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Presenting Evidence in Trial

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Trying a Case on a Shoe String Budget

This day in age, it is exceedingly difficult to get to trial on most cases. As a result, many case files seem to fizzle, as one or both sides throw up their arms in desperation, given the length of time it takes to get a solid trial date. Or, perhaps, it is because of the daunting expenses often associated with actually going to the mat and taking the case to trial. This can affect attorneys and clients alike, particularly where, like me, one might advance the costs of litigation during the pendency of the case. That may leave the attorney holding the bag, should the jury come back adverse to your position, and the client cannot afford to pay the case costs back right away (or at all).

While I can't do anything to aid the court's docket, I have found several cost saving approaches over the last decade or so that has helped to alleviate some of the stress associated with the steep litigation costs of trial work. Perhaps more importantly, the cost saving approaches I employ tend to boost your own persuasiveness and credibility, as opposed to detract from it.

Pretrial Planning

Not that every stage of trial shouldn't be planned pretrial, this section concerns something different: steps to take pretrial to set you up for cost saving options during the trial itself.

Motions for Partial Summary Judgment. If you can't knock an entire claim out with a motion for summary judgment, why not file a motion for partial summary judgment on, say, liability? Should you prevail, then you only have a damages case, and can knock a day or more off of the trial itself. Remember, however, than any such motion must be filed more than 60 days prior to the date set for trial. ORCP 47 C.

Motions for Directed Verdict. While this may not save a great deal of time at trial, it may still shave off anywhere from a few minutes to a few hours. Frankly, this motion is best used by defense attorneys as, if successful, they can nip some of the issues in the bud, and as such, would no longer need to put on any evidence to refute the claim. Moreover, the plaintiff can use such a motion at the end of the case so as to take an issue away from the jury's deliberation, thereby avoiding the risk of a wacky verdict, and more importantly,

avoiding the time necessary for the jury to look at the issue, review the evidence, review the jury instructions and ultimately vote.

Requests for Admissions. This is one of my favorite tools in simplifying the issues before the court. I often file requests for admission addressing all issues in dispute – liability, causation and damages. If they are denied wholesale, you have the chance of recovering your costs and attorney fees for proving the denied fact(s) at trial. ORCP 46 C. This is true, even if the opposing counsel claims that the answer calls for "expert opinion." See, eg., *Nicholson v. Tri-Met*, Multnomah County Circuit Court Case No. 0902-01979 (Order Granting In Part Reimbursement Under ORCP 49 C, July 13, 2012). However, the more likely scenario is one where opposing counsel is relatively reasonable, and you are able to take some issues off of the table. Thus, if liability ends up being admitted, you do not need to plan for liability witnesses, exhibits, or the costs associated with the same. In addition, you no longer need to set aside time at trial to prove the liability aspect of the case, thus saving both you and your client time and expense. Remember, however, that you are limited to 30 requests for admissions, including discrete subparts, unless you obtain leave of court to allow more. ORCP 45 F. Any admissions by opposing counsel should be incorporated into UCJI 11.02.

Conferring with Opposing Counsel. You would be shocked how much you can simplify a trial if you just ask. Moreover, the court will often taken notice of the attorneys' attempts at doing so, and is generally grateful. I always make it a point to confer with opposing counsel prior to trial concerning exhibits (even if only a partial list of my own), jury instructions and, believe it or not, motions *in limine*. In doing so, we can generally narrow down many issues for the court (30 jury instructions, 15 motions *in limine*, 10 exhibits, for example) to just a few that we cannot agree on. I then move to pre-admit all agreed upon exhibits at the start of trial. This saves time in both hashing out all issues with the court, as well as laying foundation for various exhibits as well.

Receiving Deposition Transcripts in Electronic Formats. I always ask that, in addition to a paper deposition transcript, I also receive a copy via e-mail in PDF and .txt formats. These two formats are for two programs that I use to highlight, redact, and present portions of the transcripts. This is discussed in more detail below, but I would not that there is no additional cost for the additional formats. However, in using the depositions as described below, you create a sense of professionalism that can only work to your advantage of trial.

Asking for Digital Documents. This is another topic referenced in more detail below, but I wanted to add here that I always ask for production of photographs in digital form from opposing counsel. The reason is simple: my trial presentation apps use digital photographs to present. While this isn't always possible, you can usually get the digital copies. I prefer the original format (.jpeg, .tiff, etc.) as opposed to a PDF since PDFs are usually scanned from printed photos, thus degrading the quality and color of the exhibit.

The Trial

Only Necessary Lay Witnesses. It's simple math: the more witnesses you put on at trial, the more it costs to arrange for their testimony, and the longer the trial will take. While I'm certainly not advocating cutting out necessary witnesses, there comes a point where the jury feels that they have just heard too much on a given topic. Jury boredom is your worst enemy – you bore the jury, you risk that they will either stop listening, or worse yet, punish you for it in the jury room. I prefer to employ the "KISS" method – Keep It Simple, Stupid.

Waiver of Subpoena Fees. Almost invariably, you will need to put on lay witness testimony. Should that be the case, I like to arrange for "friendly" witnesses to show up free of charge. I may still issue them a subpoena, but I try to get them to agree to waive the subpoena fee. NOTE: A subpoena without a subpoena fee probably is not valid, pursuant to ORCP 55 D(1) ("The service shall be made by delivering a copy to the witness personally and giving or offering to the witness at the same time the fees to which the witness is entitled...", so choose to do this with only your most trustworthy witnesses. Even if a subpoena is necessary, I coordinate with the witness ahead of time and get them to agree to accept service of the subpoena by mail. However, if doing so, be sure to follow the requirements of ORCP 55 D(3). This will save you a service fee, which can become quite costly as the number of witnesses add up. See, ORS 44.415.

Only Necessary Expert Witnesses. Do you really need an expert? Well, that depends on the law, whether the issues have been narrowed, and your own comfort level. However, the easiest way to cut costs from a case is to limit the number of expert witnesses you use. Notably, not every issue requires expert testimony. For example, the issue of a physical injury does not necessarily require a doctor to testify as to causation. *Burandt v. Clarke*, 274 Or 521, 523 (1976). The same holds true on the issue of permanency of the injury. *Senkirk v. Royce*, 192 Or 583, 593 (1951). Moreover, a claim for impaired earning capacity does not require an expert, either. *DeVaux v. Presby*, 136 Or App 456, 464 (1995). Because this topic is so practice area-specific, I leave it to you to determine whether or not an expert is really needed. But again, the fewer the experts, the lower the cost for witness fees, and the quicker the trial.

Shop Expert Witnesses. It goes without saying that not all expert witnesses – even those in the same field – cost the same. I recently had a trial where my vocational expert cost, literally, half as much as opposing counsel's, notwithstanding the fact that she had more hours into the case than he had. In any event, check around on the costs. You may not want to degrade to a less qualified expert, but at least you and your client can make that decision prior to trial.

Live Testimony. Witnesses are always preferred to take the stand in the courtroom. This naturally lends an aura of credibility to whomever is testifying. This is particularly true with expert doctors. If calling witnesses live at trial – especially your experts – be sure to nail down a time that they are to testify. There is nothing worse than allocating a time to

testify only to be postponed for hours, or, God forbid, a day, with an expert waiting to go on. This can be a very costly mistake, indeed.

Videoconference Testimony. Next to live testimony, I prefer videoconference testimony. Most courtrooms have the ability to receive videoconference testimony these days, and I have taken full advantage of that fact. You will need to work with the court administrator early in the process to be sure you have the proper equipment to videoconference, however. The easiest way to do it is to arrange with another courthouse to allow your witness to use their system, so that it becomes a court-to-court videoconference. When that wasn't available, I've also used a Polycom system, as well as an iPad in one instance. While not as good as in-person testimony, at least the witness is responding in real time, which the jurors still find engaging. NOTE: be sure to work out exhibit issues with your expert ahead of time. I have used an enlarged diagram for them to testify to – and had a duplicate copy in the courtroom. I also give them a copy of the trial exhibit notebook, so that they can reference other exhibits, if necessary.

Perpetuation Testimony. If the court or your expert's own timing issues will not permit videoconference testimony, the next best thing is perpetuated testimony. This is governed by ORCP 39 I. In my experience, jurors least like "canned" testimony. However, such testimony is often cheaper than live testimony, as you can work on the expert's schedule, and you don't have the prospect of cancellation fees should your trial get postponed.

Avoid Unnecessary Exhibits. It is easy to get bogged down in exhibits. Oftentimes, I have difficulty choosing which photographs to submit into evidence. However, I would argue that the fewer exhibits the jury has to sift through, the better off you will be. I look for my most powerful and persuasive exhibits, and admit those. As a general rule, if I am not going to reference an exhibit, it likely will not be on my exhibit list. Again, only necessary exhibits will save time in admitting and referring to them, will save time and expense in reproducing them, and will make the jury happy.

Testimony Techniques. When my experts testify at trial, including perpetuated deposition, I always set up my portable projection screen behind them, but to the side. That way, during their testimony, I can bring up an exhibit being referenced for them to testify to. From the juror's perspective, it looks much like a news cast which, I think, adds credibility. It is nice that the jury and the witness can see the same exhibit, and see it well since I generally use my 10-foot screen, so there is no mistaking what they are referencing. For my medical experts in particular, I like to play demonstrative anatomical videos to allow them to testify as to the anatomy, physiology or procedure at issue. Or I will have them manipulate and mark up an interactive anatomical diagram in the same app. This is all pretty slick with the 3D4Medical apps noted below. For other witnesses, you can easily display the scene at issue, vehicle/product/contract involved, summary of damages, diagrams, charts, etc.

Trial Costs. Should you prevail at trial, you are entitled to recover certain costs, as well as a prevailing party fee. The recovery of costs is governed by ORCP 68. Note, also, that you can recover subpoena fees for a witness who never testified. *Norris v. Norris*, 201 Or App

162, 165 (2005). The prevailing party fee is governed by ORS 20.190. While you generally cannot recover all of your costs associated with the trial, this does help to offset them.

Trial Technology

This day in age, you have four choices concerning trial technology. First option: You can hire somebody to run it for you on their equipment (extremely expensive). Second option: You can use a laptop (hardware and software both very expensive, not as dynamic). Third option: You can use a tablet yourself (looks just as professional, low cost and easy to use). Fourth option: Or you can use nothing, sticking with an easel and a chalkboard (ZZZZZZZZZ.....). I prefer the third option, and use the iPad as a means to that end.

Frankly, the iPad is a useful tool for moving a firm closer to the end goal of a "cheap" trial. I certainly do not profess to *fully* utilize my iPad to that end, as I will explain below, but I am pretty darned close. Indeed, I've been told that I am at the forefront of using the iPad in my trial practice, at least in the jurisdictions in which I practice.

The above being said, I am aware of most of the options an iPad provides towards that goal – the issue is simply one of implementation. I have taken it upon myself to attempt to lead the charge. The real issue for wholesale adoption is one of comfort – each step is a little disorienting at first, as it requires moving away from what is familiar. Once I become familiar with the new approach, I realize what a time saving, cost saving (and, oftentimes, back saving) step it turns out to be, and wonder why I didn't implement it sooner.

Given the myriad existing apps and approaches of implementing the iPad into a trial practice, the remainder of this article is intended to be less of an instruction manual, and more of an exemplar of what options are possible towards this goal.

Trial Technology - The Hardware

The first step towards implementation of the iPad into your trial practice: buy an iPad! They come in two sizes and various configurations. I prefer the full-size iPad over the iPad Mini, as it is easier for me to read and review documents on the full-size version. You also have options as to storage (I always opt for the most so that I don't run out, as some apps are large, and I want to be able to store all of my file documents on the iPad). There is an option to have cellular service for wireless communication. This feature is a lifesaver. Your current carrier options are Verizon, AT&T, and Sprint. I would research the relative service in your geographic area before deciding. All offer LTE service (blazing fast), but while AT&T is generally the fastest network, Verizon generally has better coverage. Another nifty feature of the iPad is that it can be used as a wireless hub for your laptop, though that is an option through the respective carrier that comes at a price.

I suspect that, by the time of the Fundamentals of Oregon Civil Trial Procedure, the newest model iPad may be revealed, and possibly already on sale. I would expect the functionality to remain the same as the current model, quite possibly improved (after all, that's the point of a new model, isn't it?). The blogosphere reports that it should be thinner, lighter, have a longer battery life, have more memory, a more powerful processor, and possibly a slightly smaller size – shrinking the device essentially to the size of the viewable screen on the current model. Expect to see the new “Lightning” adapter that was introduced with the iPhone 5. While not a big point, some of the peripherals for the current model will no longer work without a lightning adapter, if at all.

Finally, a consideration should be given towards protection of your shiny new iPad, by way of a cover vs. case vs. sleeve vs. bag. Frankly, the options seem endless. All I can suggest is that you choose what works best for you. Personally, I have a cover (Apple), two cases (Dodo; Zagg with Bluetooth keyboard), and a laptop bag that has an iPad compartment built in (Booq).

Trial Technology – Peripheral Devices

Wireless Keyboard. You can buy a mini-keyboard that is the same size as the iPad itself. These are convenient, as they are generally coupled with a cover or case for your iPad, and are wireless. Alternatively, you can buy a full-size wireless keyboard, which is my preference, particularly with my massive hands. Notably, the Apple Bluetooth keyboard is only slightly larger than the iPad itself.

Stylus. Steve Jobs famously stated that nature gifted us with the perfect stylus: our finger. I am not entirely convinced. While good for most iPad tasks, there comes a time when finer manipulation is necessary – usually when highlighting documents or exhibits at trial. In that case, I prefer to use a stylus. There are multiple types and brands to choose from (for example, check out www.beststylus.com). Personally, I don't like the wide, foam tipped style, as it seems imprecise. My favorite thus far is the Jot Pro (www.adonit.net/jot/), though I am curious how the Jot Touch 4 will perform once released. As for the Jot Pro, I found the plastic disc at the end is a bit funky at first. However, you get used to it quickly, and I find that it presents with the finest control available, and also absorbs the shock when using it to write, much like a ballpoint pen. Frankly, it feels more natural to use than other models of stylus I have tried.

Trial Technology - Connectivity / Presentation

Airport Express. If you want to present with your iPad wirelessly (without a cable), you will need to get an Apple Airport Express that can set up your own personal network wherever you are. It communicates at 802.11n speeds, and is only \$99. Note that a refresh is due soon, which may connect at the new, blazingly fast 802.11a/c speed.

Apple TV. The iPad was made to work with the Apple TV, which is a steal at \$99, and presents in full HD (1080p). If using your iPad to present wirelessly, either to a TV or projector, I highly recommend using the Apple TV. Once connected to your network (using the Airport Express, for example), your iPad communicates with the Apple TV, which, in turn, sends the signal to your TV or projector through an HDMI cable. This, too, is due to be updated in the next couple of months.

Wired Connection. Alternatively, if you do not wish to present wirelessly, you can present using a cable. This option avoids the necessity of using the Airport Express and the Apple TV, as the cable plugs directly into your TV or projector. If I must use a cable, I prefer HDMI, as it bundles sound and video into one, and displays in full HD. To do so, you would need to buy a "dongle" from Apple or a third party, as well as an HDMI cable. There are other types of cables and dongles you can use as well, though HDMI is the best option.

Projectors. To keep continuity in quality of presentation, as well as not otherwise distorting your images, I prefer to use a full-HD TV or projector. As far as a projector is concerned, I love my BenQ SH910 (www.benq.us/products/projector/sh910), as it is extremely bright, and has two powerful internal speakers – powerful enough to fill the courtroom with sound when playing perpetuation depositions. It also projects in full HD (1080p), is quiet to run, and cycles on and off quickly.

Trial Technology - E-Mail and Internet

Mail. There will come a time where you will need access to your e-mail during a trial. For me, it is often to notify staff as to timing of the witnesses, or to have them e-mail me a document or memo that came up unexpectedly. Apple's native e-mail program really works quite well. We host our own e-mail on a Microsoft Exchange server, and the iPad ties in seamlessly. You can do the same with e-mail accounts hosted elsewhere, including gmail. The benefit, also, is that the app can group your e-mail according to the subject, which makes reading (and deleting) mail a cinch. It also incorporates the folder structure of your desktop e-mail program (Outlook, in my case), and incorporates the rules you have in place on your desktop.

I would note that there are also other e-mail apps available, though I have never found the need to try one. Moreover, as of the time of this writing, Microsoft has not created an Outlook App for the iPad, though rumors persist that this will happen at some point. I assume, however, that it will only happen after the demise of Microsoft's Surface tablet which, if sales records are any indication, may be sooner than later.

Safari. You may also need access to the internet at some point, particularly once the opposing side lists their witnesses. When you do, Safari, Apple's native internet browser, does the trick. Overall, it is a really good browser. However, the one thorn in my side is that it cannot display Flash content. Apple claims this is due to security concerns. Whether or not that is the case, the internet is slowly, but surely, moving away from Flash-based

content. However, if this becomes too much of a problem, there are many browser apps available (**Puffin, Skyfire**) to allow you to view Flash content.

Trial Technology - Document Viewers

Unfortunately, the iPad does not come well equipped to view various document formats commonly used by attorneys. Thankfully, there are several apps that handily solve that problem. Below are some of the more popular ones.

DocsToGo. This is the closest to the Microsoft Word/Excel suite you can come in the iPad – at least until Microsoft finally gets off of its duff and submits apps of its own for use. In the meantime, this app allows you to create Word (.doc) documents, as well as Excel (.xls) and PowerPoint (.ppt). While not a perfect match, it covers the basic functions, and is easy to use. It is a bit clunky sometimes, as the text seems to take an extra moment to appear as you type, but it gets the job done if you want to create or edit Office-formatted documents.

iAnnotate. This is my favorite app to read and annotate PDF documents. Once a PDF is uploaded from Dropbox or e-mail, it allows you to search text for specific words, go to a particular page in the text, highlight in multiple colors, mark, add text, add notes, underline, strikethrough, date stamp, etc. You can then save, e-mail or print the edited documents. There are a ton of other options, such as the ability to add audio clips to text or to sign documents electronically as well. You can also group documents into logical categories, create sub categories, and generally organize the documents as you see fit. Also, it is the fastest PDF viewer/editor I have found.

GoodReader. Very similar to iAnnotate, and also opens Office, iWork, images, and other files. An excellent app. While my personal preference is iAnnotate, this is a very close second.

PDF Expert. Another excellent app hot on the heels of iAnnotate. Like GoodReader, it can read multiple types of files, not just PDFs.

Documents by Readdle. Yet another well received document viewer and annotator. Can read and annotate multiple types of documents.

Adobe Reader. This app can read and annotate PDF documents. However, it has fewer annotation options than the others. Also, it can fill out PDF forms.

Trial Technology - Document Sharing

There are several options that allow you to share documents through the “cloud.” This can be done with yourself (synching documents across all of your own devices), or with others (sharing documents with staff or co-counsel).

Dropbox. I have been a big fan of Dropbox for a couple of years, now. The beauty of Dropbox is that it is integrated into many other apps, including your trial presentation apps (more on that below). Moreover, it installs on your iPad, PC, Mac, iPhone, laptop, etc. It looks and feels just like any other folder on your computer or device. However, once you place a file in your Dropbox folder, it is automatically uploaded to the cloud. (Think of the cloud like a server). Then, that file is simultaneously downloaded to all of your devices. Should you happen to open the document later and make any changes, the changes are automatically made on the version stored in the cloud, and thus, downloaded to all of your devices. Therefore, you can pull the document on your iPad edit it, and those edits will immediately show up on your desktop. There are also options for sharing your folder with others, including coworkers. In terms of working with other apps, this app is the most integrated I have found.

Box. This is extremely similar to Dropbox. Same idea – cloud-based storage of a document that is available on all devices.

SugarSync. This app is also similar to Dropbox as well, but with some additional features. For example, you can stream your music stored on other devices through this app (maybe not trial related, but cool, nonetheless). You can also control what documents are on your computers remotely through the app. I have not yet used it, but it gets reviews on par with Dropbox. I do think that Dropbox has the upper hand in terms integration into other apps – particularly the trial presentation apps. However, SugarSync appears to win out on some of these additional features that go beyond that which both apps do quite well – store and sync files across all devices.

YouSendIt. This app has features quite similar to Dropbox. However, it is not nearly as well integrated into other apps. Moreover, many of its features only work with the iPhone. I assume that a future update will include these features on the iPad version as well.

Trial Technology - Case Management

TrialWorks. There are several ways one can manage their cases electronically. At the office, we use TrialWorks as our case management software (www.trialworks.com), and are very pleased with it. Thankfully, TrialWorks also has a pared down version of its full case management suite available for the iPad, and it is designed to communicate with your server through the Internet or wireless network. As of the time of this writing, I am just starting to play around with the app, but have found it useful thus far. If you do not use TrialWorks, I note that there are also several other apps available to aid you in managing your cases. I note that TrialWorks is tailored to a personal injury practice; however, there are many other case management programs on the market tailored to various areas of practice.

Dropbox. This is also a great app for case management, in that you can control the organization of your various Dropbox folders. For example, you may have a folder labeled "Cases." In that folder, you would have case names, "Jones, Steve." In each of the client-specific folders, you could create additional sub-folders – "Correspondence," "Memos," "Pleadings," "Discovery," "Chart Notes," "Bills," and so-on. Then, you can save the appropriate documents into each of these sub-folders as you see fit. This includes any documents (mail, chart notes, bills, etc.) that you have scanned. Not only are those documents available on all of your devices, including your iPad or laptop at trial, but the file structure automatically transfers as well. Not bad for a free/low-cost service.

Trial Technology - Note Taking

Yes, the iPad can replace the tried and true yellow pad! Indeed, there are multiple options available to generate electronic handwritten notes. However, unlike the yellow pad, many of the apps can recognize handwriting, perform word searches, automatically back up the notes, and can be reorganized on the fly. This may be useful in a multi-day trial, particularly when you can perform a word search to find the relevant testimony.

Below are a few of the more popular examples of these types of apps. Note that each of the apps is feature-rich, highly rated, and quite similar to one another in terms of function, features and ease of use.

Penultimate. This is my favorite note taking app. It does exactly as it sounds – allows you to take handwritten notes. I like the lined paper options, as well as the fact that the notes are automatically backed up to Evernote. Thus, you can take notes on your iPad, set the iPad down, and instantaneously see your handwritten notes on your computer. You have several options as to pen color, line thickness, you can insert photos, clip notes out with “scissors” and move them to a different section, insert or reorder the pages, etc. It also recognizes your handwriting (or, in my case, attempts to), making it word searchable. Pretty slick. If you prefer to take handwritten deposition notes, I highly recommend this app.

Notability. This is also a handwriting app. Many of its features are quite similar to Penultimate. While it is missing the automatic Evernote upload that Penultimate has, it does offer some features not found in Penultimate. The first is the fact that the text will orient with the iPad - if you write a note while holding the iPad horizontally, then turn it vertically, the text will rotate so that you can still read what you wrote. Also, it offers a palm rest – a place to rest your palm as you write without marking the e-paper up. However, its most interesting feature is the fact that it can record audio while simultaneously recording your notes. The two recordings are time-synched. Thus, if you wanted to hear what was actually said when you wrote a particular note, you can go to that note and play the audio that corresponds with the time it was written.

Noteshelf. Another great notetaking app that is well received and well reviewed. "Impressive and feature-rich" according to MacWorld. Can organize your notes into different "notebooks" (file folders), with several options as to their appearance within the app. Really a pleasant user interface, with multiple note templates that are available. It has fully customizable pen colors, can upload and edit photos, and has wrist protection (prevents your wrist from marking up the page). It can also be used as an electronic whiteboard to present to the jury (assuming you are projecting the image).

Notes Plus. Claims to be one of the most feature-rich handwriting apps in the App Store. Gets good reviews, so can't be too shabby. Can write, type, record background audio. Can annotate PDFs, insert images, and automatically backup onto Dropbox. Can also recognize your handwriting (assuming it is better than mine), turning it into a word-searchable format. Overall, one of the better choices out there.

PaperDesk. Allows you to take notes in several colors, fonts, add images, sketch, etc. No limit as to the type of content you are adding to a page. Can import PDFs from Dropbox. Can export your notes to Dropbox, GoogleDocs, E-mail, Twitter, AirPrint.

Note Taker HD. Very similar to the other apps in this area. Lots of color options, can fill in PDF forms, etc. You can also organize your pages into documents and folders, insert shapes, photos, clip art, output as a PDF, etc.

Daily Notes. Also very similar to the others. Feature laden. Gets great reviews. Dropbox backup. Word searchable. Can export as a PDF. Ability to organize notes into file folders, etc.

Trial Technology - Outlining and Dictating

MagicalPad. This app allows you to organize your ideas into flow charts, mind mapping, checklists, etc. It is shocking easy to use, and great for creating flowcharts, brainstorming ideas, organizational/relationship charting, etc. It can also back up to Dropbox, Evernote, GoogleDocs, e-mail, etc. in multiple formats. The fact that it is a freeform layout, meaning that you can move the various elements around and connect them however you see fit, makes for an interesting and useful experience to help you organize your case or thoughts. Thus, you can use it to make interesting demonstrative exhibits for use during testimony, or during your opening statement or closing argument.

OmniGraffle. Like MagicalPad, this app allows you to create flowcharts, charts, etc. It is also an excellent app in that regard. It has several export options as well.

Dictation. The current generation iPad also has dictation built right into the keypad. All you have to do is open up a document and speak. I've never dictated in my life, so don't use it myself. However, in playing around with it, I found it to be quite accurate, so long as you

speak slowly and clearly. I'm not really sure how you could use this during the trial itself, but it may be useful for some during breaks, etc.

Dragon Dictation. This is a dictation app brought to you by the good folks at Nuance. It was more relevant before the new generation of iPad included Dictation integration. However, some folks still prefer Dragon (some find it more accurate), so I thought I'd mention it here.

Trial Technology – Depositions and Trial Testimony

There are several ways that the iPad can help your deposition or trial note taking and, in turn, use of the depositions at trial. Indeed, it can be used to type notes, to write notes, or to audio record the testimony itself¹! Here are some examples:

DocsToGo. This app, discussed above, allows you to open and edit and save Word (.doc) documents. It's not perfect, but it is probably the best option out there for Word documents until Microsoft releases its own app.

Pages. This is Apple's version of Word. The nice thing is that it is made for the iPad. It, too, can open and edit Word (.doc) documents, though lacks the ability to open and edit Excel or PowerPoint documents. There are also more formatting options than DocsToGo offers, and the type-text rate is more instant. When using the iPad to take deposition notes, this is usually the app I use. Of course, if you wanted to take notes at trial on your iPad, you could use this as well.

Penultimate, Notability, etc. As discussed above, if you prefer to take handwritten trial notes, there are great options to do so. The word recognition of some of these apps is very useful.

Adobe Ideas. This app allows you to upload a document or photo, and then have a witness (or multiple witnesses) mark it up during the deposition or trial. Each witness can start with the blank slate, so that they aren't marking over other witnesses' exhibits. You can then, during the testimony itself, e-mail the marked up exhibits to the court reporter, court and opposing counsel. Moreover, it is already in electronic format to use with your presentation apps at trial.

TranscriptPad. This is a great app that allows you to review deposition transcripts on your iPad. All you need is to request a copy of the transcript in text (.txt) format. From there, you upload it into the program, and start reading. It allows you to highlight in multiple colors, create Issue Codes (assign a highlight color to an issue you create, such as "Facts of Accident" or "Motion in Limine.") You can then easily create a report that pulls all applicable sections of the transcript for each "issue" you assigned to use as a cheat sheet during cross examination. I can't tell you what a relief it is to have 15-20 depositions

¹ Permission to record testimony at trial should probably be obtained from the Court before doing so.

loaded, and to be able to read them while on a flight with nothing more than my iPad in my hands. If nothing else, it makes traveling easier, and saves you storage space at the office. Moreover, you have that "cool" or "hip" factor when effectively cross examining a witness from your iPad.

NOTE: If I plan to blow up and project a portion of a deposition at trial, I use a PDF annotator to do the highlighting and redaction of testimony I do not plan to publish. I find it easier to pre-highlight a PDF version of the deposition on my desktop to upload into TrialPad (more on that app later) to project. TranscriptPad is great for reviewing and organizing, but not necessarily great to upload and use in TrialPad. Hopefully, given the fact that the apps are created by the same developer, a future update may resolve this issue.

Westlaw Case Notebook Portable E-Transcript. While free, I have yet to try this app. I do know that it is designed to work from the E-Transcript format (.ptx). I just wanted to let you know that it is out there. The app's detail page indicates that it allows you to highlight and add notes, as well as e-mail the edited version to yourself or otherwise update it in the Westlaw Case Notebook desktop application. While free, considering the developer, it is no doubt designed to work with another paid service, and I presume the Case Notebook fills that void.

Trial Technology – Use of the iPad at Trial

The beauty of the iPad is that it allows me to prepare for trial during the evolution of my cases, rather than just before trial as I used to do. Thus, in this respect, I don't use it solely for trial presentation. In any event, some of my favorite apps for trial preparation and trial use include:

Dropbox. I love uploading all important documents into my Dropbox folder, so that the only thing sitting in front of me at the trial is my iPad. This creates an aura of someone who is tech savvy, organized, and confident in their case. It certainly leaves a better impression than a table covered in paper, binders, stickies, etc. However, I do like to highlight and note the important documents, so that I can easily find the key language/passage in response to an issue that might arise. Of course, I cover all key issues in my trial memos, so oftentimes, I simply have a copy of my trial memo open on my iPad to refer to in a pinch.

TrialPad. MY FAVORITE TRIAL APP BY FAR!!! This app works seamlessly with Dropbox. You can upload and organize your trial exhibits right into the app. You can then pre-mark or highlight the exhibits within the app, and save the edited copies as a "Key Doc" that can be brought up later, edits and all. I find the app extremely intuitive. Indeed, my associate first used it at one of my trials he was second chairing, and it was so seamless, it appeared as though he were a pro. I do have one caveat, however. If I have a multi-page document that I want to highlight portions of, I prefer to do that on my computer, using Adobe Acrobat X Pro, as it tends to be a bit easier for me on the larger screen. That being said, it is

still quite easy to highlight and save your document using TrialPad, iAnnotate, Goodreader, and the like if you have to on the fly. The best thing about this app is that I no longer have to blow up and mount 15+ exhibits for trial. Rather, I create an exhibit notebook to submit into evidence, and project the exhibits onto a screen as the “blow up” to use at trial. Not bad, considering the fact that the app costs less than just one mounted exhibit would cost to prepare for use!

Keynote. This is essentially Apple’s version of Microsoft PowerPoint. While it is pared down a bit from the desktop version, it has plenty of bells and whistles to make a clear, concise, and easy to follow presentation. Because I do not use notes at trial, I always prefer to use a slideshow presentation. It serves not only as my notes to keep me on track, but also provides some entertainment for the jury. You would be shocked to know how many opening statements or closing arguments I have put together at 11:00 at night...on my iPad...while in bed. The app can also convert PowerPoint (.ppt) files, though some of the more complex formatting or transitions can be buggy. Because of that, I prefer to build my presentations in Keynote, so as to avoid formatting issues altogether. I often use this app for both opening statement and closing argument, generally using a 10-slide opening, and try to limit my closing to 15 slides or so. I’m sure to include the most relevant exhibits. It really tends to impress the jury, particularly if the defense attorney only brought a flip chart to write on. A strong first and last impression often greases the skids towards a satisfying verdict. For additional reading on the art of creating a slideshow, I strongly recommend the books *Presentation Zen*, by Garr Reynolds; *Slide:ology*, by Nancy Duarte; *Beyond Bullet Points*, by Cliff Atkinson; *Show the Story: the Power of Visual Advocacy*, by William S. Bailey & Robert W. Bailey; *Now What Makes Juries Listen*, by Sonya Hamlin; and *Resonate*, by Nancy Duarte.

Prezi. This is fast becoming my favorite trial presentation app. I stumbled upon in only early this year, so I am a relative newcomer. However, the dynamic nature of the presentations can be riveting, if done right. Essentially, you create a large “board” of information, including photographs, video clips, text, etc., and each “slide” isn’t so much the traditional slide we come to expect from PowerPoint, Keynote, and the like but rather, it consists of a change of perspective of the viewer to a different area of the “board.” You have great latitude in zooming in or out, having text appear from the background, etc. You can even turn your own photographs you want to use as a background into a 3D perspective. Like I said, it’s pretty cool, and I anticipate using it much more during trial. The only downside is that the iPad app is really pared down in terms of control over creating the presentation. To get all of the bells and whistles, the desktop version (really, it’s their website interface) is strongly recommended. You can use it for free, so please do check it out at www.prezi.com.

Timeline 3D. This is another app I found only relatively recently. It has a great and interesting interface for displaying a timeline. Rather than the traditional timeline that runs across the page – meaning that it is difficult to see and make sense of the entire timeline at once, this app displays the timeline in a 3D perspective, walking the viewer through each step. It is really easy to set up the timeline, too. All you do is enter a date, a description, and a photograph if you wish. The app takes care of the rest.

3D4Medical – iPad edition. One of the more gorgeous app suites I have ever seen. Provides a 3-D human body with nerves, tendons, musculature, vessels, joints, etc. exposed. You can zoom, remove layers, rotate, etc. There are several apps offered by 3D4Medical, each tailored to a different area of the human body. I have purchased 14 of them. Each costs less than a traditional mounted exhibit. However, each has so many view options, it is mind boggling. They even come with several videos showing the general anatomy, degeneration, routine surgical procedures, etc. You can even mark up the diagram within the app itself. I routinely use this app during my medical experts' testimony, through my projector, of course.

Exhibit A. This app is similar to TrialPad, though costs less. Like TrialPad, it has the ability to upload photos and documents, perform call-outs, mark them up, highlight, etc. Also, it has the ability to import from Dropbox, FTP, iTunes, WiFi, and e-mail. Admittedly, I have not used ExhibitA, as I was an early adopter of TrialPad, and am quite pleased with that app. Exhibit A gets five stars in the app store, but suspiciously, there are only five reviewers! While this may be a fine app, indeed, for now I choose to stick with the one that is tried and true.

ExhibitView. This is also a relative newcomer to the trial exhibit game. It appears to do most of what TrialPad and Exhibit A do, and is priced between the two. It receives five stars (though only 16 reviewed the app). I have not purchased this app, but looking at it in the app store, I would have to say that I like the interface more than I do Exhibit A. However, and again, TrialPad works for me, so I am sticking with what I know.

iJuror. This is an example of a handful of jury selection apps that exist. I do not use my iPad during jury selection; rather, I have an associate sit at counsel table to take notes for me. Therefore, I have not tested the app in trial, nor others of its ilk, but wanted to make you aware they exist if you wanted to give one a whirl. Personally, I prefer eye contact during jury selection, so as to create a conversational feel for the prospective jurors, so I will not likely be using jury selection apps any time soon.

Trial Technology – Connectivity with the Office

I don't use my iPad to remotely access my PC or my Mac laptop. However, if needs be, this can be done through several available apps. The following are simply a couple of examples:

Desktop Connect. Allows you to connect remotely to a PC or Mac computer. You can connect and control the computer remotely, or connect and watch what others are doing on the computer. (Seems kind of creepy just watching someone else working on the computer, but I guess it could be useful in some circumstances.)

PocketCloud Remote Desktop – RDP / VNC. Essentially the same abilities as Desktop Connect. Works with a PC and Mac. Need to upgrade to premium service for quicker response times.

Jump Desktop (Remote Desktop) – RDP / VNC. Pretty much the same. No need to upgrade. Works with both PC and Mac.

Print n Share. This app allows you to remotely print on most WiFi enabled printers. Can also print over the cellular network, read several formats of files (PDF, Office, iWork, etc.), Zip/Unzip files, and convert files/documents/websites into PDF.

NOTE: Many printer manufacturers also have their own apps for printing to their printers. For example, I have an Epson at home, and use the app developed by Epson to remotely print to Epson printers.

Trial Technology - Legal Research

I primarily do my legal research on my desktop computer, as that is where I draft the vast majority of my pleadings and memoranda. However, it is not unusual to find the need to pull a case at trial, especially when dealing with motions in limine, trial memoranda, unexpected issues, jury instructions, or motions for directed verdict. Thankfully, the iPad has options that fill the need nicely.

WestlawNext. If you are a Westlaw Next subscriber, as I am, you will have access to your research through this app without an additional fee. This is my "go to" research app, and I am happy with the service. Everything you are used to on the desktop condensed into an iPad app. It even has your recent desktop searches, your saved research, etc.

Lexis Advance HD. This is Lexis' version of its desktop app. I believe it is free with a paid Lexis account. I don't use Lexis, but it appears as though it has all of the options your desktop research portal would have.

FastCase. This is a decent research tool, especially if your state subscribes to the service as mine does. It is not as good as Westlaw or Lexis, but can get the job done.

Thomson Reuters ProView. This app acts as a portal through which you can access your West eBook, such as Oregon Rules of Court – State and Federal, 2013 ed. One less book to order, one less book to store, and one less book to lug to trial.

Federal Court Records (PACER). This is exactly what you think it is. You can log into PACER and access the federal court records.

Trial Technology - Research Aids

These are simply apps that help organize Internet research, saving it electronically rather than printing website after website. Each offers slightly different features, so I included the four most popular for you to check out.

Evernote. This is my favorite. You can clip and save webpages, photographs, typewritten notes, etc. into “Notes.” You can organize these Notes within the app – by case, topic, etc. It also installs on your iPhone, as well as PC and Mac. When you add a note, or edit an existing note, the changes are made on all devices simultaneously. I use one Note as my “To Do” list, which is nice, as I always have it with me. I create a “to do” list for most of my trials, and include relevant research or notes to myself in the list. There are also other apps that link to your Evernote app (Penultimate and Hello, for example, which are both discussed elsewhere), so there is an organized place to view all of your Notes at once.

OneNote. Similar idea as Evernote, brought to you by the good folks at Microsoft. This is part of the Office suite. The app store gives it three stars out of five.

Instapaper. Similar idea, but limited to saving webpages for later reading. Moreover, it saves web pages as text only, stripping out pictures, background colors, etc. Pretty cool, but really best for news or blogs.

Pocket. Same as Instapaper, except it includes the photos and backgrounds when saving.

Scanner Pro by Readdle. This is an entirely different idea than the previous apps, but similar in the sense that it is an archiving tool. Rather than converting websites to files that can be saved, this app converts photographs to PDF files that can be saved in Dropbox, Google Drive or Evernote, or you can print or e-mail it from the app. Thus, you can take a photograph of a document – one of opposing counsel's trial exhibits, for instance – and this app will convert the photograph to a PDF and save it in one of those directories. It is an excellent app.

JotNot Scanner Pro. Extremely similar to Scanner Pro. Another excellent app.

Hello. Ok, not really a trial app, but I will throw it in nonetheless. This is a nifty app that simply scans business cards. It attempts to recognize the text on the card, and creates a surprisingly accurate contact form for the person, records where you met them (GPS), and allows you to make notes of the meeting. It also automatically links to their LinkedIn profile, uploads their photos, and backs up the information in Evernote. I love this app, as I constantly collect business cards from great people I meet, and then can't keep straight who is who some weeks later!

Trial Technology - Medical Resources

When dealing with medical issues – be that adverse expert testimony, chart notes, radiographs, research or exhibits, there are several very useful apps available for the iPad. Some of my favorites include:

Netter Atlas. The ultimate anatomy atlas for use as exhibits. High definition, easy to navigate, interactive. A giant leap ahead of the printed version. You can bring one of the

diagrams up in the app, save a "screen shot," open the screen shot in a photo editing app, and mark it up as a demonstrative exhibit.

Epocrates. Really a physician resource, but allows you to review a massive amount of prescription drug information, including: drug safety information, drug interactions, formularies for health insurance drug coverage information, identify pills, etc. Requires a yearly subscription. This would really be used by only a few practitioners at trial, but it is worth noting.

ICD9 for iPad. This is one of several apps that make ICD-9 codes available on the iPad, though this one gives you free updates. It is also word- and code-searchable. Time to get rid of that bulky book on your shelf! This app can be useful if you run into a medical billing issue at trial.

Medscape. Used primarily by physicians as a medical resource for clinical information. Contains drug, disease, conditions and procedure information, as well as medical calculators. Serves as a clinical reference and drug interaction checker. Pretty good resource for cross examination purposes

MobileCT – Medical Image Viewer. Just an example of one of several apps that allow you to view radiographs on the iPad.

MyChart. Allows you to access patient record portals at any hospital that uses the MyChart patient record system. Note that this is currently an iPhone app only (the iPad can still download and run it, the image quality will suffer a bit, though). Hopefully, they will release an iPad version soon.

Trial Technology - Miscellaneous

There are so many other useful apps out for the iPad, it is mind boggling. Here are some of my favorite that don't fit neatly into the above categories.

Numbers. This is Apple's version of Excel. It works quite well, and integrates with Keynote for presentation purposes. This is especially helpful when converting your data into 2D or 3D graphs to show the jury.

Maps. This app allows you to get a "street view" of anything that Google Earth has photographed, including most major highways and city streets. This is extremely useful during trial, though I prefer to use actual photographs that I take with my HD camera. However, that is not always possible if, say, there has been subsequent construction. Thus, this is a way to get the "before" view that was accurate at the time of the applicable event.

Google Earth. This app allows an aerial view of any location. The free version has lower resolution when you zoom in too far, but anything from 1,000 feet above the ground or

more is stellar. In addition, it provides a 3D view when zoomed, and you can now obtain the "street view" from this app as well.

I will stop here. However, note that there are so many additional apps out there, including travel apps, news apps, network TV apps, reference materials, social media, etc., that one could easily write a book on the topic. Oh, wait. Somebody already did (see below).

References

For additional information, there are, quite literally, books on iPad use for lawyers. The ABA has done a decent job of publishing useful, easy to read, books on the topic. These include:

- Mighell, Tom. *iPad in One Hour for Lawyers*, Second Ed. ABA Law Practice Management Section, 2012.
- Mighell, Tom. *iPad in One Hour for Litigators*. ABA Law Practice Management Section, 2013.
- Mighell, Tom. *iPad Apps in One Hour for Lawyers*. ABA Law Practice Management Section, 2013.

There are also several blogs on the web, which help keep you updated as to the latest apps and techniques. These include:

- <http://ipad4lawyers.squarespace.com>
- <http://offsitelawcenter.com/iPad.aspx>
- <http://tabletlegal.com>
- <http://legal-ipad.com>

Conclusion

While I realize that this article was iPad heavy, and some of it was not trial-centric. However, the device has really done wonders to keep my trial costs to a minimum. While no device is perfect, the iPad comes darned close. It is versatile, relatively inexpensive (as compared to laptops), and continues to evolve very quickly for office use. It is a quantum leap forward from the days of the PDA, and if given the choice between the iPad and a laptop, I'd go with the iPad.

Thus, with the appropriate pre-trial planning, smart use of witnesses and exhibits, as well as use of modern trial technology, a trial can now be had at a relative bargain as compared to a decade ago. This ability to minimize the costs of trial, and thus, the exposure of both you and your client, helps to lift many of the obstacles we have seen in getting our client's day in court.

Cause No. _____

Plaintiff,	§	IN THE _____ DISTRICT COURT,
v.	§	
Defendant.	§	IN AND FOR
	§	
	§	_____ COUNTY, TEXAS

PLAINTIFF’S MOTION TO EXCLUDE

Plaintiff in this car wreck case, _____ (“Plaintiff”) files this motion asking the Court to exclude all evidence of her husband, _____ (“Husband”) prior conviction and asks the Court to instruct Defendant, _____ (“Defendant”), counsel for Defendant, and through such counsel, any and all of Defendant’s witnesses, by an appropriate order of this Honorable Court, not to attempt to enter evidence of, elicit testimony regarding, suggest, or in any way, directly or indirectly, at any time during the trial or in the presence and hearing of any witness or prospective and impaneled jurors, mention or refer to _____’s criminal convictions.

I. BACKGROUND

EXPLAIN THE CONVICTION AND TIMING

II. ARGUMENT AND AUTHORITIES

Plaintiff seeks review of this motion to exclude under Texas Rule of Civil Procedure 166, which shall, upon the Court’s ruling, control the subsequent course of the action, unless modified at the trial to prevent manifest injustice. Tex. R. Civ. P. 166. Pursuant to Texas Rule of Evidence 103, a pretrial ruling on this matter shall preserve error. Tex. R. Evid. 103(a)(1).

Plaintiff seeks to exclude any reference to _____’s conviction because it is inadmissible, irrelevant, and prejudicial. If Defendant injects this matter into the trial of this case through a party, an attorney, or a witness, it will cause irreparable harm to Plaintiff’s case, which

no jury instruction could cure. If _____'s conviction is brought to the attention of the jury, directly or indirectly, Plaintiff will be compelled to move for a mistrial. In an effort to avoid prejudice and a mistrial, Plaintiff urges this motion to exclude.

The purpose of admitting evidence of a prior conviction under Rule 609 is to attack the witness's credibility for truthfulness. Tex. R. Evid. 609(a). It is the proponent's burden to establish a conviction's admissibility. *Theus v. State*, 845 S.W.2d 874, 880 (Tex. Crim. App. 1992). Accordingly, evidence of Plaintiff's felony conviction is inadmissible unless the Court determines that the probative value of the felony conviction on the issue of credibility outweighs the prejudice to Plaintiff. Tex. R. Evid. 609(a). This standard reverses the burden from the more common standard established by Rule 403, which favors the admission of relevant evidence. *See* Tex. R. Evid. 403 ("evidence may be excluded if its *probative value is substantially outweighed* by the danger of unfair prejudice . . .") (emphasis added).

A. The Probative Value of _____'s Felony Conviction on the Issue of Credibility Does Not Outweigh the Prejudice to Plaintiff.

Sitting en banc, the Texas Court of Criminal Appeals set forth a non-exclusive list of factors for courts to consider when determining whether a conviction's probative value outweighs its prejudicial effect. These factors include:

- (1) the impeachment value of the prior crime,
- (2) the temporal proximity of the past crime relative to the charged offense and the witness' subsequent history,
- (3) the similarity between the past crime and the offense being prosecuted,
- (4) the importance of the defendant's testimony, and
- (5) the importance of the credibility issue.

Theus, 845 S.W.2d at 880.

i. Impeachment Value

The first *Theus* factor relates to how strongly the crime bears on the witness's credibility. Crimes involving deception or moral turpitude have greater impeachment value than violent

crimes because past violence is less likely to inform the jury about whether the witness is likely to lie to them on the stand, which is the purpose of Rule 609. *Thomas v. State*, 312 S.W.3d 732, 739 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd); Tex. Health & Safety Code §841.002. _____'s felony conviction, indecency with a child, according to the law is a crime involving violence and does not involve an element of untruthfulness. *In re Commitment of Eeds*, 254 S.W.3d 555, 557 (Tex. App. 2008). Further, _____'s felony conviction was not premeditated, which would suggest his willingness to disregard the oath. Accordingly, the first factor disfavors admission.

The nature of the crime, that is a crime involving violence rather than dishonesty, not only decreases the evidence's probative value, but also increases the prejudice to Plaintiff. In enacting Texas Rule of Evidence 609's federal counterpart, the Legislature considered versions of the bill that only allowed admission of crimes involving dishonesty or false statements because they recognized that evidence of a prior crime inevitably creates prejudice. *United States v. Ortiz*, 553 F.2d 782, 788 (2d Cir. 1997 (Mansfield, J., dissenting) (discussing the history of the bill and the Legislature's rationale and recognizing that there is "obvious prejudice that might be caused by the jury's learning of his prior conviction"). That bill would have limited federal Rule 609's application to instances where the crime spoke directly to the witness's character for truthfulness—situations where the prejudice was worth the price.

The specific crime at issue, one involving indecency with a child, makes the danger of unfair prejudice extremely high. *Montgomery v. State*, 810 S.W.2d 372 (Tex.Crim.App.1990). This type of crime, by its very nature, is likely to inflame the jurors' passion, confuse the issues at hand, and irreparably harm Plaintiff's case. *See id.* ("Both sexually related misconduct and misconduct involving children are inherently inflammatory [T]here was a grave potential

for decision on an improper basis, as jurors may have lost sight of specific issues they were called upon to decide and convicted appellant out of a revulsion against his parental demeanor.”); *see also Nat’l Freight, Inc. v. Snyder*, 191 S.W.3d 416, 424 (Tex. App.—Eastland 2006, no pet.) (under the Rule 403 standard, trial court properly excluded surveillance tape offered to prove personal-injury plaintiff had greater range of motion of arm than claimed because arm’s movement appeared to be a simulation of an “inappropriate act”). Put simply, any probative value the conviction may have on the issue of Plaintiff’s credibility cannot outweigh the type of prejudice created by evidence of a crime involving sexual conduct with a child.

ii. Temporal Proximity and Subsequent Criminal History

The second *Theus* factor involves the prior conviction’s recency and the witness’s subsequent criminal history. *Thomas*, 312 S.W.3d at 739-40 (“[T]he temporal proximity of the past crime relative to the charged offense and the witness’s subsequent history . . . favors admission if the crime in question is recent and the witness has a demonstrated pattern of running afoul of the law.”). When considering whether a crime is too remote under Rule 609(a), courts consider “the age of the accused, his conduct as reflecting non-reformation on his part, the nature of the accusation and attendant facts for which he is upon trial, and the length and severity of the penalty inflicted.” *Dillard v. State*, 218 S.W.2d 476, 478 (Tex. Crim. App. 1949). _____ was found guilty of the felony crime at age sixty-eight. Despite being sentenced to ten years in prison, the judge agreed to allow _____ to serve his sentence on probation instead. Since that day, _____ has been a model citizen while carrying out his sentence on probation. He has followed every rule imposed on him perfectly. In fact, he only has less than two years left on his sentence. This has been _____’s only offense and has had no further altercations with the law. He will continue follow the consequences for his actions

by registering as a sex offender for the rest of his life. Defendant should not be allowed to impeach _____'s character for truthfulness with evidence of an unfortunate turn of events _____ had in his life, thereby distracting the jury from the issues at hand, when _____'s conviction has nothing to do with the issue at hand.

iii. Similarity of Past Crime

The similarity of the past crime and the conduct at issue weighs against admission due to the risk that the jury is likely to use it as propensity evidence, rather than come to a conclusion based on the facts in evidence. *Theus*, 845 S.W.2d at 881. Further, a criminal conviction is irrelevant when the witness is not being tried for a crime in this case. *Woodall v. State*, 77 S.W.3d 388, 395 (Tex. App. 2002). Obviously, this case is in regards to a motor vehicle collision that occurred on April 6, 2012, not a crime _____ may or may not have committed. Further, although _____'s convictions are dissimilar in every way from the conduct at issue, which weighs in favor of admission according to *Theus*, in the civil setting however, the dissimilarity of the conduct should disfavor admission because it speaks to the evidence's irrelevance and immateriality. As previously mentioned, this is a motor vehicle collision case, which is a negligence cause of action. Evidence of _____'s conviction does not have any tendency to make the existence of a consequential fact more or less probable. Tex. R. Evid. 401. Rather, injection of such irrelevant matters unnecessarily creates a danger that the jury will consider the evidence for impermissible purposes.

iv. Importance

The last two *Theus* factors, importance of the testimony and importance of the credibility, are related. *Theus*, 845 S.W.2d at 881. They both depend on the nature of the case theory and the means available to prove it. *Id.* The fourth factor weighs against admission because a person who

fears impeachment with prior convictions may be dissuaded from testifying and thus be unable to present a meaningful defense. *See e.g., Ortiz*, 553 F.2d at 788 (2d Cir. 1997) (Mansfield, J., dissenting) (when crucial portion of government's case rested on testimony of witness with ten prior convictions, it was reasonable to assume that he was deterred from testifying because the prosecution could introduce his prior convictions).

As to the fifth factor, if the importance of the witness's credibility escalates, so will the need to allow an opportunity to impeach the witness's credibility. *Theus*, 845 S.W.2d at 881. _____'s credibility as a witness is not important because there are two other witnesses to the wreck. However, _____'s credibility as to Plaintiff's injuries is important, as he is the only one who knows the severity other than Plaintiff. Therefore, impeaching _____ with his prior conviction will only taint the jury.

III. CONCLUSION

The Court should exclude _____'s felony conviction because Defendant cannot prove that the conviction's probative value on the issue of credibility outweighs its prejudicial effect to the Plaintiff. Tex. R. Evid. 609(a). The probative value of _____'s felony conviction on the issue of credibility is particularly low because: 1) it involved a crime of violence rather than dishonesty; 3) _____'s testimony is important; and 4) _____'s credibility is not a pivotal issue because: there are multiple and independent witnesses to the wreck; and Defendant is not entitled to the defenses of contributory negligence, comparative causation, co-employee negligence, or assumption of the risk. Among other reasons, the danger of unfair prejudice is extremely high because the crime at issue is inherently inflammatory.

IV. PRAYER

Plaintiff respectfully asks the Court for an order:

- a. excluding any and all evidence of _____'s prior conviction;
- b. instructing Defendant, counsel for Defendant, and all witnesses called on Defendant's behalf not to attempt to enter evidence of, elicit testimony regarding, suggest, or in any way, directly or indirectly, at any time during the trial, during the taking of any deposition or in the presence and hearing of any witness or all prospective and impaneled jurors, mention or refer to _____'s conviction;
- c. specifically instructing Defendant's counsel to inform Defendant and all witnesses called on Defendant's behalf of the Court's order and instruct them not to make any reference to _____'s convictions in any manner, either directly or indirectly, at any time during the trial, discovery, or in the presence and hearing of all other witnesses and prospective and impaneled jurors, unless and until specifically questioned thereon after Defendant's counsel receives a favorable ruling by the Court outside the hearing of all prospective and impaneled jurors; and
- d. instructing Defendant that a violation of the Court's Order and instructions in connection with this order would likely constitute undue harm to Plaintiff's case and deprive Plaintiff of a fair and impartial jury trial, and that such violation and failure to abide by the Court's order may bring about a finding of contempt and/or a mistrial.

Plaintiff prays for general relief.

Respectfully submitted,

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PRESENTING EVIDENCE AT TRIAL

By: Dean Boyd

Prepping for Trial

Presenting your evidence starts before trial

Practice Practice Practice



Types of Practice

- Practice with your client and witnesses
- Take them back to the scene.
- Practice in the courtroom – Witness chair, microphone, etc.

Practice with the Witness

- Tell them they are going to be sworn in.
- If it's your witness, go through your actual direct questions with them a few days before the trial. Leave them with no surprises.

Don't make them cry before they are at trial!

Pat Montes Style Witness Prep

- Get to know your client/compartments
- Find out what they were like before the injuries from friends and family
- Walk through every aspect of their lives before, during, and after

Depositions

- What your client says in deposition is all fair game at trial BUT...
- So is what the Defendant says in deposition
- Be ready to use that information



Practice Your Job

Practice how you are going to deliver the evidence

- Your Direct
- Your Cross
- Delivery and order of evidence

Pretrial

Get your ducks in a row before the trial

Order of exhibits, witnesses and link those up

Motion in Limine

Don't open the door to things that you have already closed!

Pretrial Rulings and Stipulations

1. Stipulate to as much as you can
2. Get pretrial rulings that will mirror your jury charges
3. However, don't cut out all the juicy stuff via stipulations.

The trial will be boiled down to what really matters
- you'll know what evidence you really need to present

Trial

Showtime!!

Dorsaneo

- If you do your job with excellence the trial court HAS to work for YOU.
- If you read the rule book once a year, you won't end up as a case study in a law school text book

Get Your Evidence Admitted

1. Pre-mark the exhibit
2. Lay the witness's foundation of knowledge of their testimony
3. Show it to opposing counsel
4. Ask to approach the witness
5. Show it to the witness
6. Ask the right predicate questions (i.e., do you recognize this?)
7. Ask the court to admit the exhibit
8. Let the clerk mark the exhibit into evidence
9. Publish to the jury

Step 6 – Ask the right predicate questions

•Examples are:

“Do you know what this is?”

“Is this a fair and accurate representation of _____”

Ask The Court to Admit The Exhibit

“Your Honor, I ask that what’s been previously marked as Plaintiff’s Exhibit “A” for Identification be admitted into evidence as Plaintiff’s #1”

“At this time, we offer Plaintiff’s ‘A’ (for identification) into evidence as Plaintiff’s exhibit #1”

“Your Honor, I move that Plaintiff’s Exhibit ‘A’ be introduced into evidence”

GET A RULING!!!

Seems Simple, Right?

You get in there and you fumble over your words – forget a step.

Next thing you know.....

Failing to Execute the Magic Phrases

Leads to:

Raising more objections from the defense because they have time to object

Making the judge mad

Distracted or lost jury ☹

Know The Rules Of Evidence

Especially relevancy!

Rule of Relevancy: Rule 401

Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the **fact is of consequence** in determining the action.

PRIOR CONVICTIONS

Examples

An unrelated conviction (see motion)

Evidence of drinking but, not a factor in causing the wreck consider *Bedford v. Moore*, 166 S.W.3d 545 (Tex. App.- Fort Worth 2005, no pet.)

Redacting medical records to exclude irrelevant information—what do you want them to see?

Types of Evidence

Demonstrative v. Real

Know when you want your demonstrative evidence admitted so it can go back with the jury

Some stuff, you just want it seen...not admitted.

Presenting the Evidence

Technology

Social Media Posts

Issues Raised with Social Media

- 1. What was actually on the website?
- 2. Does the exhibit or testimony accurately reflect it?
- 3. If so, is it attributable to the owner of the site? PROVE THAT!

Two Steps to Use Social Media

Establish relevance with Rule 401

Authenticate with Rule 901

Rule 901

“To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”

Specifically Helpful for Social Media

Rule 901(b)(1): *Testimony of a Witness with Knowledge* – Testimony that an item is what it is claimed to be

Rule 901(b)(4): *Distinctive Characteristics and the Like* – The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances

Facebook Status Issue

Generally, it would be a hearsay issue.

However, there are exceptions

Exceptions

Rule 803: Exceptions to the Rule Against Hearsay – Regardless of Whether the Declarant Is Available as a Witness.

Rule 803(1): *Present Sense Impression* -- A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

Rule 803(2): *Excited Utterance* – A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that is caused.

Rule 803(3): *Then-Existing Mental, Emotional, or Physical Condition* – A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will

And if they are REALLY STUPID...ADMISSION AGAINST INTEREST!!!

Technology

Using Technology to Present Your Case

Equipment to Use

Ipad with a data plan

Airport Express

Apple TV

Projector with screen and speakers

Wireless keyboard

Apps to Use

Dropbox – a storage facility for all documents

TrialPad – An organization and presentation app

Notability – a handwriting and recording app

Keynote – PowerPoint for Ipad

Court Room

- Use the whole room
- Not only say your evidence, show your evidence.
- Turn the courtroom into the scene
- Bring your witness off of the stand
- Act out what happened with the witnesses

Look and Act Presentable

- Make sure your appearance is presentable
- Dirty fingernails on the Doar presenter!
- How you dress matters.
- "if your lawyer has a flip phone and his suit doesn't fit...you are gonna LOSE"
-Better Call Saul
- Know your audience
- When appropriate, be friendly and polite
- Be prepared. Don't fumble with anything
- Establish a relationship with the jury

Google Earth

If you don't use this to show the scene... sheesh



Depositions via Video

- If you aren't making video cuts, you are boring the jury.
- Laser in on what you want the jury to focus on. Arrange the clips in the way that serves your argument the best
- DO NOT GO IN CHRONOLOGICAL ORDER
- **IF IT BLEEDS, IT LEADS!**

Presenting Witnesses

- LIVE witness is always best
- Consider a video/skype call with an expert that couldn't be there personally. Will the court allow it?
- Video is boring unless it is clear and concise and to the point. If the point isn't made right away, you didn't cut it right.
- Sometimes, reading the deposition to the jury is BETTER than video. Again, if it's short and to the point.

Judge's Advice

- Do NOT ask questions you don't know the answers to
- Don't feel like you have to get the last word in or re-direct and re-cross.

LET. IT. GO.



Questions

- Cell Phone Records
- Seat Belts
- Pain Scale
