MINNESOTA JUDICIAL TRAINING UPDATE

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CIVIL JURY TRIALS:
10 TRIAL ISSUES JUDGES SHOULD BE PREPARED FOR

JUDICIAL REFERENCE TOOLBOX: Most judges tend to preside over criminal jury trials more frequently than they do civil jury trials. Thus, it is not surprising that many judges are more familiar with and comfortable handling criminal jury trial issues than they are civil jury trial issues. In the world of civil jury trials there are certain legal issues that tend to occur with a fair amount of frequency. Because most civil trial attorneys deal with these issues regularly, trial judges must be prepared to address these same issues, sometimes on very short notice.

FIVE ISSUES THAT APPLY TO MOST CIVIL JURY TRIALS

1. **Insurance Question – Rule 123:** Rule of General Practice 123 provides that:

"During examination of the jurors by the court, the jurors shall, upon request of any party, be asked collectively whether any of them have any interest as policyholders, stockholders, officers, agents or otherwise in the insurance company or companies interested in the defense or outcome of the action, but such question shall not be repeated to each individual juror. If none of the jurors indicate any such interest in the company or companies involved, then no further inquiry shall be permitted with reference thereto.

If any of the jurors manifest an interest in any of the companies involved, then the court shall further inquire of such juror or jurors as to any interest in such company, including any relationship or connection with the local agent of such interested company, to determine whether such interests or relationship disqualifies such juror."

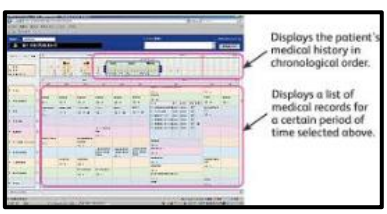
a) Suggested Voir Dire Questions for Court to Ask:
   - *i.* Do any of you have any interest as policyholders, stockholders, officers, agents, employees, or otherwise in *[name of insurance co or companies interested in the defense or outcome of the action] – if any juror manifests an interest, then ask:*
   - ii. Please explain the nature of your interest;
   - iii. Do you have any relationship or connection with the local agent of [*name of insurance co or companies interested in the defense or outcome of the action].*

2. **Deposition Use:** Judges need to be familiar with Minn. R. Civ. P. 32.01 (b). The deposition of a party may be used by an adverse party for any purpose. Attorneys have used this rule to play video excerpts of the defendant's deposition during opening statement. Attorneys have also relied on subsection (a) of the rule to use video depositions to impeach witnesses.

3. **Improper Argument:** A frequent issue for judges is what to do when one or both attorneys unfairly resort to improper argument which in turn provokes an improper response. For example, defense counsel unfairly suggesting a sizeable verdict will "personally hurt" their client, or plaintiff's counsel unfairly suggesting that the jury needs to send a message to defendant to protect future victims. Judges confronted with this problem should be familiar with *Kramer v. Kramer*, 162 N.W.2d 708, 717 (Minn. 1968) ("Where counsel.....pursues an improper line of argument which invites or provokes a reply, it is not reversible error if his adversary engages in similar argument in reply even though such argument might otherwise be objectionable."). Judges that are confronted with a mistrial motion can rely on the *Kramer* case for the proposition that the door swings both ways once it's opened.

4. **Limited Use of Pleadings as Evidence:** If a party seeks to use the opponent's pleadings as evidence during trial, Judges can rely on two cases: *Fitzer v. Bloom*, 235 N.W.2d 395 (Minn. 1977) (a party may read from her opponent's pleadings at trial). *But see Kelly v. Ellefson*, 712 N.W.2d 759 (Minn. 2006) (allegations in pleadings that are not based on the opposing party's personal knowledge properly excluded from evidence).

5. **Summarized Records:** If faced with an objection to the submission of summarized records, judges should be familiar with Rule of Evidence 1006, "The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court." See also, *Adrian v. Edstrom*, 229 N.W.2d 161 (Minn. 1975) (allowing hand written summary of past earnings); and *Wolf v. State Farm*, 450 N.W.2d 359 (Minn. Ct. App. 1990) (allowing summary of medical expenses).



FIVE ISSUES THAT APPLY TO MOST PERSONAL INJURY JURY TRIALS

6. **Degenerative Changes & the "Thin-Skulled" Plaintiff or "Eggshell" Doctrine:** In cases involving degenerative changes with no prior symptoms judges should be familiar with *Filler v. Soo Line R.R. Co.,* 2014, WL 3396871 (Minn. Ct. App. July 14, 2014) and *Orbeck v. Larsen*, C1-00-1274, 2001 WL 345453 (Minn. Ct. App. Apr. 10, 2001) ("Because it was undisputed that plaintiff did not suffer from any pre-accident pain or disability related to the degenerative changes in his neck, the appropriate measure of damages in this case would be the entire amount of injury suffered by him."). Both cases illustrate the "eggshell" or "thin-skulled plaintiff" doctrine).
   Note: Both the "Aggravation" instruction (CivJig 91.40) and the "Eggshell" Plaintiff instruction (CivJig 91.41) can be given at the same time. *Filler v. Sioux Line R.R. Co.,* (Minn.App.7/14/14).

7. **Future Medical Expenses:** In jury trials involving personal injury, future medical expenses are almost always contested. There are two cases which trial judges should be familiar with; *Pietrzak v. Eggen,* 295 N.W.2d 504 (Minn. 1980) (plaintiff need not prove future damages are "absolutely" certain, but merely "reasonably certain" by a fair preponderance of the evidence); and *Kwapien v. Starr*, 400 N.W.2d 179 (Minn. Ct. App. 1987) ("While there was no testimony directly estimating respondent's future medical expenses, it was possible for the jury to take respondent's life expectancy and factor it against the cost of her past physical therapy treatments to arrive at an approximate figure for future medical expenses.").
   Note: Once an injury has been established within a "reasonable medical certainty", an expert medical witness may testify that the victim is at "increased risk" to develop a future complication from that injury without stating "to a reasonable medical certainty". *Dunshee v. Douglas,* 255 N.W.2d 42 (1977).

8. **Liability Facts Where Liability is Admitted:** A late admission of liability does not necessarily prevent an attorney from discussing the circumstances surrounding the plaintiffs injury. Judges should be aware of *Baltus v. Von Der Lippe*, 196 N.W.2d 922 (Minn. 1972) (the circumstances of the accident, including the force of impact, is admissible if relevant and material to indicate the extent of plaintiff's injuries); and *Newman v. Gallipo*, 2004 WL 1192357 Minn.App.2004) (photographs of vehicles taken after collision are admissible because evidence of force of impact is relevant to the issue of damages).

9. **Loss of Earnings Capacity:** On the issue of loss of earning capacity Judges should be familiar with *Bigelow v. Halloran*, 313 N.E.2d 10 (Minn. 1981) (Plaintiff's own testimony that permanent loss of eyesight to her right eye would affect her ability to return to her former work was sufficient evidence to warrant a loss of earning capacity instruction); and *Kwapien v. Starr,* 400 N.W 179, 183 (Minn. Ct. App. 1987) (a plaintiff need only prove, by a preponderance of the evidence, "that a loss of earning capacity – an impairment in her **power** to earn a living - was reasonably certain to occur as a result of the injuries she sustained…..Evidence of past earnings or future desired areas of employment is not necessary.")

10. **Loss of Enjoyment of Life:** The Supreme Court decision in *Dawydowycz v. Quady,* 220 N.W.2d 481 (Minn. 1974) is often cited to support the addition of "loss of enjoyment of life" as a factor to consider in the past and future non-economic damages instructions.

RESOURCES: This update is based on an article published in the spring 2014 edition of "Minnesota Trial," titled "At the Ready: the Trial Lawyer's Toolbox," page 25, written by trial attorney **Stacy Deery Stennes**, an associate attorney at the Conlin law Firm; **James Schwebel**, Schwebel Goetz & Sieben.

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