# 2015 Annual Convention

# Best Practices for Busy Attorneys: Litigation

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**Solo, Small Firm, and General Practice Section**

**1.5 General CLE Hours/1.5 NLT Hours**

OHIO STATE BAR ASSOCIATION

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**April 29 – May 1, 2015 ♦ Sandusky**

# Speaker Biographies

## Mark Kitrick

Kitrick, Lewis & Harris Co., LPA

Columbus, Ohio

Mr. Kitrick has been doing plaintiff litigation for 34 years, including serious injury and death, product liability, malpractice, aviation, and complex litigation such as class actions. His professional memberships include the Ohio Association for Justice (Past President), Franklin County Trial Lawyers Association (Past President), Columbus Bar Association (Former Board Member),and Ohio State Bar Foundation (Board Member). Mr. Kitrick is also immediate Past Chair of the Budget Committee for the American Association for Justice where he sits on eight other committees. He lectures and writes frequently on litigation, malpractice, subrogation, and class actions. For additional information, please visit www.kitricklaw.com.

# Best Practices for Busy Attorneys: Litigation

**Mark Kitrick**
Kitrick, Lewis & Harris Co., LPA
Columbus, Ohio

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# Best Practices for Busy Attorneys: Litigation

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## I. Selecting the "Right" Case

We tend to waste much time reviewing and talking with people about potential cases we don't ultimately accept. One of the reasons is that we want to help folks and it is hard to accept the reality that we cannot fix every person's problems. Because we can never make up those precious moments, how do we avoid losing precious minutes, hours, days and years interviewing, screening or working on cases? Here are a few best practice ideas to consider:

A. When you meet the possible client, always write down your immediate impressions. Remember, it is more likely than not what a jury or judge will think when they are introduced to your client. Over time and after getting to know your client better- assuming you take the case- you often forget what you first thought about our client, and their style and their idiosyncrasies.

B. Use focus groups to determine if you should even take certain cases. Usually, these claims would involve complex or unusual scenarios of facts or law and it is difficult to easily synthesize or understand the claim.

C. We should always analyze three ingredients when reviewing a potential claim: liability, collectability, and damages.

D. How likeable and/or believable is the client? This is a pre-eminent consideration.

E. When screening, as a rule and to be efficient we should limit initial talks with possible clients to five minutes. How can we do so? Ask the person to tell you in two minutes what he would relay to a jury. This usually allows you fast to learn the root, the core of the problem. At the same time be careful not to be too quick to judge.

F. Be aware of the *Concord Fallacy* and remaining on a case too long and after investing major money and time and then realizing you probably should have dropped it months or years ago.

G. Ask your client what he is worried about on his case – make him tell you three bad points. You may be surprised what you learn.

H. If the client has many unrelated life issues, then it is highly likely that the client's case will be permeated with issues too.

I. If you discover that your client has not told you the truth on important points or forgets to do so on more than one occasion, you have a major problem.

J. If you learn that the client has minimal to no support from family and friends or doctors and experts, that is a bad sign.

K. Heed other *red flags/warnings*. Here are some that come to mind:

- *I am not in this for the money.*
- *I want the defendant to go to jail.*
- *No amount of money will make me happy.*
- *I do not care what you say, I want my day in court.*
- *I do not care what the verdicts are, my case is different.*
- *I have had several other attorneys.*
- *I know it is late and the statute is tomorrow.*
- *I am desperate and spoken to at least 4 other attorneys but I know I have a good case and you are the one for me.*

L. Cross examine and be honest with yourself as to whether you have the expertise and wisdom to prosecute or defend the claim. The wise person knows sooner than later when or whether they are getting in over their legal head. If that is a reality, don't hesitate to bring in a more experienced co-counsel so that the client receives the best representation possible. The client will appreciate that you care and whenever the client's interest are primary, you cannot go wrong. Remember:

*"A person does not care about how much you know until they know how much you care."*

## II. Case Themes – Framing – Rules of the Road

If you are going to litigate a claim, you must select a **THEME**. The theme is an overriding principle that focuses on the defendant's conduct and what was wrong and what it should have been. Those who hear it, that being the defense, the jury and the judge, should immediately understand its importance, and it must resonate with the decision-makers and have societal implications. In other words, a case theme is one that our community members not only understand but believe to be true and had the theme been followed, the harm or injustice to your client would not have occurred. Moreover, had the theme violations been adhered to, society at large, including your jury, would be safer and better protected-a wrong would be righted. Said yet another way, it should reflect a social standard. Let us take, for instance:

*"A Stitch in Time"*

This phrase has immediate meaning when stated. It could be an excellent theme for a medical malpractice case: had the defendant doctor simply done one more act, or ordered one more test, or . . . , the unraveling of the plaintiff's health would never have happened. And this action or failure is bad for the community.

The jury must realize that its verdict has direct implications for them, their family and friends. To create this connection between what you want a jury to conclude and a decision rendered for your client, you must convince the jury, using the theme throughout the discovery and trial, that what they do protects and thus positively effects all of them. Said differently, their verdict has implications far greater and broader than just for your client.

It is not always easy to think of an applicable theme. It takes serious cogitation and study. It must be simple and powerful. It must encapsulate the law and damages of your case. Here are a few methods to arrive at the appropriate theme:

- Analyze ancient morality plays or stories from the Bible or any other well-known books that contain belief systems;
- Review well known children's stories;
- Run the facts by non-lawyers and see how the case impacts them.

Remember, if the litigation is only about your client, it is far more difficult to win. Because self-interest and survival drive and motivate all of us to some degree, we must consider the interests of the jury or judge. The end result must be one that the judge or jury believes is just. Everyone needs to go home at night and know and feel they did the right thing, that their verdict has meaning for the client and for the community.

You should select the theme at the case's beginning, well before conducting discovery. It should be reflected in everything you do throughout discovery and the trial. This approach will serve your client well and be a powerful tool for winning your case.

**Rules of the Road**

If the case is one of negligence or injury, for example, the main theme, every sub-theme, and every issue in your case involves safety rules. It was the defendant's conduct that violated those safety rules. Banish the word "negligence" from trial because it is misleading or meaningless to jurors. Every act of negligence is the violation of a safety rule. Jurors easily forgive accidents or inadvertence. "Accidents happen" is a common refrain. People can be careful and accidents can still happen. Humans make mistakes, as it were. But, the violation of safety rule transgresses an easily understood norm. Moreover, jurors find it easier to hold rule-violators accountable and even punish them.

## III. Focus Groups

I cannot emphasize enough how important focus groups are to case evaluations, development, and the prosecution or defense of a claim. Often if someone conducts a focus group, it is done immediately before trial. By then, however, it is too late. What you learn cannot be used throughout discovery. The focus group helps you select themes, provides ideas for discovery, and posits important questions you may not know the answers to but should. Focus groups can aid you in your determination as to whether you should even take the case.

There are numerous books and articles on focus groups and how to conduct them. Some opine that the attorney can do her own focus work, to save money. I am not a proponent of this technique. Why? We are too biased and we cannot be objective enough to run the group. There is a pastiche of methodologies to obtain information from the group and it takes years of studying, practice and knowledge of social science and psychology to properly and meaningfully run a focus group review. We don't have the time, experience or expertise to be our own focus group mediator or leader. Therefore, I strongly suggest using a professional. The costs run anywhere from $1500-$5000 depending on numerous factors, such as do you want a full jury, do you want to video the decision-making, do you want to have two groups at one time, how long do you want the group to work such as a half day or a full day or several days, do you want

to use a shadow jury which will run at the same time as your trial, etc. Generally, the economics are such that we focus larger and more complex cases. You can focus liability and damages, witness assessments, themes, photos, etc. When your expert moderator conducts the focus:

- You should not argue with the jury or the members of the group. Let everyone, just as you would in Voir Dire, express their ideas and be open in their discussion even though it is not easy to listen to what people say.
- The group should NOT know who you represent.
- The event should occur in a neutral location.
- Your interaction should be directed solely by the focus group expert.
- If possible, video the jury's discussions.
- Use at least 6-10 people, folks you do not know and who do not know the case.
- Use what you learn. Do not ignore that which you do not like.
- If your client attends, your client should not interact with the group or you if in the same room. (This is unless you have your client testify to them in order to get feedback.) Sometimes the client needs to hear what people have to say about the case, so as to bring their expectations in line with reality, among many other reasons.

## I. Winning in Discovery – Deposition Is Trial

There are many tools you can and should utilize while litigating. We've already discussed focus groups, themes and the rules of the road. I have enclosed a ***trial matrix*** you can easily adopt. Fill it out before filing the Complaint. Be aware of the many biases we all have when prosecuting or defending a case. I highly suggest you read the attached article for ways to combat your own mind and the many myths and falsehoods we tend to accept.

### *A. Requests for admissions.*

We don't use this excellent tool enough. Requests are extremely useful to pin down the defense on important facts and points so that if admitted, you have streamlined your case in such a fashion that you are more likely to win. When should you use Requests?

- To have the defense admit the actual ***Rules of the Road*** you have chosen;
- To have the defense agree that certain medical bills and records are reasonable, necessary and related to your case and the incident;
- For various defenses the defendant has asserted;
- For salient facts and statements you obtained in depositions;
- For objective injuries;
- For crucial damages that seem indisputable.

The questions must be very simple and exact. They should also contain sub sections that ask why the request is being denied and what evidence and support the defense has for the denial. We all know that if the RFA are not timely admitted, they are deemed admitted. And if the denial is not proper, we can request attorney fees and costs connected with the RFA.

### *B. Client preparation.*

I cannot emphasize enough how significant it is to fully prepare your client for his or her deposition. This takes time and effort but it is well worth it. Sadly, many lawyers simply spend 10-15 minutes with a client and tell them to "tell the truth." In my view, such brief sessions are legal malpractice. The preparation should occur in at least two sessions:

#### 1. Session one.

Review in general the deposition and the rules that the client must obey. There are some fine videos you can have your client watch that go over in detail the process and how to act.

#### 2. Session two.

This is the practice session, which can be done 1-2 times- where you become opposing counsel and go through the case and examination in details. You want your client to come out of the deposition itself and say that you were tougher on him or her than the defense. You don't want the client to state that the actual deposition was worse than he or she thought.

Your practice should include not only cross examination questions but should be videoed – use your iPad - so the client can see for himself or herself how she is doing. Also, it is beneficial to have someone else in your office sit in and provide "jury" feedback.

There is no substitute for these mandatory practice sessions and fully preparing your client. Naturally, this will ease and comfort your highly nervous client who is a stranger in this strange legal world that we know so well. This should be done within a week or so of the deposition. If it is too far out, your client will forget what was learned. But do not have it so close in time that the client does not have a chance to absorb and learn the lessons you've taught.

For injury claims, have your client write out 50-100 ways their life has been affected. Review it with them. If it is a good list, give it to the defense and use it.

Make sure you tell your client how to dress and what not to wear.

### *C. Videoing Depositions*

We video all depositions. Although this creates an additional case expense, the cost-benefit analysis overwhelmingly favors the benefits. Let me show you the difference between reading the transcript and seeing the video of the same statements.

As you can readily see, the difference is amazing and very powerful. There is no substitute for actually seeing a witness' demeanor, discovering how long it takes to answer questions, visualize whether the witness is stumbling or looking at the lawyer for help, viewing and assessing the body language- all of this basic human interaction and observation that we all do everyday is an unknown and thus hidden from the jury- if the jury is just reading or hearing words from a transcript. The many nuances and subtleties on a video make a major difference.

Make sure you:

- Insert in your **NOTICE** that the deposition will be videoed. (See sample attached.) Ohio law allows the deposition to be taken by "any means."

  *RULE 29. Stipulations Regarding Discovery Procedure Unless the court orders*

*otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions; and (2) modify the procedures provided by these rules for other methods of discovery.*

*(B) Notice of Examination; General Requirements; Nonstenographic Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone. (1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, a designation of the materials to be produced shall be attached to or included in the notice. (2) If any party shows that when the party was served with notice the party was unable, through the exercise of diligence, to obtain counsel to represent the party at the taking of the deposition, the deposition may not be used against the party. (3) If a party taking a deposition wishes to have the testimony recorded by other than stenographic means, the notice shall specify the manner of recording, preserving, and filing the deposition. The court may require stenographic taking or make any other order to ensure that the recorded testimony will be accurate and trustworthy*

- When playing back the aspect of the depo to the jury, use the video and make sure the words in the transcript are also below in yellow;
- Use clips for demand packages or negotiations;
- Use clips for focus group work;
- Use clips when conducting other depositions and for feedback or reactions you want from one witness about the videoed witness;
- Video your client when doing deposition preparation so your client can see how she is doing and how to improve.

### *D. Jury instructions.*

Far too often lawyers don't review the applicable jury instructions until trial time. The relevant OJI should be studied and copied and put in your Trial Notebook at the beginning of litigation, not at the end. The salient language, burden of proof, and key words to use in discovery (depositions, RFA) will be at your fingertips and this allows you to be far more prepared and on target with what you must prove to win.

### *E. The defendant's deposition.*

Naturally, this is a major event. Again, your preparation here is pre-eminent. In addition to videoing the deposition:

- Create a master outline of questions including your Theme and Rules of the Road;
- Focus on liability and all the details;
- Pin down and lock in the witness;
- Ask open- ended questions. Learn the bad and the good;

- Do not allow opposing counsel to be obstreperous or engage in leading or inappropriate behavior- stop such actions immediately. Remember that a deposition is as if it is happening in Court in front of a judge or jury. If opposing counsel cannot say or do what he is doing or saying in court when his client is testifying, he cannot do it in a deposition. Make a record of bad behavior. Call the Court if necessary. Be strict but fair.
- Require that the defendant and all witnesses you depose read and sign the transcript. Many lawyers do not know that any party can require this signing.

*(E) Submission to witness; changes; signing. When the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by the witness, unless examination and reading are waived by the witness* ***and by the parties****.*

### *F. Further evaluations.*

As the case progresses, do the following:

- Continue to evaluate your case and play devil's advocate. Do not get caught up in your own belief that you have the best case. The regularly scheduled evaluation and review usually leads to the ratcheting down of expectations for your client and you.
- As you learn facts in discovery, review them with staff and friends-this is separate from focus group analysis. Obtain informal opinions and feedback from non-lawyers.
- Grade your case. What do I mean? All cases are important, of course. But some deserve or require more time and that time and the money you spend should be proportionate equal to the case value.

### *G. Voir dire.*

We should not accept the standard *voir dire* limitations that we usually confront. As this is such an important phase we must do all we can to protect our client and get the best jury possible. What are some ways we can do so?

1. File a Motion to Extend Time to conduct VD;
2. Submit a Jury Questionnaire to the judge and jury;
3. Ask the Court for More jurors;
4. Educate the Court on the law in Ohio on VD and bias;
5. When conducting your VD, do not ask questions like, will you be fair and reasonable? Ask open ended questions, get the jury to talk and debate amongst themselves;
6. Put numbers from 1-10 on the key points so that when you add them up, you have objective evidence regarding a prospective juror's bias or prejudices or attitudes so you can more easily have the judge strike them for cause;
7. Tell the jury what you are afraid of and talk about it;
8. Have someone help you select the jury. It is impossible to see and do it all without another's eyes, ears, and mind.

## V. New Ideas and Cases – Trends

This is an era where you must be creative and be willing to study trends. If possible, try and create a sub-category of expertise that perhaps others do not have. If you find a legal arena that is new and has potential, explore it. If a client comes to you with a possible case, do not dismiss the facts or the scenario without fully analyzing all aspects of it. For instance, if the damages are small, would it be suitable for a potential class action? Is it an area that has minimal case law but what occurred is wrong? If so, should you correct it and make better law? Keep in mind the moral or ethical proposition that if something is wrong - even if the law is not all that good or does not exist- perhaps you can make it right. Legal rubics booming today are:

- Cyber space claims, internet fraud and technology and privacy breaches;
- Police Misconduct;
- Truth in Lending;
- Bad Faith denials by insurance companies

## VI. Be a Leader

When prosecuting or defending a case, be a <u>leader</u>. Let the other side and the Court know that **<u>you</u>** are the expert, the person who they can rely on as the expert. Besides always being more than well prepared:

- Put pictures/photos in your briefs and pretrial statements. Bring your case to life. There is no rule that prevents you from doing so.

- Create diagrams, maps and outlines for the Court and other side when you attend status conferences and pretrials. (See Attachment.) Judges and everyone appreciate it when they can get a handle on the case quickly and easily. Also, it shows you are on top of your work and people can rely on and trust you. As well, it forces you to study details.

  *"God or the devil is in the details, depending on your point of view."*

- Always try to exceed your client's expectations. Conversely, make sure your client's expectations are realistic.

  As for the Courtroom and the Court, do the following:

  - Get to know the bailiff, the clerk, and the judge's personnel;
  - Walk around the courtroom and when empty, sit in all parts of it. Know what technology it has or needs so you are best prepared. Always use high technology and keep the trial interesting and exciting. Otherwise, the jury and judge will be asleep and bored and you will lose.
  - Have your client visit the Courtroom privately to get ready for Court and to feel more comfortable.

## VII. Conclusion

I submit to you that these best practices will help you win. While implementing them, be yourself at all times. If you are fully prepared, if you are yourself, if you are passionate and you care, if you have a nice client and you use themes and rules of the road and you are honest about the good and bad in your file, and while doing so you are imminently fair and reasonable and ethical in your pursuit of justice, you will have a long, fulfilling, and exciting litigation career.

## PowerPoint Presentation



BEST PRACTICES TO CONSIDER
WRITE DOWN IMMEDIATE IMPRESSION
USE FOCUS GROUPS
LIABILITY, COLLECTABILITY, DAMAGES?
LIKEABILITY/BELIEVABILITY
INITIAL TALK 5 MINUTES
CONCORD FALLACY
3 POINT OF CONCERN
UNRELATED "ISSUES"
HONESTY
MINIMAL FRIENDS/FAMILY SUPPORT
RED FLAGS
DON'T GET IN OVER YOUR HEAD


CASE THEME
OVERRIDING PRINCIPLE
DEFENDANT'S CONDUCT
WHAT WAS WRONG AND WHAT IT SHOULD HAVE BEEN
Resonate with the decision-makers
Societal implications
Reflect a social standard
"A Stitch in Time"

## CHOOSING CASE THEMES

NOT EASY

SERIOUS COGITATION & STUDY

ENCAPSULATE LAW & DAMAGES

SIMPLE & POWERFUL

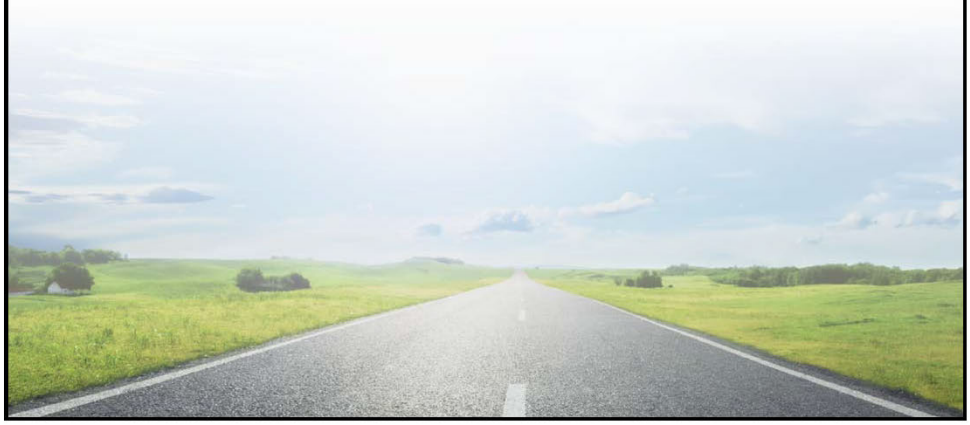
## IDEAS FOR CHOOSING CASE THEMES

Analyze ancient morality plays or stories from the Bible or any other well-known books that contain belief systems

Review well known children's stories

Run the facts by non lawyers

## RULES OF THE ROAD



## FOCUS GROUPS

- VITAL TO CASE EVALUATION, DEVELOPMENT & PROSECUTION OR DEFENSE OF A CLAIM
- TIMING
- USE A PROFESSIONAL

## FOCUS GROUP GUIDELINES

| | |
|---|---|
| DON'T ARGUE | IF POSSIBLE, VIDEO THE JURY'S DISCUSSIONS |
| THE GROUP SHOULD NOT KNOW WHO YOU REPRESENT | USE AT LEAST 6 -10 PEOPLE |
| NEUTRAL LOCATION | USE WHAT YOU LEARN. DO NOT IGNORE THAT WHICH YOU DO NOT LIKE |
| YOUR INTERACTION SHOULD BE DIRECTED SOLELY BY THE FOCUS GROUP EXPERT | IF YOUR CLIENT ATTENDS, YOUR CLIENT SHOULD NOT INTERACT WITH THE GROUP OR YOU IF IN THE SAME ROOM (unless you have your client testify to them in order to get feedback) |

## WINNING IN DISCOVERY

DEPOSITION IS TRIAL


## REQUESTS FOR ADMISSIONS

- Have the defense admit ROR
- To have the defense agree that certain medical bills and records are reasonable, necessary & related to your case and the incident
- For various defenses the defendant has asserted
- For salient facts and statements you obtained
- For objective injuries
- For crucial damages that seem indisputable

## CLIENT PREPARATION

IMPORTANT TO FULLY PREPARE YOUR CLIENT

TAKES TIME AND EFFORT

THE PREPARATION SHOULD OCCUR IN AT LEAST 2 SESSIONS

## CLIENT PREPARATION
SESSION 1

Review in general the deposition and the rules.

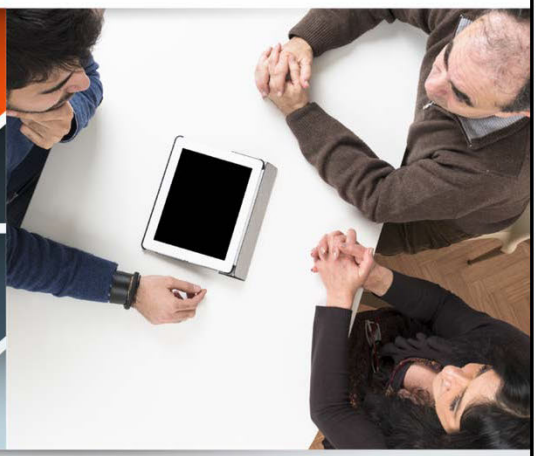
## CLIENT PREPARATION
SESSION 2

Practice session – 1-2 times

You become opposing counsel and go through the case and examination in details

Should include not only cross examination questions but should be videoed – use your iPad

Have someone provide "jury" feedback



## CLIENT PREPARATION

WHAT TO WEAR/WHAT NOT TO WEAR

## VIDEOING DEPOSITIONS

- VIDEO ALL DEPOSITONS
- When playing back, use the video and make sure the words in the transcript are also below in yellow;
- Use clips for demand packages or negotiations;
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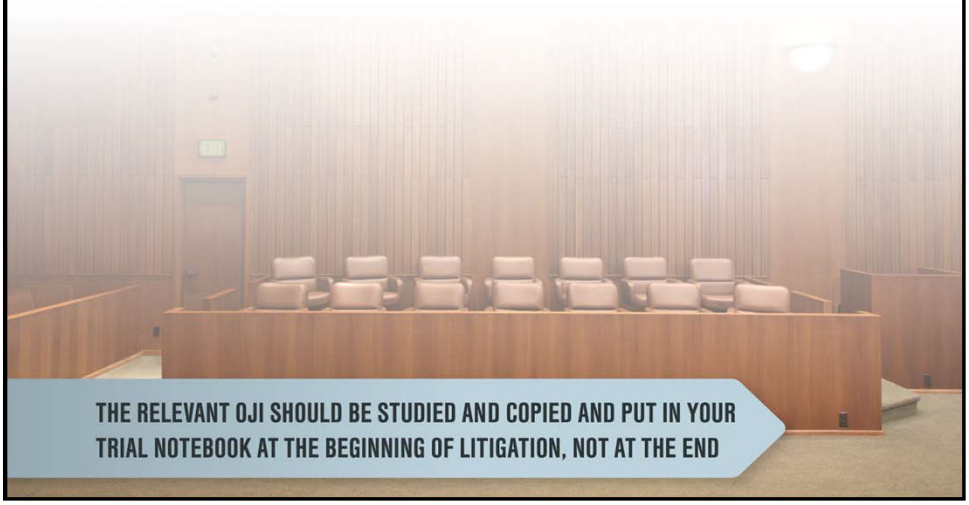
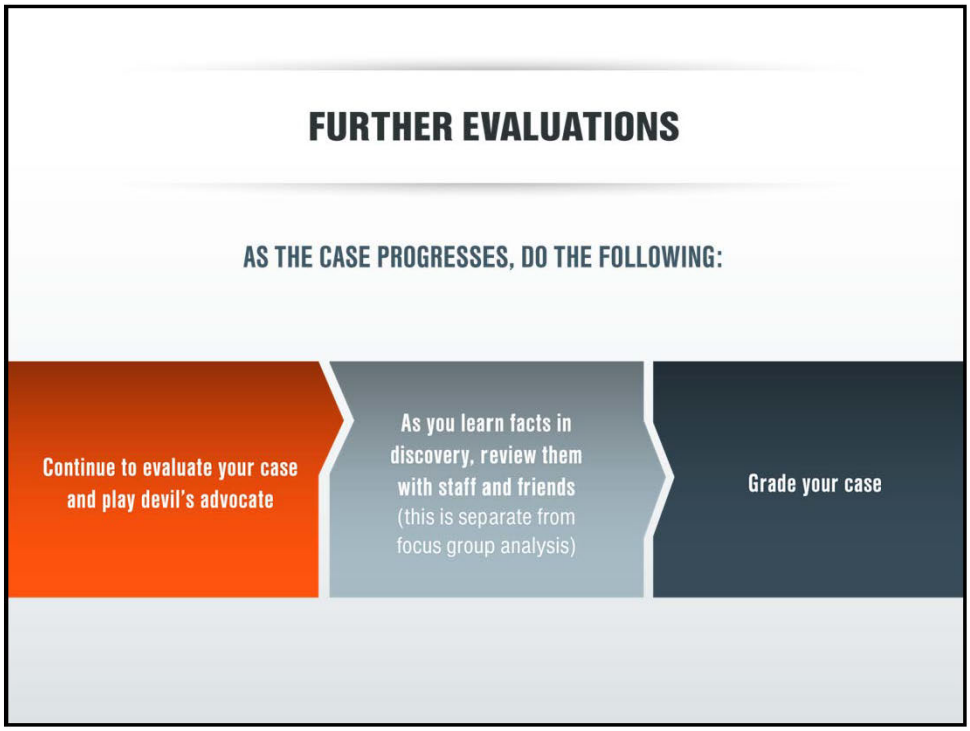
## JURY INSTRUCTIONS



THE RELEVANT OJI SHOULD BE STUDIED AND COPIED AND PUT IN YOUR TRIAL NOTEBOOK AT THE BEGINNING OF LITIGATION, NOT AT THE END

## THE DEFENDANT'S DEPOSITION

- CREATE A MASTER OUTLINE
- INCLUDE YOUR THEME AND RULES OF THE ROAD
- FOCUS ON LIABILITY AND ALL DETAILS
- PIN DOWN THE WITNESS
- ASK OPEN- ENDED QUESTIONS. LEARN THE BAD & GOOD
- DO NOT ALLOW OPPOSING COUNSEL TO BE OBSTREPEROUS OR ENGAGE IN LEADING OR INAPPROPRIATE BEHAVIOR- STOP SUCH ACTIONS IMMEDIATELY
- REQUIRE THAT THE DEFENDANT AND ALL WITNESSES YOU DEPOSE READ


FURTHER EVALUATIONS
AS THE CASE PROGRESSES, DO THE FOLLOWING:
Continue to evaluate your case and play devil's advocate
As you learn facts in discovery, review them with staff and friends (this is separate from focus group analysis)
Grade your case


VOIR DIRE (VD)
File a motion to extend time to conduct VD
Ask open ended questions, get the jury to talk and debate
Submit a jury questionnaire
Put numbers from 1-10 on the key points so that when you add them up, you have objective evidence regarding a prospective juror's bias or prejudices or attitudes so you can more easily have the judge strike them for cause
Ask for more jurors
Tell the jury what you are afraid of and talk about it
Educate the court on the law in Ohio on VD and bias
Have someone help you select the jury. It is impossible to see and do it all without another's eyes, ears, and mind

## NEW IDEAS & CASES – TRENDS

TRY AND CREATE A SUB-CATEGORY OF EXPERTISE THAT PERHAPS OTHERS DO NOT HAVE.
IF YOU FIND A LEGAL ARENA THAT IS NEW AND HAS POTENTIAL, EXPLORE IT

### LEGAL RUBICS BOOMING TODAY ARE:

Cyber space claims, internet fraud and technology and privacy breaches

Police Misconduct

Truth in Lending

Bad Faith denials by insurance companies

## BE A LEADER

BE A LEADER. LET THE OTHER SIDE AND THE COURT KNOW YOU ARE THE EXPERT

Put pictures/photos in your briefs and pretrial statements.

Create diagrams, maps and outlines for the Court and other side when you attend status conferences and pretrials. (See Attachment.)

"God or the devil is in the details, depending on your point of view."

Always try to exceed your client's expectations. Conversely, make sure your client's expectations are realistic.

## COURT & COURTROOM

Get to know the bailiff, the clerk, and the judge's personnel

Walk around the courtroom and when empty, sit in all parts of it. Know what technology it has or needs so you are best prepared

Have your client visit the Courtroom privately to get ready for Court and to feel more comfortable

## CONCLUSION

These best practices will help you win. Be yourself at all times. If you are fully prepared, if you are yourself, if you are passionate and you care, if you have a nice client and you use themes and rules of the road and you are honest about the good and bad in your file, and while doing so you are imminently fair and reasonable and ethical in your pursuit of justice, you will have a long, fulfilling, and exciting litigation career.

# Plaintiff's Initial Pretrial Statement

IN THE COURT OF COMMON PLEAS, COSHOCTON COUNTY, OHIO

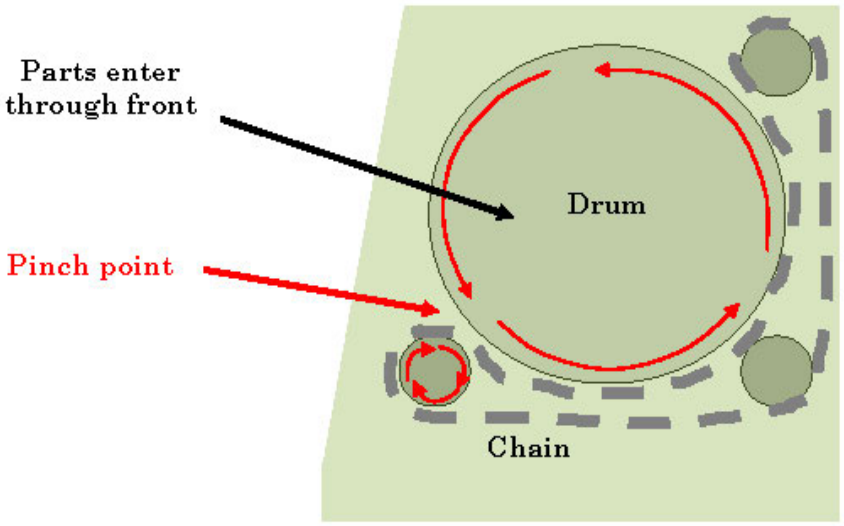
| | |
|---|---|
| David Rhoades, et al.,<br><br>Plaintiffs,<br><br>vs.<br><br>Sancast, Inc., et al.,<br><br>Defendants. | Case No. 14-CI-0103<br><br>Judge Robert J. Batchelor |

PLAINTIFFS' INITIAL PRETRIAL STATEMENT

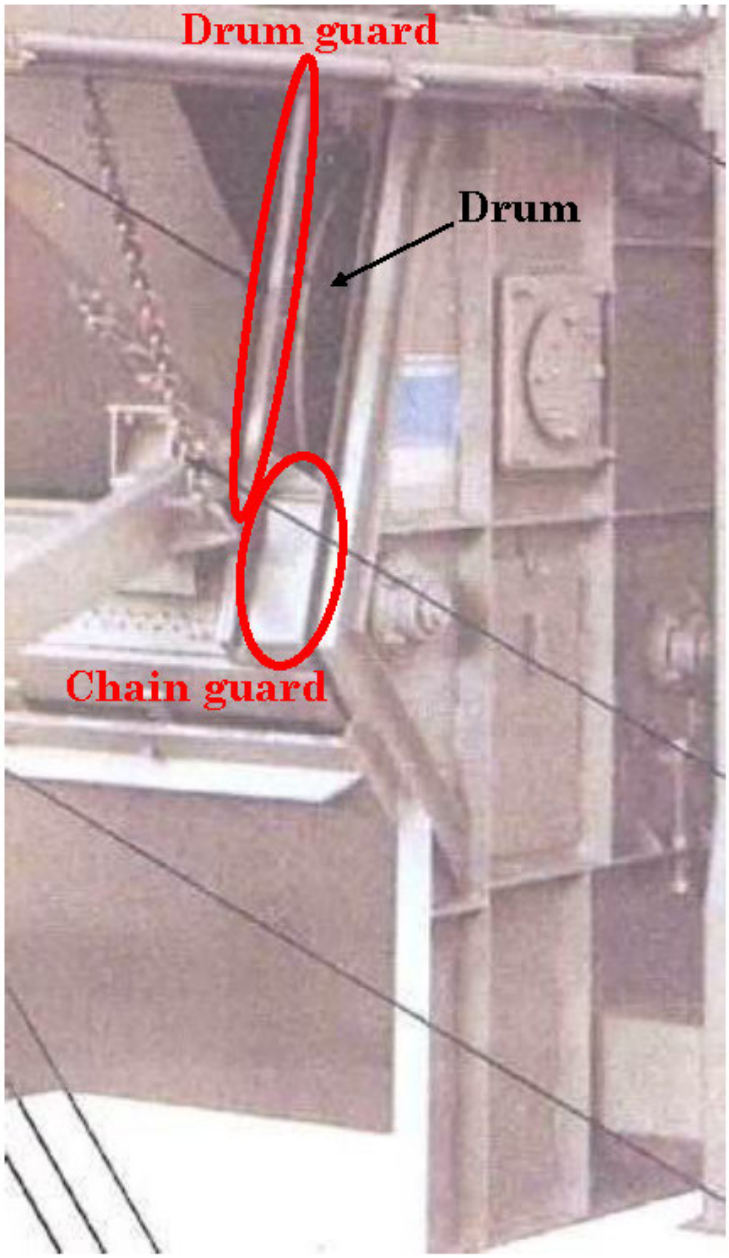
1. Factual and legal contentions

Defendant Sancast, Inc. makes iron railroad parts in its factory. Sancast, Inc. uses a "shot blast machine" to smooth out the rough edges of the forged parts. Inside the shot blast machine, metal shot is sprayed at the parts while a large drum rotates counterclockwise to tumble the parts. Below the drum, a chain rotates in the opposite direction. These opposing directions create a pinch point.

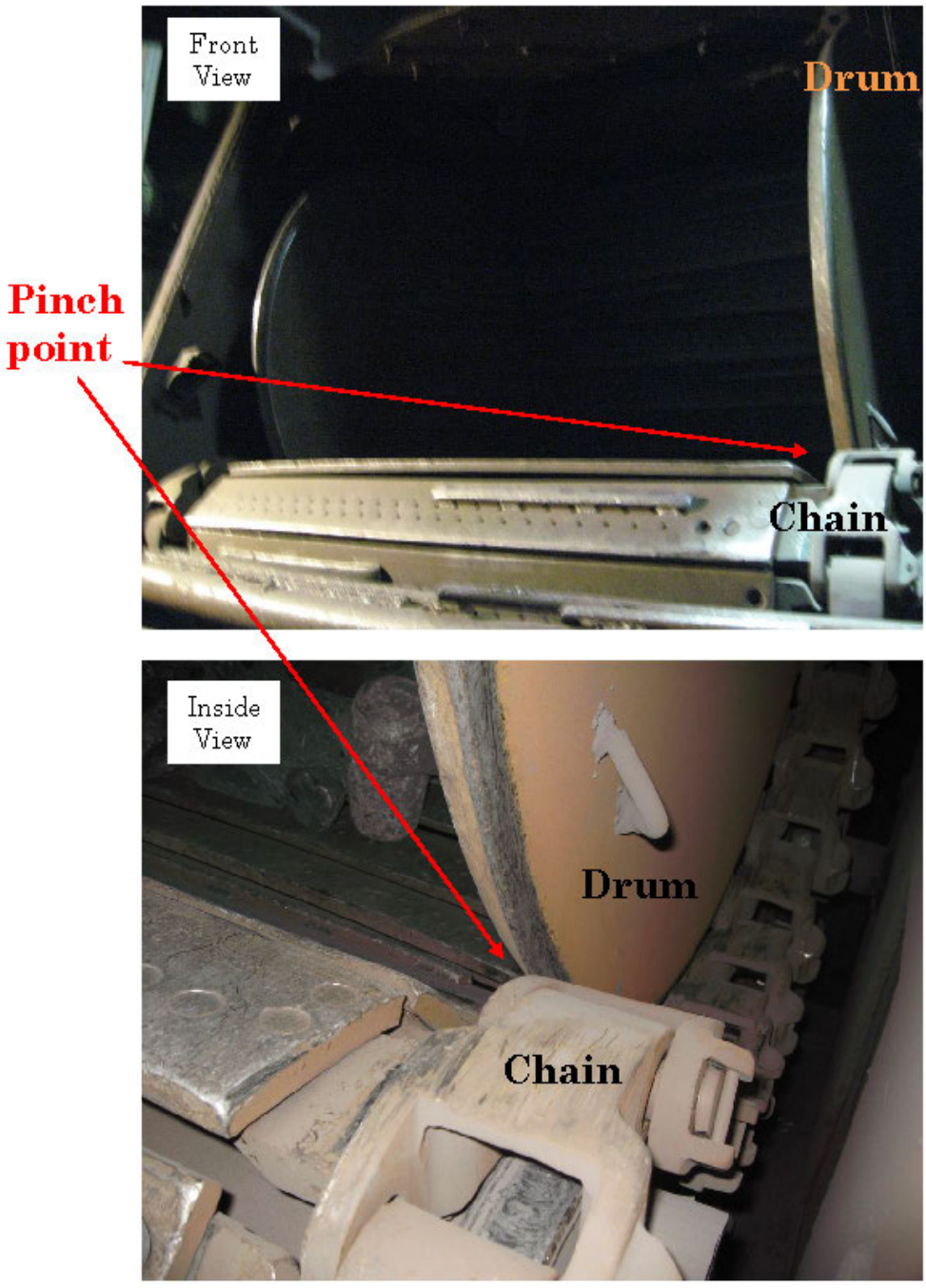
Shot blast machine - side view



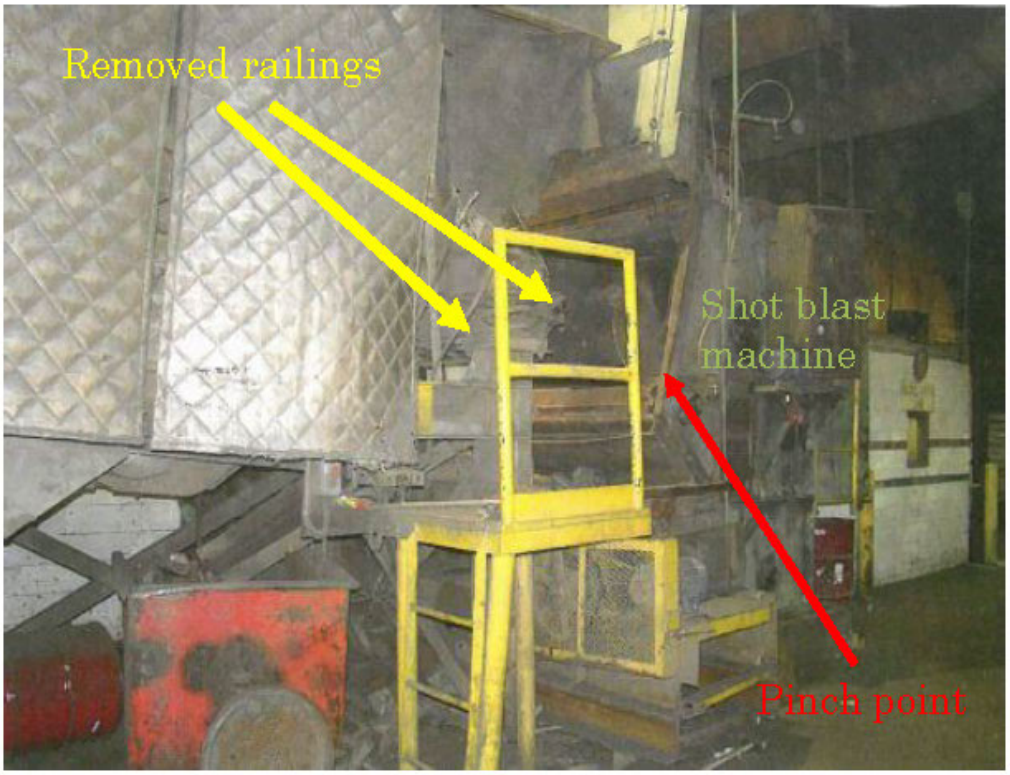
The shot blast machine is designed by the manufacturer to have two guards covering the pinch point; one over the chain and another on the side of the drum.



Sancast, Inc. removes the chain guard and the drum guard from its shot blast machine.



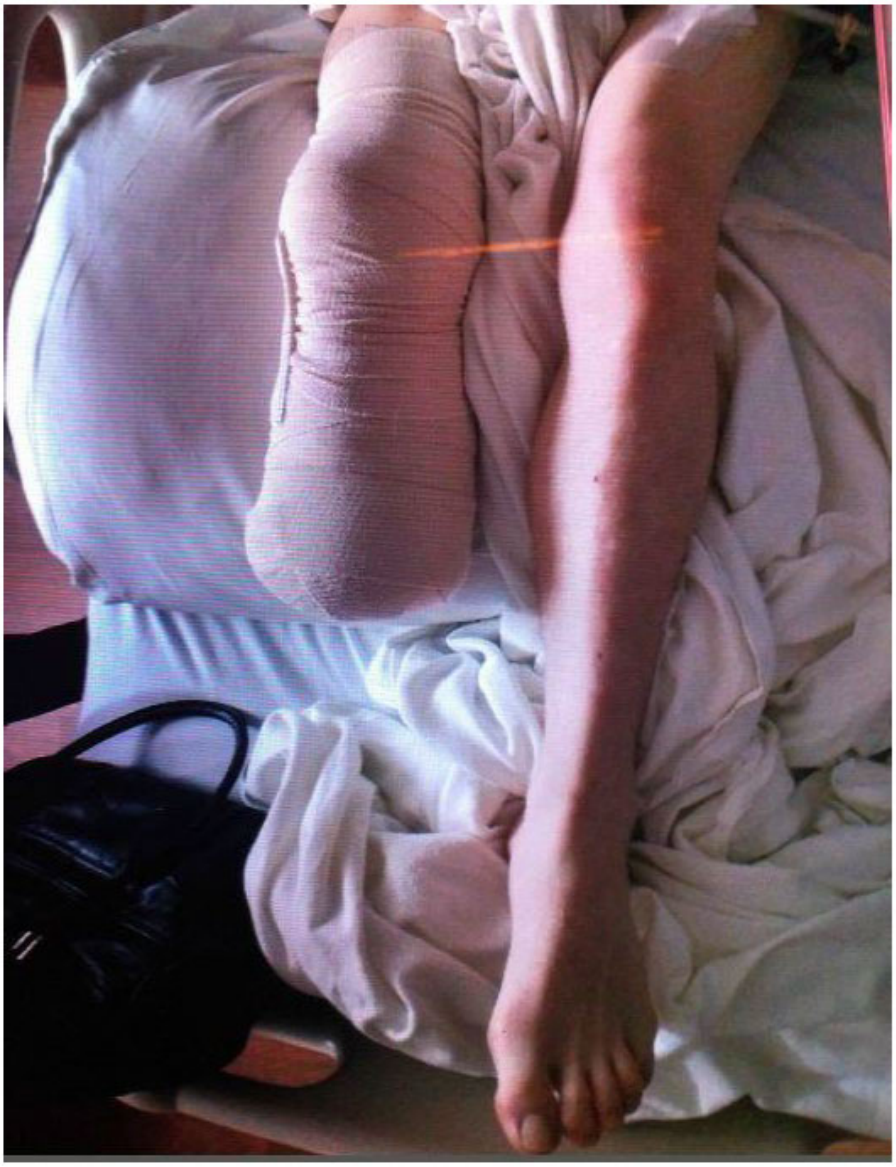
Sancast, Inc. also removes two sides of a three-sided yellow railing around the platform where the shot blast machine operator stands.




Davis Rhoades goes to work for Sancast, Inc. He is hired as a temporary employee. Sancast, Inc. assigns him to work on its shot blast machine. Sancast, Inc. provides no training to Davis on how to properly run its shot blast machine.

On June 4, 2013, Davis has been on the job for approximately 6 weeks. He is working on the shot blast machine. He attempts to dislodge a stuck iron part. But it is too late. His pants and leg are pulled into the pinch point on the shot blast machine. He is stuck in the shot blast machine for over an hour. An orthopedic surgeon is called to the scene to determine whether Davis' leg should be amputated at the scene.

Davis is finally extracted from the shot blast machine. He is life-flighted to Grant Hospital. His leg is injured beyond repair. It must be amputated.



2. **Amendments to the pleadings**

Plaintiffs do not anticipate amending the pleadings.

3. **Motions**

Plaintiffs anticipate filing motions in limine prior to trial.

4. **Medical examinations**

No medical examinations have been scheduled.

5. **Discovery status**

Discovery has just begun. To date, the parties have conducted an inspection of the scene and exchanged written discovery responses. Plaintiffs have also disclosed expert reports from their life care planner, economist, and vocational expert. No depositions have been conducted. The parties have scheduled a private mediation for Friday, October 17, 2014.

If the case does not resolve at mediation, Plaintiffs' expect to depose:

a. Sam Bannister – Sancast Foundry Production Manager

b. James Kulbachi – Sancast Logistics/Distribution

c. Doug Moore – Sancast Facility Manager

d. Francis Porreca – Sancast General Manager

e. OSHA Investigator

f. Representative of Pangborn Corporation (manufacturer)

g. All defense experts

h. Plaintiffs reserve the right to conduct additional depositions

Each deposition will likely require a full day. Plaintiffs' Counsel suggests the depositions take place in Coshocton, either in the Courthouse or another location. Proposed dates for depositions are October 21, 22, 27, 29 and November 4 and 5.

6. **Economic losses**

| | |
|---|---|
| Past medical loss | $ 98,078.51 |
| Past lost wages | $ 37,700.00 |
| Future life care | $ 2,925118.65 |
| Future lost wages | $ 748,800.00 |
| **Total** | **$3,060,998.16** |

7. **Exhibits**

   a. Photographs, images, plans, drawings, and diagrams of the shot blast machine as it was designed

   b. Photographs and diagrams of the shot blast machine at the time it mangled Davis' leg

   c. Photographs of the shot blast machine after it mangled Davis' leg

   d. Model of the shot blast machine

   e. Example of the chain guard

   f. Example of the drum guard

   g. Example of the railings

   h. OSHA report

   i. Mancan Investigation report

   j. Sancast Investigation report

k. Economic Loss Package, including all medical bills and records

l. Wage loss documentation

m. Photographs of Davis' leg and injuries

n. Diagrams and charts demonstrating future wages losses

o. X-rays of Davis' leg

p. Example of prosthetic leg

q. Examples of wheelchair, walker, and cane, among other walking aides

r. "Day in the life" video

s. Plaintiff reserves the right to list additional exhibits

8. **Witnesses**

a. Lay Witnesses

i. Plaintiff Davis Rhoades

ii. Plaintiff Melissa Rhoades

iii. Dallas Brewer – before and after witness

iv. Tasha Troendly – before and after witness

v. Heather Blanchard – before and after witness

vi. Sam Bannister – Sancast Foundry Production Manager

vii. James Kulbachi – Sancast Logistics/Distribution

viii. Doug Moore – Sancast Facility Manager

ix. Francis Porreca – Sancast General Manager

x. OSHA Investigator

xi. Representative of Pangborn Corporation (manufacturer)

xii. Plaintiffs reserve the right to name additional lay witnesses

b. Expert Witnesses

i. Ronald Schaible – occupational safety expert

ii. Dr. Bruce French – orthopedist (by video)

iii. Dr. Lee Roach – psychologist (by video)

iv. Bruce Growick – vocational expert

v. Pamela Hanigosky – life care planner

vi. David Boyd – economist

vii. Plaintiffs reserve the right to name additional expert witnesses

**9. Trial procedure**

Plaintiff will not waive jury trial. No jury view is requested. Trial is expected to last 3-4 days.

Respectfully submitted,
**Kitrick, Lewis & Harris Co., L.P.A.**

Sean Harris (0072341)
445 Hutchinson Avenue, Suite 100
Columbus, Ohio 43235
Phone (614) 224-7711
Fax (614) 225-8985
sharris@klhlaw.com

*Counsel for Plaintiff*

## CERTIFICATE OF SERVICE

I sent a copy of this document by email to the following on October 7, 2014:

Robert D'Angelo
RJD@Pietragallo.com
Counsel for Defendant Sancast, Inc.

Kevin Foley
KFoley@reminger.com
Counsel for Defendant Mancan

Aaron Bucco
aaron@larrimer.com
Co-counsel for Plaintiff Davis Rhoades

_____
Sean Harris (0072341)

# Plaintiff's Notice to Take Video Depositions of Defendant

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

| | |
|---|---|
| De'Ontay Sanders, a minor by and through his parent and guardian, Deborah Sanders, et al.,<br><br>Plaintiffs,<br><br>vs.<br><br>Columbus City School District, Board of Education, et al.,<br><br>Defendants. | Case No.: 13 CV 013527<br><br>Judge Kimberly Cocroft |

PLAINTIFFS' NOTICE TO TAKE VIDEO DEPOSITIONS OF DEFENDANT COLUMBUS CITY SCHOOL DISTRICT, BOARD OF EDUCATION REPRESENTATIVES, SHERRI BERRIDGE AND LINDSEY SAPP

Please take notice that on September 10, 2014, beginning at 8:00 am and continuing until completion, Plaintiffs will take the depositions of Defendant Columbus City School District, Board of Education Representatives, Sherri Berridge and Lindsey Sapp. These depositions will take place at the law firm of Crabbe, Brown and James, located at 500 S. Front Street, Suite 1200, Columbus, Ohio 43215, pursuant to the Ohio Rules of Civil Procedure, before a Notary Public, videographer, and/or before some other officer authorized by law to administer oaths.

Respectfully submitted,
**Kitrick, Lewis & Harris Co., L.P.A.**

/s/ Elizabeth Mote
Elizabeth Mote (0086379)
445 Hutchinson Avenue, Suite 100
Columbus, Ohio 43235
Telephone: (614) 224-7711
Facsimile: (614) 225-8985
liz@KLHLaw.com

*Trial Attorneys for Plaintiffs*

Kitrick, Lewis & Harris Co., LPA
www.klhlaw.com

**CERTIFICATE OF SERVICE**

I hereby certify that on the 2nd day of September, 2014, the foregoing was filed with the Court through the e-filing system, which shall provide notice of this filing to counsel for all parties.

/s/ Elizabeth Mote
Elizabeth Mote (0086379)

Kitrick, Lewis & Harris Co., LPA
www.klhlaw.com

# Plaintiff's Memorandum on Jury Selection Improvement

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

| | |
|---|---|
| Texas Willison, et al.,<br>Plaintiffs,<br>vs.<br>Durgin's Ice Cream & Pizza, et al.,<br>Defendants. | Case No. 2013-CI-0373<br>Judge Kneece |

PLAINTIFFS' MEMORANDUM ON JURY SELECTION IMPROVMENT

There is no more fundamental precept in our justice system than the right of litigants to have their case heard by a jury of their peers. Discharging this Constitutional imperative, though, requires more than merely assembling eight random citizens. "The right of trial by jury guaranteed by the Constitution carries with it by necessary implication the right to a trial by a jury composed of unbiased and unprejudiced jurors." *Lingafelter v. Moore*, 95 Ohio St. 384, 388 (1917) (emphasis added).

We live in an ideologically-charged legal climate. As the Court is aware, jurors openly express their disapproval and distrust of the civil justice system and the decisions it renders. Media and internet stories about cases take on lives of their own, often devoid of facts. Pundits and talking heads, on both sides of the aisle, regularly condemn lawyers, judges, and litigants alike. In the face of this reality, proper interpretation of the cause challenge statute is critical to ensure that both parties in this case receive a fair trial from an impartial jury.

Ohio law regarding dismissing biased jurors for cause is clear. The General Assembly has instructed the Court to excuse all jurors about whom "the court has any doubt as to the jurors' being entirely unbiased." (emphasis added). *See copy of R.C. 2313.17, attached as Ex. 1.*

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These statutory terms – "any doubt" and "entirely unbiased" – were deliberately chosen and enacted by The General Assembly. They must therefore be given their intended meaning and effect. In its recent decision on the cause challenge statute, the Ohio Supreme Court paid special attention to the precise words used by the legislature. "In interpreting a statute, we are bound by the language enacted by the General Assembly, and it is our duty to give effect to the words used in a statute. (Citations omitted). We are free neither to disregard or delete portions of the statute through interpretation, nor to insert language not present. (Citation omitted)." *Hall v. Banc One,* 114 Ohio St. 3d 484, 2007-Ohio-4640, at ¶24. The *Hall* Court concluded that, "[w]e cannot add words to a statute to conform it to a meaning not intended by the General Assembly. (Citation omitted.) And we are required to give effect to the words used in statutes. Id." *Hall* at ¶35.

Giving the words "any doubt" and "entirely unbiased" in R.C. 2313.17 their natural and normal effect presents a low threshold for excusing jurors for cause. If the General Assembly had intended to create a high standard for removing biased jurors, it was free to require "reasonable doubt" or "substantial doubt." But it didn't – it said "any doubt." The word "any" means "in whatever degree; to some extent; at all." *Random House Webster's College Dictionary, 1997.* Similarly, if the General Assembly had wished for "basically unbiased" or even "mostly unbiased" jurors to be able to serve, it was free to say so. But it didn't – it chose "entirely unbiased." The word "entirely" means "wholly or fully; completely or unreservedly." *Id.* Therefore, if the Court has any doubt – any doubt at all – that a potential juror is not wholly and completely unbiased, that juror is statutorily ineligible to sit on this jury, and must be dismissed.

In addition, R.C. 2313.17 provides that a potential juror must also be disqualified if "he discloses by his answers that he cannot be a fair and impartial juror or will not

follow the law as given to him by the Court." (emphasis added). A fair reading of the statute requires evaluation of all answers *in toto* to determine whether a juror can be fair and impartial. The General Assembly understood that jurors reveal their biases and prejudices in subtle ways in response to different questions. Therefore, when the juror discloses by her answers (note the plural) that he cannot be fair and impartial, the statute requires her dismissal. Simply answering the single question, "Can you be fair and impartial" does not end the inquiry. To be sure, few jurors will admit to being unfair or partial unless they are intentionally seeking to evade jury service. Rather, it is the juror's collective responses to the totality of voir dire questions that give the more full and complete picture of the jurors beliefs. It is the same collective responses that must be evaluated to determine his/her fitness to hear this case. When the aggregate of the juror's answers produce "any doubt" as to his/her being "entirely unbiased," that juror is properly struck for cause under R. C. 2313.17. *See, e.g., Tisdale v. Toledo Surgical Specialists, Inc.*, 2008-Ohio-6539, 6th Dist. No. L-07-1300, ¶50-51 (finding the trial court abused its discretion in failing to excuse a juror for cause when answers revealed she was not entirely unbiased, despite statements to the contrary).

Justice therefore requires that the Court and counsel work to make sure that any potential jurors whose answers give "any doubt" that they are not "entirely unbiased" against the civil justice system and the parties be dismissed for cause.

Respectfully submitted,
**Kitrick, Lewis & Harris Co., L.P.A.**

Sean Harris (0072341)
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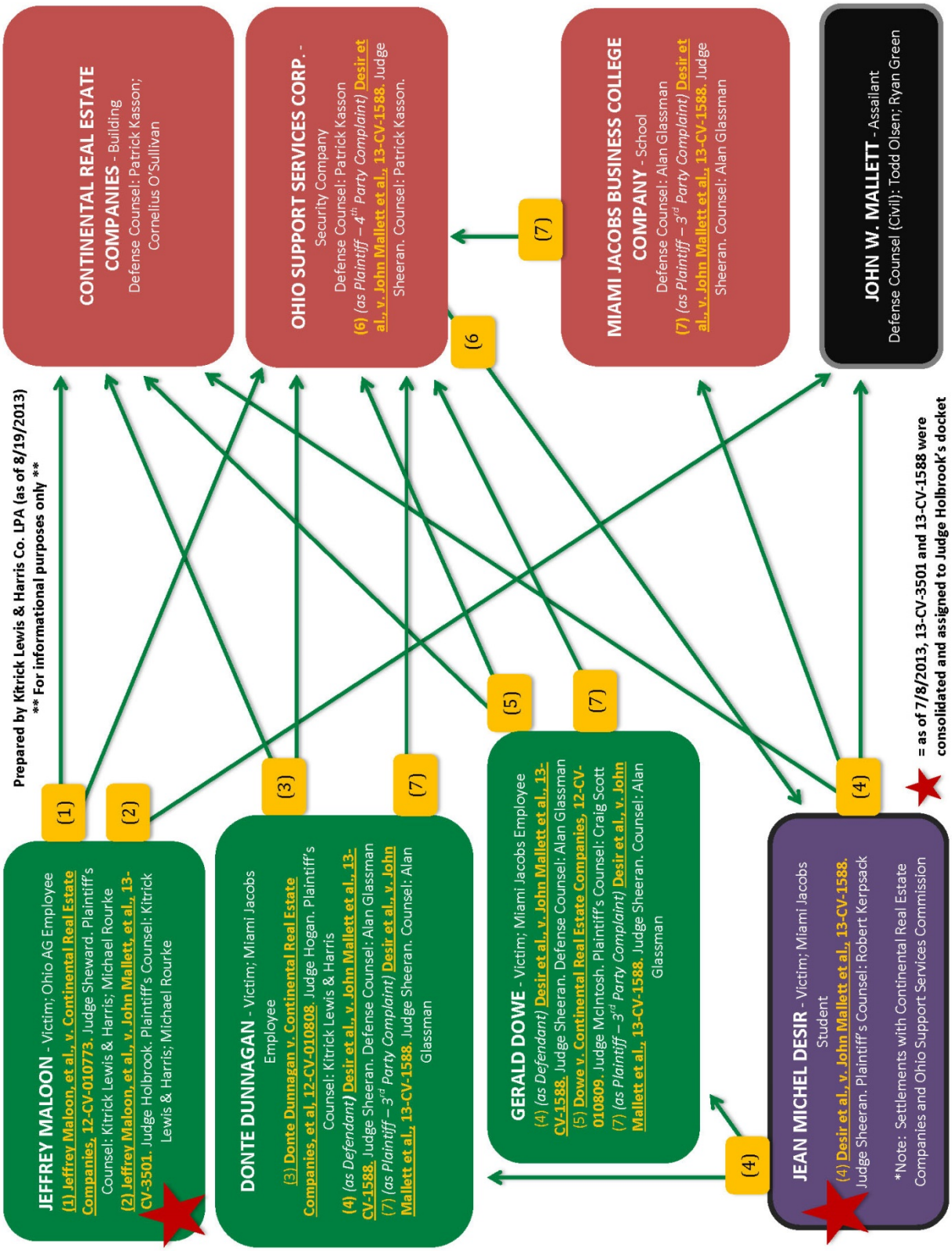
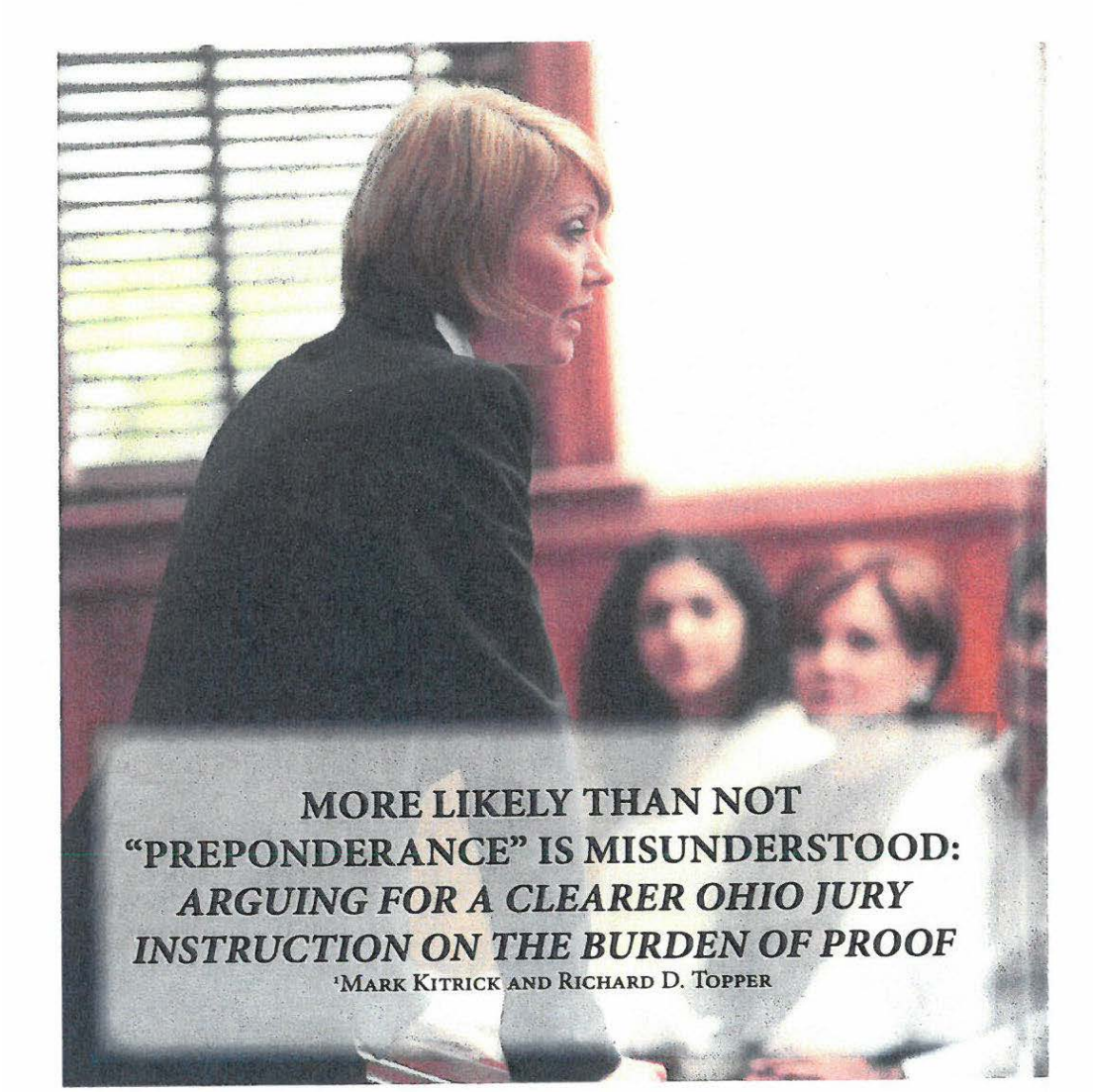
Columbus, Ohio 43235
Telephone: (614) 224-7711
Facsimile: 614.225.8985
sharris@klhlaw.com

# Maloon Diagram



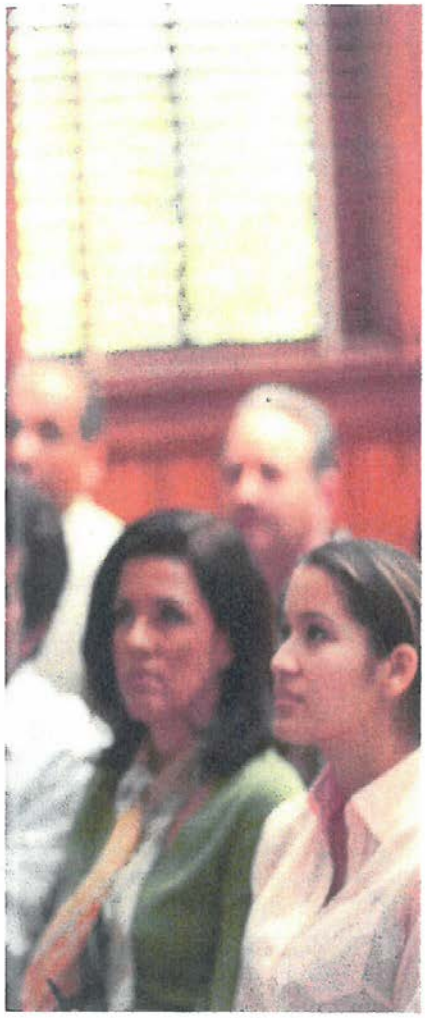
# More Likely Than Not "Preponderance" Is Misunderstood: Arguing for a Clearer Ohio Jury Instruction on the Burden of Proof




**Introduction**

In civil cases, jurors often struggle with the required burden of proof. Jurors have a hard time understanding the word "preponderance" because it is antiquated and seldom used. As a result, attorneys use hand motions, quantitative examples, scale analogies and other illustrations in an attempt to introduce this unusual, perplexing term. It is time to define the burden of proof with a phrase more easily understood by juries: "more likely than not."

Many scholarly articles address the confusion presented by the term "preponderance" and have suggested that Courts define the burden by using the phrase "more likely than not." In a paper published in 2006 by the National Center for State Courts, Professor



Peter Tiersma stated, "research suggests that jurors often poorly understand or confuse standards like preponderance of the evidence."[2] Tiersma strongly recommends the use of a California civil jury instruction, which states "a party must persuade you by the evidence presented in Court that what he or she is required to prove is more likely than not true."[3] Tiersma says this instruction "states the burden clearly: whether something is more likely than not to be true, a phrase that is common in everyday speech."[4]

This problem has persisted so long that over a century ago, a Kentucky court stated that the word "preponderance" confused jurors saying, "The word preponderance . . . is only calculated to embarrass the jury when considering the issue."[5] The Court's solution was to eliminate the instruction on burden of proof.

Let us remember our first year in law school when we repeatedly combed Black's Law Dictionary to better understand legalese terms such as "preponderance." Imagine how a jury panel reacts when hearing the antiquated term, "preponderance," for the first time and then told they are not allowed to use a reference manual to understand it.

Although Ohio Jury Instructions[6] attempt to define "preponderance" by using the words outweigh, overbalance, more persuasive, more probable, and probative, these terms are inadequate in assisting juries' in their quest to understand the preponderance standard.[7] What is interesting is that even though Ohio case law repeatedly uses the phrase "more likely than not" when outlining a party's burden of proof, this phrase is not included in the formal definition.

It is time for a clearer, more juror friendly definition of a party's burden of proof. The authors submit that the term "more likely than not," which is the law and is easier to understand and explain, should replace "Preponderance" in the Ohio Jury Instruction.

**Ohio Law Regarding Burden of Proof**

A. *Case Law*

Ohio cases have often referred to the burden of proof as "more likely than not" or "greater than fifty percent." In *Cooper v. Sisters of Charity*, the Ohio Supreme Court recognized that traditional proximate cause standards require a result be "*more likely than not* to have been caused by an act."[8] The Court discussed that proximate cause be proven by a probability, defined as "more than fifty percent of actual."[9] The "more likely than not" standard was solidified in *Schumaker v. Oliver B. Cannon & Sons, Inc.*[10] In *Schumaker*, the Plaintiff attempted to causally link his pancreatic cancer with the use of chemicals manufactured by the Defendant.[11] The Court cited *Cooper* stating, "the trier of fact must be provided with evidence that the injury was more likely than not caused by defendant's negligence."[12]

The Ohio Supreme Court has used "more likely than not" in many other instances. In defining the burden of proof for proximate cause, the Court stated in *White v. Leimbach* that plaintiffs must "meet their burden to produce expert testimony showing it to be more likely than not" that the physician's action proximately caused the injury.[13] In defining the burden of proof required to show an employers' discriminatory intent, the Court in *Mauzy v. Kelly Services* stated that the Plaintiff must show it "was more likely than not" that the employer was motivated by discriminatory intent.[14] In defining the burden of proof for foreseeability, the Court in *Estate of Morgan v. Fairfield Family Counseling Center* used the "more likely than not" standard.[15]

Ohio courts have used the two phrases, "preponderance of the evidence" and "more likely than not," interchangeably.[16] In *Segedy v. Cardiothoracic & Vascular Surgery of Akron, Inc.*, the appellate court repeatedly switched between "preponderance" and "more likely than not" in the span

*Although Ohio Jury Instructions attempt to define "preponderance" by using the words outweigh, overbalance, more persuasive, more probable, and probative, these terms are inadequate in assisting juries' in their quest to understand the preponderance standard.*

of a paragraph.[17] In using the terms interchangeably, another appellate court stated: "[T]he plaintiff must prove by a *preponderance of the evidence* that the defendant's negligence was a direct or proximate cause of the plaintiff's injuries. The court went on to say that the evidence 'must be such that a trier of fact may reasonably determine that it is *more likely than not* that the defendant's negligence was the cause of the plaintiff's injury.'"[18] Another appellate court used the phrase "greater than 50%"synonymously with preponderance and more likely than not.[19]

In *Herman & Maclean v. Huddleston*, the Ohio Supreme Court found "preponderance" synonymous with "more likely than not."[20] *Huddleston* was a class action case alleging fraud and misrepresentations in violation of the Securities Exchange Act of 1934.[21] One of the main issues in the case was whether the applicable burden of proof was a preponderance of the evidence or clear and convincing evidence.[22] The Court concluded the preponderance standard applied stating, "If they prove that it is more likely than not that they were defrauded, they should recover. We therefore decline to depart from the preponderance-of-the-evidence standard."[23] In *Ostmann v. Ostmann*, the Court directly stated the equivalence saying, "the preponderance of the evidence standard is synonymous with the phrase 'more likely than not.'"[24] While *Ostmann* was a divorce case, the Court's conclusion on burden of proof cites to a personal injury case.[25] The conclusion is also supported by numerous states.

**Other States' Jury Instructions on the Burden of Proof**

Michigan[26] and Delaware[27] are among the states which use "more likely than not" as the burden of proof in civil cases. Michigan does not use preponderance anywhere in its jury instructions.[28] In fact, 23 of the 48 states that publish form jury instructions and the District of Columbia do not use "preponderance of the evidence" in their instructions. Eighteen states use "more likely true than not true"[29] in their published instructions; twelve states use "more probably true than not";[30] and four states use "more likely so than not so."[31]

**Conclusion**

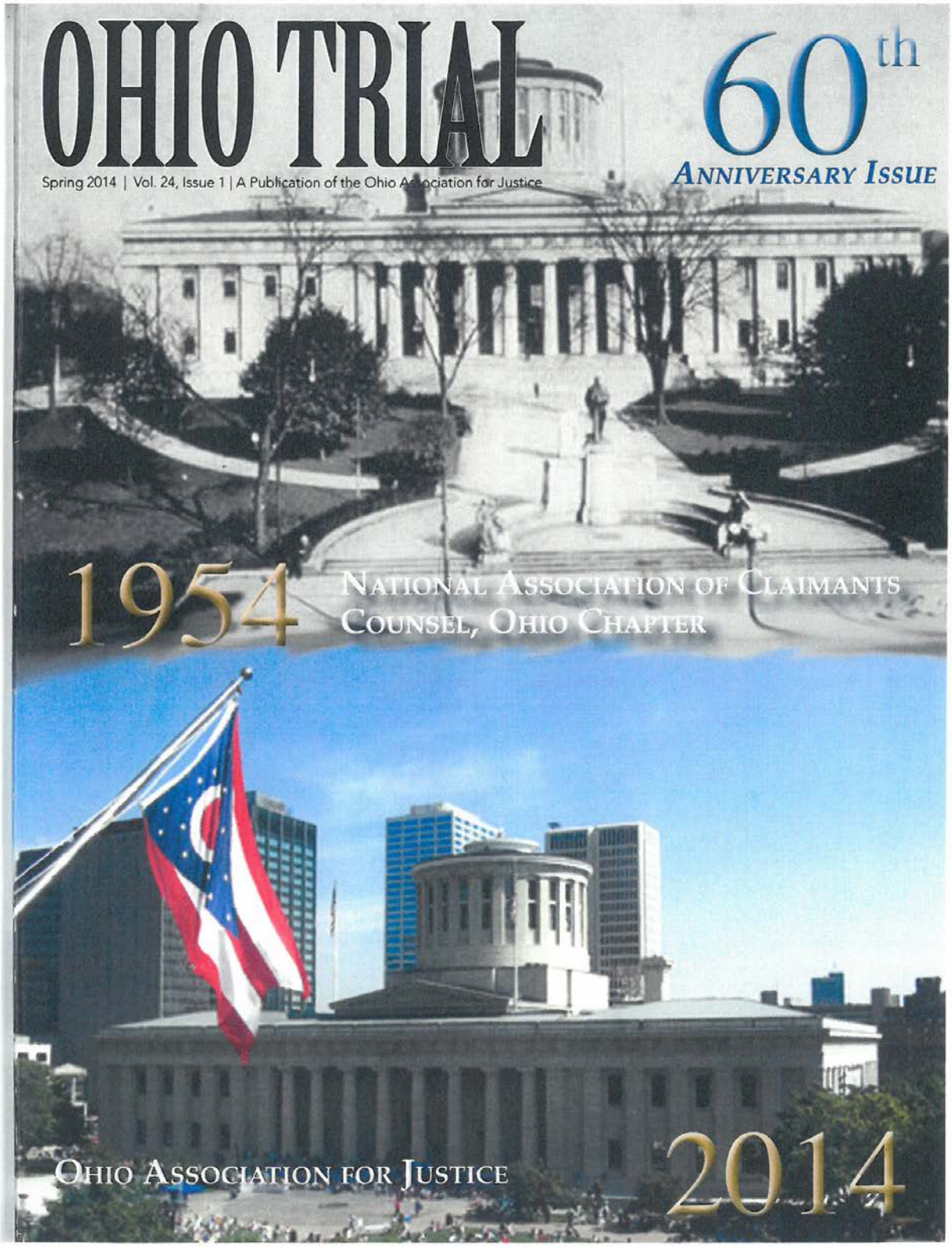
Ohio should remove the word "preponderance" from the form jury instructions and substitute the juror-friendly phrase "more likely than not" to define the burden of proof. At the very least, Ohio Jury Instructions should clarify "preponderance" by adding "more likely than not" to its definition to help define the burden of proof.

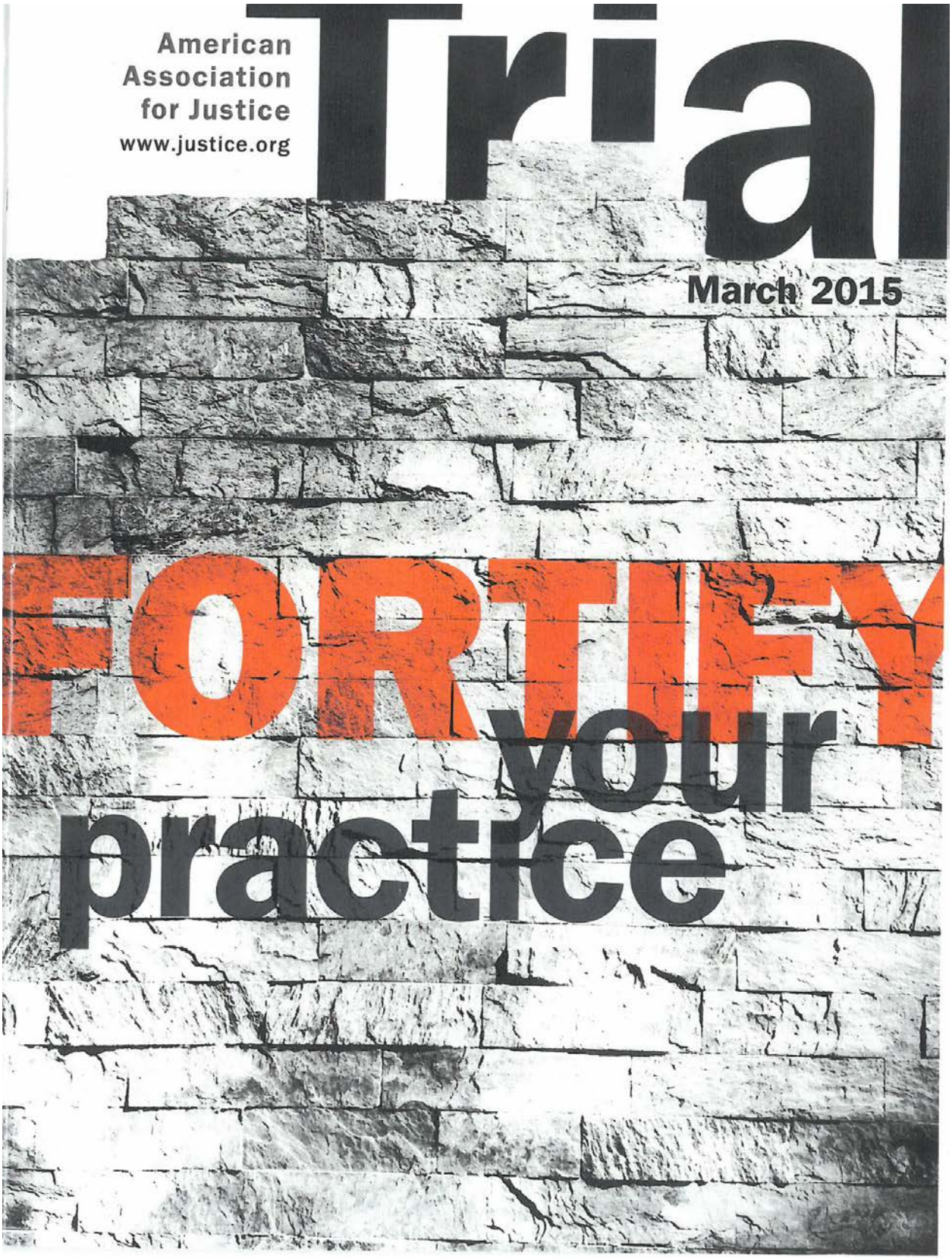
If this Ohio Jury Instruction is not changed, the authors suggest that attorneys file a Motion to replace the Ohio Jury Instruction "preponderance" with "more likely than not" or at a minimum argue that the definition should be supplemented with this phrase. This is the correct legal standard in Ohio as evidenced by multiple Ohio Supreme Court and Appellate Court rulings, would be accord with the ongoing nationwide movement to eliminate "preponderance" in favor of more modern terminology, and increase juror understanding of our burden of proof.

Endnotes

1. Mark Kitrick, President of Kitrick, Lewis & Harris, is past President of the Ohio Association of Justice and past President of the Franklin Country Trial Lawyers and is one of OAJ's Board of Governors to AAJ. Mark is a trial lawyer with over 32 years of experience in personal injury and complex litigation. He is AV rated with Martindale-Hubbell and listed as an Ohio Super Lawyer, "Best Lawyers in America" for over 20 years, and "Lawyer of the Year." Richard Topper is a trial lawyer with over 33 years of experience in medical malpractice and personal injury law. He is past president of the Central Ohio Association for Justice and was a board member of OAJ for 20 years. He is listed in the Best Lawyers in America and Super Lawyers. The authors would like to thank Christopher Woeste for helping conduct the research on this article.
2. Peter M. Tiersma, *Communicating with Juries: How to Draft More Understandable Jury Instructions*, 10 SCRIBES J. LEGAL WRITING 1 (2005-2006), *reprinted in* NAT'L CENTER STATE COURTS, *22 (2006).
3. *Id.* (citing 1-200 J. Council Cal. Jury Instructions 200).
4. Tiersma, *supra* note 1.
5. *See* Ragsdale v. Ezell, 35 S.W. 629, 630 (Ky. 1896); *see also* Blue Diamond Coal Co. v. United Mine Workers, 436 F.2d 551, 564 (6th Cir. 1970) ("We call to mind the varying expressions employed by trial judges to tell juries the meaning of preponderance of the evidence, and do understand Kentucky's view that these efforts may indeed make a jury's task more difficult than Kentucky's [instruction].")
6. Ohio Jury Instructions 303.05.
7. *Id.*
8. *See* 27 Ohio St.2d 242, 251 (1971) (emphasis added) *overruled on other grounds by* Roberts v. Ohio Permanente Med. Group, 76 Ohio St.3d 483, 488 (1996).
9. *See* Cooper, 27 Ohio St.2d. at 253 (citing Price v. Neyland, 320 F.2d 674,678 (D.C. Cir. 1963)).
10. 28 Ohio St. 3d 367, 369 (1986) (per curiam).
11. *Id.*
12. *Id.*
13. 131 Ohio St. 3d 21, 29 (2011).
14. 75 Ohio St. 3d 578, 584 (1996).
15. 77 Ohio St. 3d 284, 313 (1997) ("[R]ecords revealed that Matt was a medication-controlled schizophrenic who, without medication, would *more likely than not* have a relapse of his psychosis, placing him at substantial risk for conflict with his parents and potential violence.") (emphasis added).
16. Segedy v. Cardiothoracic & Vascular Surgery of Akron, Inc., 182 Ohio App. 3d 768, 776 (Ohio Ct. App. 2009); *see also* Pang v. Minch, 53 Ohio St. 3d 186, 197 (1990) ("[T]he plaintiff is required . . . to sustain his burden of proof by a preponderance of the evidence. This means that he must make it appear that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the harm." (citing RESTATEMENT (SECOND) OF TORTS § 2 (1965)).
17. "In order to prove medical malpractice, the plaintiff has the burden to prove, by *a preponderance of the evidence*, that the defendant breached the standard of care owed to the plaintiff and that the breach proximately caused an injury . . . . A medical malpractice claim requires the plaintiff to 'prove causation through medical expert testimony in terms of probability to establish that the injury was, *more likely than not*, caused by the defendant's negligence.'" Segedy, 182 Ohio App. 3d at 776 (emphasis added) (citation omitted).
18. Eck v. State Farm Mut. Ins. Co., 1996 Ohio App. LEXIS 2479, *7 (Ohio Ct. App. 1996).
19. Rosenshine v. Med. Coll. Hosps., 2012-Ohio-2864, P10 (Ohio Ct. App. 2012), *rev'd on other grounds*, ("Probably is defined as more likely than not or greater than fifty percent chance. The plaintiff must prove this by a preponderance of the evidence.) (internal quotations omitted).
20. *See* Herman & Maclean v. Huddleston, 459 U.S. 375, 390 (1983); Haughey v. Twins Group, Inc., 2005-Ohio-1371, P32 (Ohio Ct. App., 2005); Grange Mut. Cas. Co. v. Tackett, 2008-Ohio-631, P77 (Ohio Ct. App. 2008).
21. *Id.* at 377.
22. *Id.* at 387.
23. *Id.* at 390.
24. 168 Ohio App. 3d 59, 66 (2006) (citing Haughey v. Twins Group, Inc., 2005-Ohio-1371 (Ohio Ct. App. 2005); *see also* State *ex rel.* Doner v. Zody, 130 Ohio St. 3d 446, 457 (2011) ("[P]*reponderance of the evidence* is defined as that measure of proof that convinces the judge or jury that the existence of the fact sought to be proved is *more likely than its nonexistence*.") (emphasis added).
25. *See* Ostmann, 168 Ohio App. 3d at 66 (citing Haughey v. Twins Group, Inc., 2005-Ohio-1371 (Ohio Ct. App. 2005).
26. Mich. Civil Jury Instruction 8.01.
27. Del. Pattern Jury Instruction Civil § 4.1.
28. Mich. Civil Jury Instruction 8.01.
29. Alaska Civil Pattern Jury Instruction 02.04; 1-200 J. Council Cal. Jury Instructions 200; D.C. Std. Civil Jury Instructions § 2.08; Haw. Civil Jury Instruction 3.3; Md. Civil Pattern Jury Instructions 1:12; Me. Jury Instruction Manual § 7-11; Pa. Suggested Std. Civil Jury Instructions 5.00; Minn. Civil Jury Instruction 14.15, Miss. Model Jury Instruction Civil § 1.30; Mo. Approved Jury Instruction (Civil) 3.01 (7th ed.); Neb. Jury Instructions Civil 2d 2.12A; N.M. Rev. Ann. Civil Uniform Jury Instruction 13-304; N.D. Pattern Jury Instructions 2000; S.D. Pattern Jury Instruction 1-60-10; Tenn. Pattern Instructions Civil 2.40; State Bar of Tex., Pattern Jury Charges § 6.3; Model Utah Jury Instructions (2d ed.) CV 117; Vt. Civil Jury Instructions § H.
30. Rev. Ariz. Pattern Jury Instructions – Civil Std. 2; Ark. Model Jury Instructions – Civil 202; Colo. Jury Instructions for Civil Trials 3:1; Haw. Civil Jury Instruction 3.3; Idaho Jury Instructions 1.20.1; Ill. Pattern Jury Instruction Civil 21.01; Pattern Instructions Kan. Civil 4th 1006.00; Mont. Pattern Instruction 2.12; Nev. Jury Instructions – Civil 2EV.1; N.H. Civil Jury Instruction 5.1; Wash. Pattern Jury Instr. Civ. 21.01 (6th ed.); Wyo. Civil Pattern Jury Instruction 2.03.
31. D.C. Std. Civil Jury Instructions § 2.08; Haw. Civil Jury Instruction 3.3; R.I. Jury Instructions Civil 302.1.

## Ohio Trial: Look Inside Your Own Mind

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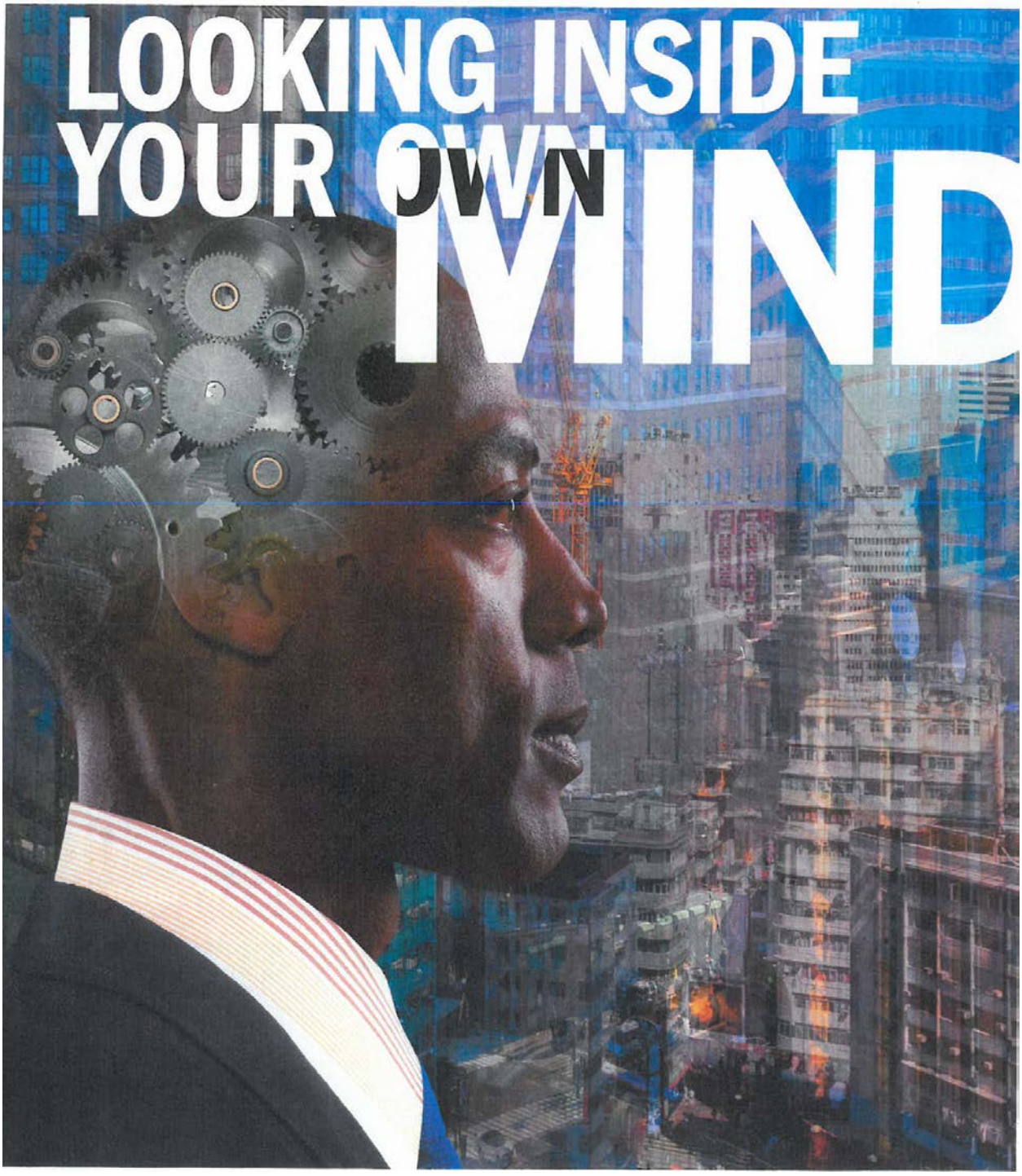
your
practice


LOOKING INSIDE
YOUR OWN
MIND

By || MARK KITRICK AND MARK LEWIS

# Taking a look inward, guided by neuroscience and social science principles, can make you a better lawyer and allow you to see your cases more clearly.

We litigators spend significant time trying to understand, capture, and convince the minds of others—judges, jurors, and adjusters. This focus on the other's mindset allows us to craft persuasive messages. But in our search to understand and appeal to other minds, do we misunderstand and neglect our own? What can we learn by self-consciously turning our intellectual spotlight inward—by attempting to read our *own minds* first?

For decades, social scientists and neuroscientists have been doing just that: studying our cognitive processes and learning powerful secrets to the unconscious ways we distort our own thinking. Cognitive science teaches us much about the cause-and-effect stories we automatically tell ourselves, as well as our reflexive tendency to confirm our own self-serving narrative presuppositions. Research also reveals how easily we fall prey to "group think," which is often coupled with our unconscious willingness to sink more time and costs into losing cases. These cognitive dangers are ever present in the trial lawyer's practice. But they can be overcome thanks to recent scientific advances.

Several cognitive flaws can harm or limit us as lawyers, but we can defeat them.[1] We recommend appointing case "naysayers," conducting "pre-mortems," and implementing cost-benefit spot checks as countermeasures to poor thinking. These require both professional detachment and focused introspection. Once embraced, they will enable you to see better into your mind, while at the same time envision clearer paths to justice for your clients.

## Narrative and Self-Serving Biases

We have a built-in storyteller living in our brain just above and behind our left eye and in our right brain.[2] This is the region of the brain that, as we are inundated with billions of bits of information, attempts to make sense of it all by filtering data through many layers of attitudes, societal norms, fiscal needs, and personal agendas, among countless other influences. So that these influences cohere with our sensory intake, we are constantly and subconsciously concocting yarns and plots that connect causes to effects. We seek patterns that hold our narratives together as we experience our world. This is the "narrative bias" through which we all make sense of our lives.

Our narrative bias is primarily egocentric: We are almost always the protagonist or hero in our own self-serving tales.[3] As such, we come to believe we are better, smarter, and more rational than others.[4] This automatic, unconscious spin doctor in all of us manifests as the "self-serving bias." Together, these two mental predispositions—the narrative and self-serving biases—dominate our hidden mental lives, influencing our behaviors and decisions beyond our conscious awareness.

So, for example, when confronted with negative facts and opposition, we do not realize how the closely related

biases cause us to deselect, ignore, downplay, avoid, and deny that which does not comport with the story we've created. No one is immune from the delusive hold of the inner spin doctor or the powerful grip of our storytelling mind. Experiments demonstrate that people in highly educated disciplines, such as medicine and law, often are the most susceptible to such biases.

Our susceptibility to believe that our story is *the* correct one diminishes our abilities as trial lawyers because it blinds us to other plausible case views. This reality reveals itself in various unnoticed ways throughout our cases. It surfaces at case inception, when we first hear the client. It is equally prevalent in our trial preparation. Indeed, professional mediators often observe that many lawyers—separate from "posturing"—become overly attached to their stories and truly do not understand problems inherent in their cases. And mediators spend considerable time educating counsel on case weaknesses.

## Confirmation Bias

Closely related to the narrative and self-serving biases, and further jeopardizing our advocacy, is confirmation bias.[5] We actively seek only those facts that fit our storyline and reject those that don't. Research has shown that when more information comes to us that includes opposite viewpoints and contrary data, we still accept only the facts that confirm our narrative, even though that seems counterintuitive. Often, instead of being shaken or changing our views, our beliefs become even more firm in the face of contrary evidence.

Take this example of confirmation bias at work: If you are conservative, you may tend to like people such as Ann Coulter and Rush Limbaugh. If you are liberal, you may be likely to enjoy and find credible Rachel Maddow. This much is obvious. But consider further that when you expose yourself to the other side's rhetoric, the confirmation bias may actually predispose you to further discount opposing viewpoints and attach yourself even more securely to your prior beliefs.[6]

This bias comes up when we discover our client's complicated medical history that confounds proximate cause, or when we learn about diverse scientific opinions regarding a potential defective product, or when someone misperceives that we have a liability problem. How many times have we dismissed a client's preexisting medical problem as irrelevant or not important, or not even bothered to discover that history as we prepare the case? Have we ever searched for alternative experts whose opinions contradict our own? How often do we say certain defenses are ridiculous or irrelevant even though they may be true? What have we thought when we've listened to focus group opinions about a case or a client? Often, we are shocked and then dismissive.

If we do not understand our own mental biases and then strive to overcome them, we may make poor choices. Once you begin to understand the

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distorting effects of the narrative and confirmation biases, you can implement solutions.

First, appoint someone in the firm or the litigation team to be the naysayer—the antagonist as you prepare for trial. This should occur the moment the client retains you. This person should have complete freedom to attack your case. Permit this "in-house defense attorney" to present opposite viewpoints and outline other counterfactuals and hypotheticals to create a spectrum of "defense" outcomes. As part of the analysis, the "in-house lawyer" should

- create juror characteristics you do not want and why. For instance, do you want nurses on your malpractice case or engineers on your bad product claim?
- outline the three most important reasons you will lose the claim
- set forth the defense counsel's and opposing experts' strengths
- research the venue's possible negatives
- document jury verdicts that are disconcerting
- talk with other plaintiff counsel who have lost similar claims.

This last step, in particular, deserves our attention. We frequently share our victories but shy away from publicizing our losses. This is a mistake. While we do not need to parade our failed cases before the bar, we certainly can share our stories of failure privately for our colleagues' benefit. We often learn best from our mistakes. Detecting and overcoming confirmation bias through the in-house defense attorney should be our first order of business, ideally preventing losses that can be avoided by considering the disconfirming evidence earlier.

When these measures fail to overcome confirmation bias, consider consulting with a respected colleague from the defense bar. Check first for conflicts, and be sure to address confidentiality and nondisclosure before involving a defense attorney. Once you address these matters, direct the defense lawyer to disprove your case theory. Resist your urge to overcome the defense deconstruction or counter-case, and instead attempt to understand how your own case ignores the evidence against you.

This same tendency to disregard harmful facts can be revealed by asking your client to list the three most damaging or harmful facts in the case. Your client may surprise you by raising problems you've yet to consider, including a nonlegal perspective that may sway a juror. This exercise has the added advantage of educating the client about the realities of the case.

## Group Think and Pre-Mortems

Closely related to confirmation bias is the cognitive distortion known as group think.[7] When people like each other, are somewhat isolated, and face crucial decision deadlines, the group becomes empowered and believes its decision is solid, if not invulnerable. Brain science teaches us that when such groups decide matters, they show an innate tendency to stereotype, maintain harmony, and conform.[8] This dynamic can hinder progress. The problem is exacerbated when a boss or a superior actively participates, or when the consequences of disagreement are extreme. People are afraid to speak up, and this diminishes healthy debate.[9]

To avoid such psychological barriers, at least one person must be able to express adverse opinions or suggest alternatives without fear. Here, again, the in-house defense attorney or naysayer can be most effective. Also, consider breaking the group into pairs to encourage separate discussions; this can counter group thinking, too.

Even better, as you develop your case, you can look ahead and assume you lost the trial—conduct a "pre-mortem" analysis of the case.

**MORE ON BIASES**

**Visit the Web pages below for additional information.**

**AAJ LITIGATION GROUP**
Jury Bias
**www.justice.org/litgroups**

**LITIGATION PACKET**
Voir Dire and Jury Selection
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**AAJ EDUCATION PROGRAMS**
2014 Weekend With the Stars
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Program
**www.playbackaaj.com**

**AAJ PRESS**
*Blue's Guide to Jury Selection*, by Lisa Blue & Robert Hirschhorn
**www.justice.org/aajpress**

You should analyze numerous fac tors, such as client likability and cred ibility, the experts' opinions, opposin counsel's legal skill, the defendant' positions and personalities, and preex isting and postincident complications We advise creating an objective maste chart that lists, for instance, the likabil ity and credibility of the plaintiffs—as well as the experts on both sides—and any other comments that a naysayer notes. Then, if you add up the pluses and minuses (or ratings from 1 through 10), this helps give you an overview of how the case looks.

Other line items to consider: Was the case professionally focused, what was the theme, did we learn all we could about our judge and jury pool, and how did the relevant law affect matters? Then, point by point, respond with the goal of seeing each problem fairly and accurately. You should *not* at first try to defeat the problem as you envision it, because this will only reinforce your tendency to biased thinking. Instead, you must first understand the problem clearly from the other side's perspective, assuming it to be valid and winning. Focus group results are helpful in this regard.

Likewise, use list servers and various

other lawyer or nonlawyer sources to solicit opinions, knowledge, and comments from those with similar cases and experiences. Do not be afraid to inquire why cases were won or lost to uncover issues that made the difference in victory or defeat. Become a legal clinician, using as much detachment as possible for your own case when listening to what people will share with you. As the famous philosopher Sir Karl Popper opined, use others' skepticism as a modus operandi to better critique your thinking. Thank those who give you these gifts, and resist the urge to confirm only what you want to believe or feel you already know.

**Sunk Cost Fallacy**

We all have cases we've spent so much time, money, and energy on that we just can't seem to let go. Scientific studies illustrate that our aversion to loss outweighs the promise of gains.[10] We tend to stay aboard our sinking ships because we've put so much time and energy into building them and keeping them afloat. Be wary of this classic mistake, the hallmark of the "sunk cost" fallacy.

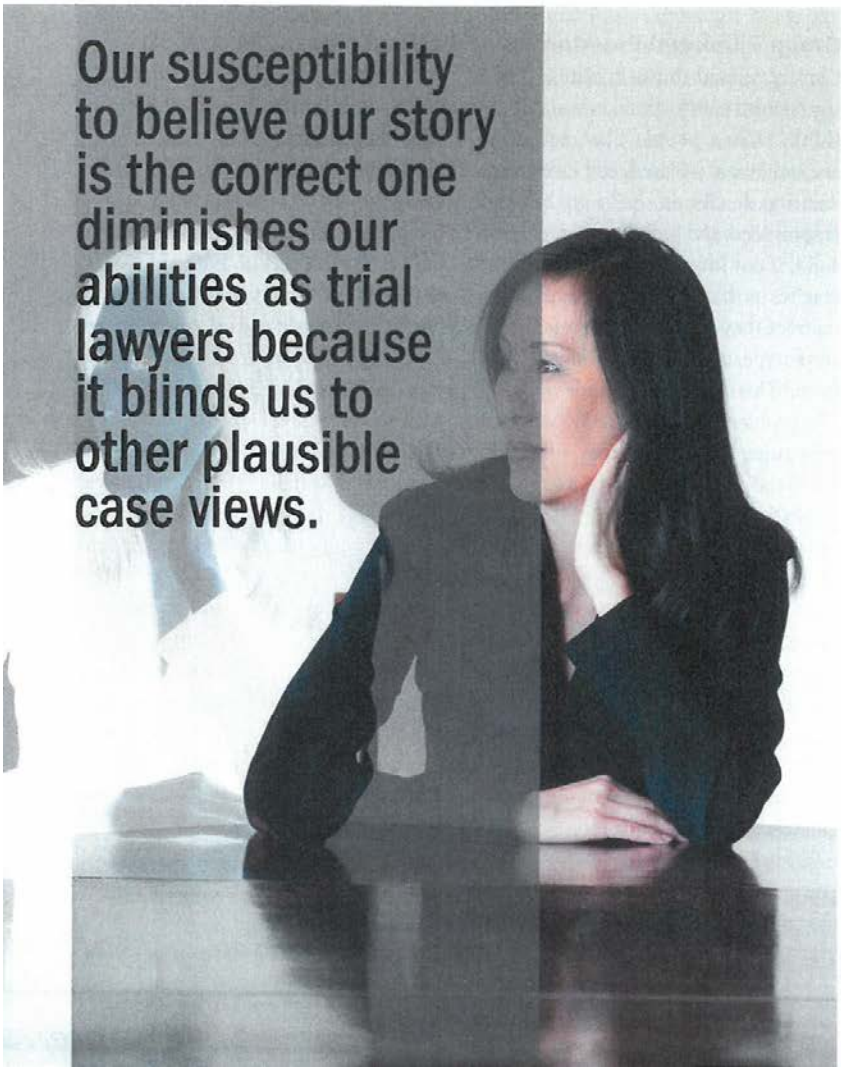
Similarly, where our investments of time and money on a certain case grow exponentially, there is a tendency to "stay the course." This reaction can be irrational. The intensified commitment causes us to cling to the past and ignore the reality that we must move on and no longer prosecute a case.

To combat this fallacy, regularly compute the odds of succeeding and decide whether more investment is warranted for your client's sake. It is important to reassess a case over time through independent opinions and the approaches suggested here. It may save the firm and the clients from going down with the ship.

At various stages of your case's development, compute specific predictions about the chances of victory. Do this at the outset, before filing suit, during discovery, before settlement negotiations, and again before trial. Make this analysis part of your routine case work-up. Include a breakdown regarding liability and damages. Delineate percentages of success and failure, put down a case value, and note estimated case expenses and time spent on the litigation. Then track and compare statistically the final outcomes with the predictions. As the case becomes more complicated and takes more time, do quarterly reviews. Invite someone from the firm who has not been working on the claim and get his or her reactions to the case's evolution. Such a metric allows for greater accountability and reduces the likelihood of sunk costs.

Another way to reduce sunk costs is to consider alternatives. For example, devise multiple case strategies and backup tactics for deposition questions, expert opinions, and settlement scenarios. This will avoid the tendency to lock into binary thinking, the yes-no mindset that sees only two mutually exclusive options. Such a narrow mindset encourages sunk cost thinking. But by devising alternatives, you can both open the array of choices and challenge your underlying assumptions (or at least make them clear).

We should routinely search for observations, comments, and criticisms that prove us wrong. If we seek what lies outside our own viewpoint, we can separate

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wishful thinking from reality. Appointing a naysayer can reduce the influence of confirmation bias. Pre-mortem examinations can avoid both confirmation bias and group think. Systematic cost-benefit checks throughout the case help you avoid the sunk cost fallacy.

Just as important as these cognitive techniques, we must vigilantly consider our own thinking as lawyers. This may be the most important—and humbling—lesson for lawyers in the wake of the cognitive revolution in the sciences. The multitude of biases and cognitive distortions that grip our legal thinking are vast. This article covers only a handful, but these are some of the most damaging to a clear view of our cases and legal positions. By taking the time to explore these solutions, you will not only improve your own mind but also enhance your clients' cases.

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**Notes**

1. This article is a primer and therefore does not contain a plenary discussion of our suggested approach, nor does it include all recommended steps.
2. Jonathan Gottschall, *The Storytelling Animal, How Stories Make Us Human* 95–99 (Houghton Mifflin Harcourt 2012).
3. Carol Tavris & Elliot Aronson, *Mistakes Were Made (but Not by Me)* 79–82 (Harcourt Books 2008).
4. Joseph T. Hallinan, *Why We Make Mistakes: How We Look Without Seeing, Forget Things in Seconds, and Are All Pretty Sure We Are Way Above Average* 149–67 (Broadway Books 2009).
5. Rolf Dobelli, *The Art of Thinking Clearly* 19–22 (HarperCollins 2013).
6. Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion* 84–85 (Pantheon Books 2012); Michael Shermer, *The Believing Brain: From Ghosts and Gods to Politics and Conspiracies, How We Construct Beliefs and Reinforce Them as Truths* 262–63 (Times Books 2011).
7. David McRaney, *You Are Not So Smart: Why You Have Too Many Friends on Facebook, Why Your Memory Is Mostly Fiction, and 46 Other Ways You're Deluding Yourself* 127–30 (Penguin Group (USA), Inc. 2011).
8. Dobelli, *supra* n. 5, at 73–75.
9. Chip Heath & Dan Heath, *Decisive: How to Make Better Choices in Life and Work* 93–99 (Crown Business 2013).
10. Daniel Kahneman, *Thinking, Fast and Slow* 345–46 (Farrar, Straus and Giroux 2011).