case.

Consider the following:

Example:

In an automobile negligence case, the plaintiff pedestrian was struck by defendant's car at an intersection. Some evidence will place the plaintiff within the crosswalk with the walk light green. Other testimony will place the plaintiff outside the crosswalk, jaywalking across the intersection.

As plaintiff, your theory could be one of the following:

a. Plaintiff was in the crosswalk and had the right of way (ordinary negligence)
b. Plaintiff may have been outside the crosswalk but was injured because the defendant could have stopped his car but didn't (last clear chance)
c. Both plaintiff and defendant may have been negligent, but defendant bears most of the fault (comparative negligence)

Example:

In a murder case, the prosecution's evidence will show that after a violent argument the victim was shot by a man some witnesses will identify as the defendant.

[1] The Original reads "jury's perception"

As defendant, your theory could be one of the following:

a. Defendant did not do any shooting (identification)

b. Defendant did the shooting, but was justified in defending himself (self-defense)

c. Defendant did the shooting, but the circumstances do not make the shooting a (intentional homicide)[2] but (negligent homicide)[3]or lesser charge

As you see, your position on the facts, both disputed and undisputed, must be developed well in advance of trial. Each disputed fact must be analyzed and a position taken on it that is consistent with your theory of the case. Only then can you move on to the next stages of your trial preparation.

Most trials, where the issues are close, are usually decided on a few pivotal points. It may be an admissibility issue on a critical exhibit of a key witness testimony. It may be the impression a crucial witness makes … Whatever the issues, thorough trial preparation must include determining what those issues will be at trial. In short, you must find out what the crucial issues will be, how you want to articulate those issues …, and how to prepare for the critical issues more thoroughly and convincingly than your opponent … All these considerations must come together in deciding on your theory of the case.

…

Direct Examination Outline

How do you create an outline of your planned direct examination in your trial notebook? There are two common methods.

a) *The Q & A method.*

Under this approach, every question you intend to ask the witness (and a summary of the expected answer) is written out. This is the method frequently employed by inexperienced lawyers during their first new trials. Its advantage is that you can draft your questions in proper form in advance. The disadvantages are that, unless you are a good actor, your questions will invariably sound as though they are being read from a script – hardly the impression you want to convey. This approach also weds you to the script and hiders your flexibility in asking logical follow-up questions. …

b) *The witness summary method*

Under this approach, used by most experienced trial lawyers, you outline the key things the witness will testify about on direct. You then simply follow the outline, asking the questions that elicit the desired answers. The advantages are that your questions will sound fresh and spontaneous, and you retain flexibility to ask follow-up and clarifying questions. A convenient way to organize the direct under this approach is to note at the top of the outline the exhibits the witness will work with or qualify the witness's prior statements (which will be in the witness' file folder). The rest of the page is then split into three columns: dates and times, witness testimony, and exhibits. This makes it visually simple to know where you are and what you should do next. As the examination progresses, you simply check off what has been done as it occurs.

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[2] "murder" in the original

[3] "manslaughter" in the original

Example: (John Doe – direct examination)

Exhibits:

1. wallet (P#2)
2. building photo (P#1)
3. line up photo (P#6)

Statements :

1. …
2. statement to police in report, p. 7
3. line up photo (P#6)

(Question outline)

1. Background		
	name, age, address	
	how long there	
	work and school	
	residence – neighborhood	
	family	
2. 5/20/00		
	where living	
	describe building	
	describe apartment layout	
	doors, locks, lights	ID photo – P# 1
3. 2:00 A.M.		
	in apt.	
	TV, beer, lights	
4. What happened		
	two men broke in door	
	describe men	ID. def
	guns, describe	
	took wallet, describe	
	men searched apt.	
	took things, describe	
	threats, ran out	
5. Aftermath		
	called police, arrived	
	spoke to them	
6. Lineup		
	9:00 A.M. call	
	to station	
	talked to police	
	viewed lineup, ID def	ID photo- P#6
	shown wallet	ID wallet- P#2

All the direct examination outlines should be put in your trial notebook (under plaintiff or defendant, depending on whom you represent) in the order you plan to call them in your case in chief.

…

Witness list

… (Y)ou neen to keep a list of witnesses I the charts section of your trial notebook. The witness list will show each witness' name, home address and telephone, work address and telephone, any other information useful for locating and scheduling him during the trial, and a one-sentence synopsis of the witness' role at trial. Some sawyers put the list in alphabetical order. Others put the list in the order in which the witnesses are expected to testify at trial The witness list is critical for keeping in touch with the witnesses as the trial date approaches and during the trial. …

Exhibit selection and preparation

If you have prepared your witness examinations, you already know what exhibits you intend to use during trial. You need a strategy that incorporates both 'exhibits' that will be formally admitted in evidence, and 'visual aids' that are not formally admitted in evidence but can supplement opening statements, closing arguments, and expert testimony. …

… (Y)ou need to keep a list of exhibits in the charts section of your trial notebook. The exhibits list will show, for each party, the exhibit number, without description, and boxes to check showing the evidentiary status of the exhibit – if offered, admitted, refused, reserved, or withdrawn. The exhibits list is essential for you to keep track of the admissibility status of your, and your opponent's exhibits during trial. …

Example (exhibits list – plaintiff):

#	Exhibits marked for identification	*Offered*	*Admitted*	*Refused*	*Reserved*	*Withdrawn*
1	Construction contract	**x**	**x**			
2	Final payment check	x			**x**	
3 a-g	Monthly progress reports	x	x			

Order of proof

The last step in preparing your case in chief is deciding the order in which you will present your evidence. Your proof will come from four possible sources: witnesses, exhibits, stipulations, and judicial notice. You have total control over the order in which you will present your evidence, and you are limited only by the availability of your witnesses. Hence the principal question is: what order of proof will present my case more efficiently?

There are various considerations you should keep in mind in deciding on the order of proof. These include the following:

a. Present your case in chronological order or some other logical progression, as viewed from the (court's)[4] perspective. …
b. Start with a strong, important witness to give the (court) a good initial impression of your case.
c. Finish with a strong witness. … There are psychological principles of primacy and recency. Use them to your advantage.
d. Begin each morning or afternoon session with a strong and interesting witness whenever possible. …
e. If you must call your opposing party or another adverse witness during your case in chief, it is usually safer to call him during the middle of your case in chief. If the witness does more damage than he helps, he will not have started your case in chief on a bad note, and you can immediately follow him with favorable testimony. On the other hand, lawyers sometimes prefer to take the risk and begin their case in chief by calling the opposing party as an adverse witness. This can work well if the witness is unprepared or will make bad impression on the (court).
f. Call important corroboration witnesses immediately after primary witness has testified. … Avoid calling several corroboration witnesses to the same point. Overkill adds nothing, and boring the (court) is costly. Sometimes a corroboration witness can be called later so that the (court) does not repeatedly hear the same evidence.
g. Several witnesses are sometimes necessary to establish technical elements of proof. These can be boring witnesses. Unless doing so will interrupt the logical progression of your case, these witnesses can sometimes be interspersed with more interesting witnesses. In any event, these technical witnesses should be efficiently presented. Keep in mind, however, that technical witnesses may be necessary both to provide foundation for critical exhibits you want to introduce at certain time and as predicate witnesses for other witnesses, unless the court will allow you to call witnesses out of turn on your representation that you will 'connect it up.' …
h. Reading depositions, stipulations and documentary evidence is inherently less interesting and usually boring. See how you can make this come alive. … Intersperse this kind of evidence with more interesting proof, unless it will disrupt the orderly presentation of your case.
i. Get your exhibits in evidence and show them … as son as possible. …
j. Alternate lay witnesses and expert witnesses to keep the (court's) attention.
k. An expert often is a good final witness because he can effectively summarize the evidence in your case. This will capsulize your case just before you rest.
l. Finally, remember that your planned order of proof must remain flexible. Witnesses, particularly experts, have busy schedules and can be available only at certain times. Last-minute problems invariable arise, requiring you to adjust your expected order. … Remember that the above considerations can and often will compete with each other so that there is no one way in which your proof should be ordered. As usual, there is no simple solution to these conflicts. Each case must be analyzed, and the

[4] The Original reads "jury's perspective"

advantages and disadvantages of each order considered, to arrive at an order that appears reasonable, one that presents your case in a logical, progressive way that is easy … to follow and understand.

The following examples give simple illustrations of one way in which the proof could be organized in … civil and criminal cases.

Example (plaintiff in pedestrian collision case):

1. plaintiff
2. eyewitness
3. police officer at scene
4. ambulance driver
5. doctor at emergency room
6. treating physician
7. former employer on damages
8. spouse on damages

Example (prosecutor in murder case):

1. eyewitness in shooting
2. first police officer at scene
3. ambulance driver
4. doctor at emergency room
5. pathologist on cause of death
6. second eyewitness
7. arresting police officer
8. detective on defendant's admissions

Cross-examination preparation

Your final trial preparation task is to prepare the cross examination of your opponent's witnesses. This has been saved for last for a reason. Cross-examination preparation cannot be focused until you know exactly what your theory of the case is, what themes and labels you will use, and what the key factual disputes will be during the trial.

Effective cross-examinations require preparation. … A common problem of inexperienced trial lawyers … is lack of organization. During the direct examination they feverishly take notes, and this rarely does anything worthwhile. The better approach is to take only those notes that will help your cross-examination. If necessary, have someone else take full notes of your opponent's direct examination. This is easily accomplished if you organize your case notes so that you can integrate anything useful the witness says on direct on your notes.

A common system is to outline the planned cross-examination on one side of a sheet of paper, by specific topics. The other half of the sheet is blank; this is where you will note anything specific the witness says on direct that you can use on cross. This will limit your note-taking during the direct, giving you more time to watch the witness testify, which is usually more useful anyway. Some lawyers put a short synopsis of the witness' expected direct testimony, and a list of prior statements, at the top of the page. …

Example (John Smith – cross examination):

Direct: Witness sill probable testify he was walking down the street late at night, was accosted by a man he claims was the defendant, who claimed he had a gun, and was robbed of $35, and later identified defendant in lineup.

Statements: statement to police (pp. 6-8 of reports)

…

Cross examination	Direct examination
1. late at night dark, no lights near	1.
2. happened suddenly , not expecting trouble	2.
3. worried about being hurt, looking for gun	3.
4. never saw gun (GJ transcript, p.7)	4.
5. description to police, general never noted scar on face	5.

Under this system, the only notes you will make during the direct examination are on any specific facts the witness makes that help you on the points you have planned to make on cross. These notes can be made on your cross outline next to the topic involved. In this way your direct examination notes are useful because they are immediately correlated to your planned cross examination.

All the cross-examination outlines should be put in your trial notebook (under plaintiff or defendant, depending on whom you represent) in either alphabetical order or in the order you anticipate your opponent will call these witnesses at trial.

Section 2- Opening statements, objections and closing statements

In criminal cases, "the public prosecutor shall open his case explaining shortly the charges he proposes to prove and the nature of the evidence he will lead."[5] The opening statement should not be argumentative and it is required to be made in an "impartial and objective manner."[6] In most cases opening statements are not formally pursued in Ethiopia. The public prosecutor usually states the core elements that are expected to be proved by the witnesses and other evidence in the course of the trial after which witnesses will be called to testify. In certain cases, however, formal opening statements are made by way stating what is intended to be proved and the nature of the evidence before the public prosecutor starts calling witnesses.

Opening of hearing in civil cases are made "on the day fixed for the hearing of the suit" and the plaintiff is entitled to begin unless the defendant admits the allegations and forwards an affirmative defence, in which case the court can allow the defendant to begin in accordance with Article 258 of the Civil Procedure Code. The opening statement in civil cases is very brief and it merely involves statement of the case. "The party entitled to begin *shall state his case* and produce his evidence in support of the issues which he is bound to prove."[7] The same opportunity will be given for the other party[8] when it produces its evidence to the court. The statement of the case and production of evidence pursues the issues that have been framed [9] prior to the opening of the hearing.

As evidence (witnesses, exhibits, etc.) is produced to the court, the adverse party my object the various elements of the evidence. Objections may be made to questions or answers during witness testimony or to the introduction of exhibits (documents, real evidence, etc.). If objections relating to *substance (content)* are

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[5] Crim. Pro. C., Art. 136(1)
[6] *Ibid*
[7] Civ. Pro. C., Art. 259(1)
[8] Civ. Pro. C., Art. 259(2)
[9] Civ. Proc. C., Arts. 246-252

sustained by court, the evidence becomes inadmissible or would be struck our, while objections to *form* of questioning might bring about rephrasing questions of the other party. According to Article 270 of the Civil Procedure Code objection made against any question made to a witness is recorded "together with the decision of the court thereon." With regard to criminal cases, Article 146 of the Criminal Procedure Code provides that the court shall decide forthwith on the admissibility of evidence where "the public prosecutor or the accused objects the admission of any evidence."

Closing statements constitute the last opportunity to succinctly forward one's points of law, points of fact and relief so that the logical and forceful presentation of your client's side of the case can bring about a favourable decision of the court. The Civil Procedure Code does not envisage formal closing arguments while Article 148 of the Criminal Procedure Code enables the public prosecutor and the accused to make final addresses (closing statements) to the court after the conclusion of evidence. The accused is entitled to make the last statement.[10] The final address shall be on questions of law and questions of fact.

Reading on Objections

(Source: Thomas A. Mauet (2002) *Trial Techniques*, 6th Edition (New York: Aspen Publishers), pp. 463- 472 with omissions)

Introduction

In some ways making proper, timely objections is the most difficult skill for the inexperienced trial lawyer to master. This is difficult for two reasons. First, evidence is usually taught in law schools at a theoretical level, which, while important, has little to do with the contexts in which evidentiary and procedural problems routinely arise during trials. Trial lawyers learn to associate "buzz words" with appropriate objections until the association is automatic. A buzz word is simply a word or phrase that an experienced trial lawyer is conditioned to know is objectionable. For instance, when a lawyer starts a question with 'Isn't is conceivable that …" a trial lawyer will instantly react because the question necessarily calls for a speculative answer. Second, timeliness is essential when making objections, since making a late objection is often worse than not objecting at all.

…

[10] Crim. Pro. C., Art. 148(2)

When to make objections during trial

1. (Judges)[11] dislike (constant) objections

(Judges) see lawyers who make constant objections as lawyers who are trying to keep the real truth from them. Since your credibility as a lawyer has a critical influence on the outcome of the trial, minimize your interference while evidence is being introduced before the (court). … Raise them before the trial whenever possible. …

2. Will the answer hurt your case

Unless you are reasonably sure that the answer to a question will hurt your case, it is usually better not to object. …

On the other hand, you must keep the judge in mind. Repeatedly failing to make a proper objecton (because the answer won't hurt your case) can result later on in the judge overruling a proper objection (where the answer will hurt your case), since you have through your conduct conditioned the judge to assume that what was repeatedly asked earlier was proper. Object enough to let the judge know that you know when to make proper objections.

3. Does your objection have a solid legal basis?

If you do make an objection, be reasonably sure you will be sustained. Have statutory … authority ready to support the major objections you anticipate during the trial. Making an objection and having it overruled is often worse than not making it at all, since the objection merely draws the (court's) attention to the question and eventual answer.

4. Protect the record

Evidentiary objections must be made with two purposes in mind. First, to keep the (court) from hearing improper evidence; second, to preserve any error on appeal.

You must make and protect your record. Errors in admitting evidence at trial are usually waived on appeal unless a proper, timely, specific objection was made during the trial.

5. Can you use objection as a tactical device?

Making an objection necessarily has the effect of breaking the flow and pace of the opponent's examination or argument. While it is unethical to make an unfounded objection solely to disrupt your opponent (or coach your witness), it is proper to make an objection whenever there is a legitimate evidentiary basis for it, even if the inevitable effect is to disrupt your opponent's presentation.

How to make objections during trial

1. Timeliness

Evidentiary objections must be made timely. If a question is improper, an objection must be made before an answer to the question is given. Ordinarily, you should object to a

[11] 'Jurors' in the original

question only when it is completed. If, however, the question itself is directly prejudicial as well as improper, you must object promptly when this first becomes apparent. …

2. Legal basis

Objections should state the legal basis for the objection. This should be done succinctly, without excessive argument.

Example: The question calls for hearsay answer. …

Objections, your Honour, to the hearsay answer

…

Offers for proof

When your opponent's objection has succeeded in excluding important evidence, you must make an offer of proof. The offer is necessary for two reasons. First, it may convince the trial judge to reverse his ruling. Second, the offer will create a record so that the reviewing court will know what the excluded evidence was and be able to determine if the exclusion was improper, and, if so, whether the improper exclusion constituted reversible error. …

Example:

Counsel: Your Honor, if we were allowed to pursue this line of questioning, the witness would testify that one week after the robbery, the defendant tried to sell her watch which we can prove was taken during the robbery.

…

Evidentiary objections

… The following evidentiary objections are commonly encountered at trial. Note that the objections can be classified into two broad categories, objections directed to form and those directed to substantive evidence. Objections to form can usually be cured by rephrasing the question or answer. On the other hand, objections to substantive evidence, if sustained, will actually result in excluding evidence.

Example (form):

Q. Mr. Jones, is it possible that the driver of the other car didn't come to a complete stop at the stop sign?

Counsel: Objection, your Honor. Counsel is asking the witness to speculate.

Court: Sustained.

Q. Mr. Jones, did you see the other car as it approached the sign?

A. Yes

Q. Describe what the car did.

A. It came to the corner, slowed down to around 10 mph, then kept going through the intersection without ever stopping.

In this example, the examining lawyer overcame the objection simply by rephrasing his questions in proper form to elicit the desired information. The objection only forced the examining lawyer to ask better phrased questions and ultimately obtain a better answer that he would probably have gotten to his original question. For this reason, it is often better not to object to question that are improper in form only.

Example (Substance):

Q. Mr. Jones, tell the jury what you heard the bystander, Shirley Smith, say about how this accident happened.

Counsel: Objection, hearsay.

Court: Sustained.

In this example, the objection has succeded in excluding from evidence any statements by Shirley Smith. If there are no applicable exceptions to the hearsay rule, the statement simply cannot get into evidence. …

The following objections are commonly encountered at trial during the presentation of evidence through witnesses and exhibits:

Objections to questions

a. calls for irrelevant answer
b. calls for immaterial answer
c. witness in incompetent
d. …
e. calls for privileged information
f. calls for a conclusion
g. calls for an opinion (by an incompetent witness)
h. calls for narrow answer
i. calls for hearsay answer
j. leading
k. repetitive (asked and answered)
l. beyond the scope (of the direct, cross, or redirect)
m. assumes facts not in evidence
n. confusing/misleading/ambiguous/vague/unintelligible
o. speculative
p. compound question
q. argumentative
r. improper characterization
s. misstates evidence/misquotes the witness
t. cumulative
u. improper impeachment.

Objections to answers

b. irrelevant
c. immaterial
d. privileged
e. conclusion

f. opinion
g. hearsay
h. narrative
i. improper characterization
j. violates parole evidence rule
k. unresponsive/volunteered

Objections to exhibits

a. irrelevant
b. immaterial
c. no foundation
d. no authentication
e. violates original documents (best evidence) rule
f. contains hearsay/double hearsay
g. prejudice outweighs its probative value
h. contains inadmissible matter (mentions insurance, prior convictions, etc.)

Section 3- Trial court simulations: Exercises and Activities

A team of two students will select a case for mock trial. If the case is the one submitted as assignment for writing pleadings, the student who has done the assignment will be public prosecutor (in criminal cases) or counsel for the plaintiff (in civil cases). Mock trials are not expected to handle civil and criminal cased during the same session. However, mock trials may simulate a different bench after recess.

Students are expected to determine theory of the case, identify witnesses and other evidence, open their case and produce evidence in court. Another student will cross-examine witnesses.

Trial Simulation Exercises

Source: Thomas A. Mauet and Warren D. Wolfson, (1987) *Materials in Trial Advocacy: Problems and Cases*, 2nd Edition, Boston, Little, Brown & Co. (pp. 39, 41, 43, 44, 55, 65

(Adjustments are made to types of offences, and students can give names to witnesses)

1. Homicide Victim's widow

This is a prosecution of negligent homicide. The charge arises out of a quarrel in a bar which turned into a brawl, during which the victim was killed. The defense is self-defense.

The case is now on trial. To prove the identity of the victim and to show that the victim had no pre-existing medical condition that could have caused his death, the prosecution calls the victims widow. She testifies on direct examination that she last saw her husband the morning he was killed, May 15 of last year. At that time he was in perfect health. She next saw him late that evening in the Menilik II Hospital Morgue. At that time he was dead.

1. For the defense, cross-examine wife of the deceased.
2. For the prosecution, conduct any necessary redirect examination.

2. Alibi witness

This is a criminal case. The defendant is charged with robbery. The defense is alibi. The defendant claims that the time of the robbery, June 15 of last year at 10:00 p.m., he was at home, about one-half mile from the scene of the robbery. He claims he didn't feel well that evening and had gone to bed around 9:30 p.m. The defendant, age 17, has not brothers and sisters. His father is deceased.

The case is now on trial. To support his alibi defense the defense counsel calls the defendant's mother. She testifies that on the night in question, she was home all evening. Her son came home around 7:00 p.m. She went to bed a few minutes after he did.

The witness has not previously told this to anyone other than the defense attorney. Police investigators attempted to interview her shortly before trial, but she told them she did not wish to talk to them.

1. For the prosecution, cross-examine the witness
2. For the defense, conduct any necessary redirect examination.

3. Driver in car collision

This is a personal injury case arising out of an automobile intersection collision. The plaintiff claims that he was driving eastbound, entered the intersection, and was struck by a car driven by the defendant, that was going northbound. Plaintiff claims that the defendant ran the red light and was speeding.

The case is now on trial. Plaintiff calls a witness, who testifies on direct as follows:

> "I was driving eastbound on Main Street toward the intersection on June 15 [-1], at 8:30 A.M. I was on my way to work, about three miles away. It was the morning rush hour. The car and the pedestrian traffic was normal for that time of day. Main street is a commercial street with four lanes of traffic, tow in each direction. …"

The witness stated that as she was driving on the Main Street, in the outside lane, there was another car ahead of her, perhaps half a block away. Both she and the other car were going perhaps 20 M.P.H. As the car in front of her, a tan Ford sedan, and plaintiff's car, entered the intersection, the light turned yellow. As the Ford reached the far side of the intersection, another car, a beige Plymouth, the defendant's car, going from right to left, suddenly entered the intersection and slammed into the right rear side of the Ford. The light was still yellow for Main Street at the moment of impact. The defendant's car was speeding as it went into the intersection.

The witness stated that she worked for her present employer for five years, and that her expected work hours were 8:30 to 5:00 P.M.

1. For the plaintiff, conduct a direct examination
2. For the defense, cross-examine the witness.

4. Defendant's murder case

This is a murder case brought against the defendant. The defendant is charged with murder on January 1 of last year.

The case is now on trial. A police officer has testified in his prosecution's case-in-chief. His testimony was in all respects consistent with his (preliminary inquiry)[12] testimony.

The accused's defense is that both victims had knives in their hands before she pulled her gun out of her purse and that they were moving toward her and pointing the knives at her before she fired. She claims that she told the same thing to the police officer when he interviewed her.

1. For the defense, conduct a direct examination of the (defendant's witness who is her friend who claims to be present during the incident).[13]
2. For the prosecution, cross-examine (the witness).

4. Robbery victim

(The branch manager of a bank) was at his desk in his office in the rear of the bank when he heard a gunshot.

He jumped up, ran out the door of his office and five feet to his left into the hallway. He saw a man with a handgun, whom he now identifies as the defendant. The defendant was standing about 20 feet away, at one of the tellers' windows.

The manager says that the defendant turned his head, looked momentarily right at him, then turned around, and ran through the lobby and out to the bank's front door.

1. For the prosecution, conduct a direct examination of the witness.
2. For the prosecution, conduct a direct examination of the witness, using a diagram to illustrate his testimony.
3. For the defense, conduct cross-examination.

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[12] The original reads "grand jury testimony."
[13] The defendant is the witness in the original.

Pair work

The following is an excerpt from page 197. It gives you an illustrative sample of the range of witnesses one can have in a case. Work in pair:

a) Each student will prepare a statement of claim or a charge
b) The pair will choose one of the two cases for trial. The case can be hypothetical or predominantly based on facts of a real case, with names of the parties changed.
c) For Student "A": Produce witnesses and conduct direct examination.
d) For Student "B": Conduct cross-examination
e) For Student "A": Conduct redirect examination.

The following examples give simple illustrations of one way in which the proof could be organized in … civil and criminal cases.

Example (plaintiff in pedestrian collision case):

1. plaintiff
2. eyewitness
3. police officer at scene
4. ambulance driver
5. doctor at emergency room
6. treating physician
7. former employer on damages
8. spouse on damages

Example (prosecutor in murder case):

1. eyewitness in shooting
2. first police officer at scene
3. ambulance driver
4. doctor at emergency room
5. pathologist on cause of death
6. second eyewitness
7. arresting police officer
8. detective on defendant's admissions

Annex I

Trial Lawyer's Self-evaluation Guide

Source : Mauet, *Trial Techniques*: 339-340

When a trial is over, trial lawyers are only human. They bask in the warm glow of victory or sink into the despair of defeat. Once the trial is over, however, every trial lawyer should ultimately ask: What did I learn from this trial, what did I do well? and how can I get better?

Good trial lawyers get better because they learn from their experiences. They don't avoid critical self-analysis (through) … defensive attitudes. Good trial lawyers review their performances dispassionately and learn from their mistakes.

The following self-evaluation guide may help your review your trial performances in the future.

1. Strategy

Did I develop a persuasive theory of the case?

Did I develop persuasive themes?

Did I develop persuasive labels for … places, events?

Did I develop people stories?

Did I identify the key disputed issues?

Did I develop my important facts on the disputed issues?

Did I pursue only what I could realistically accomplish?

Did I anticipate my opponent's strategy?

Did I anticipate problems and weaknesses?

2. Execution

a) *Openings*

Did I present the theory of the case?

Did I present my themes? …

Did I use storytelling to present facts and my case?

Did I use persuasive exhibits?

Did I realistically deal with my weaknesses?

Did I accomplish my purposes efficiently?

b) *Witnesses*

Did my examination serve my overall strategy?

Did I use simple, factual, non-leading questions on direct?

Did I illicit "word pictures" on direct?

Did I use simple, factual questions on cross?

Did I 'save' my conclusions during cross for closings?

Did I accomplish my purposes efficiently?

c) *Exhibits*

Did I make and use persuasive exhibits and visual aids? …

Did I provide legally sufficient and persuasive foundations?

Did I effectively manage my own and my opponent's exhibits throughout the trial?

d) *Closings*

Did I argue my theory of the case?

Did I consistently use my themes? …

Did I develop the important facts and logical inferences to support my version of the key disputed issues?

Did I use exhibits, instructions, analogies and theoretical questions?

Did I use both logic and emotion?

Did I accomplish my purposes efficiently?

3. Delivery

a) Verbal

Did I (enable) my witnesses to create "word pictures"?

Did I and my witnesses use "plain (language)"?

Did I effectively modulate my voice to maintain the (court's) interest and emphasize key points?

Did I use … pauses?

Did I have any distracting verbal mannerisms?

b) Nonverbal

Did I avoid overusing notes during my opening and closing?

Did I maintain eye contact with witnesses and (judges)?

Did I use reinforcing … gestures?

Did I project appropriate attitudes?

Did I have any distracting nonverbal mannerisms?

Annex II

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