TABLE OF CONTENTS

Articles »
A Guide to the Offer of Proof
By Christin J. Jones
Learn how to use this largely neglected technique when evidence is struck from consideration.

When Do You Need an English Translator in Civil Depositions?
By Robert E. Sumner, IV, and Charles R. Scarminach
There is little related case law to guide this decision, but often it’s simply a question of fairness.

Tom Brady, Roger Goodell, and Your Next Arbitration
By Theresa W. Parrish
Tips for being an effective advocate.

Telling Stories to Reverse the Tide: How Minorities Change Majorities
By Jeremy T. Brown
We use narratives to categorize, organize, and interpret incomplete information.

Practice Points »
Fourth Circuit Allows Appeal Where Appellant Gives "Functional" Notice of Appeal
The case is Clark v. Cartledge.

First Circuit Affirms Lower Court's Substitution of Parties Post Judgment
The case is Rodriguez-Miranda v. Benin et al.
A Guide to the Offer of Proof
By Christin J. Jones

No matter how prepared you are for trial, it’s bound to happen. Your judge sustains an objection and strikes a piece of evidence or testimony that is significant and material to advancing your case. And while your immediate goal is to continue developing your case and obtain a victory at trial, a seasoned lawyer is also thinking ahead and working to develop the record and preserve issues for appeal. But for a less-than-seasoned attorney, this is not so easy to do. This article addresses one largely neglected technique to preserving error when evidence is struck from consideration: the offer of proof.

The offer of proof is the other side of the objection coin. Just as an objection preserves errors in admitting evidence for review, an offer of proof preserves errors in excluding evidence. Federal Rule of Evidence 103 specifically provides that a party may claim error “if the ruling excludes evidence, [and] a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.” Fed. R. Evid. 103(a)(2).

Why Bother?
This preservation device can be critical to a case when key evidence has been excluded by the trial court. Proponents of excluded evidence put themselves in a weak position to later argue the value of excluded evidence if they failed to make an offer of proof at trial and have been unsuccessful in seeking reversals of dismissals of their cases when they based their appeals on excluded evidence for which no offer of proof was made. See, e.g., Nulf v. Int’l Paper Co., 656 F.2d 553, 562 (10th Cir. 1981); Sime v. Trustees of Cal. State Univ. & Colleges, 526 F.2d 1112, 1113–14 (9th Cir. 1975). So the most obvious purpose of an offer of proof is that it creates an adequate record from which an appellate court can determine whether the exclusion of evidence affected the substantial rights of the offering party and whether the error requires reversal. Inselman v. S&J Operating Co., 44 F.3d 894, 896 (10th Cir. 1995), on reh’g in part, (Feb. 17, 1995). Rule 103 contemplates that hearings on offers and objections will build a basis on which a reviewing court may consider the ruling ultimately made. Christensen v. Felton, 322 F.2d 323, 328 (9th Cir. 1963) (hearing on proffer gives reviewing court “a better basis on which to decide” whether court was right to exclude evidence). Simply put, the offer of proof allows the appellate court to review and consider the evidence if it determines that the evidence should have been admitted by the trial court. Instead of the appellate court only seeing that there would have been evidence or testimony regarding a certain point or issue, an offer of proof enables the appellate court to review what the evidence specifically was.

But the offer of proof also serves a second purpose likely of more interest to trial counsel: It gives you an opportunity to persuade the trial court to change its mind and admit the evidence. An offer of proof provides the trial court more information regarding the evidence on which to make a more complete and adequate basis for a ruling and allows the trial court to review the evidence and potentially reevaluate and change its ruling on the objection. A well-crafted offer
of proof can also be an opportunity to argue the facts in an effort to persuade the judge to accept your theory of the case.

Where Should the Offer Be Made?
Rule 103(d) dictates that offers of proof should be made out of the hearing of the jury “to the extent practicable.” To accomplish this, the jury may be excused, the court and counsel may retire to chambers, or counsel may approach the bench. The purpose is to prevent “inadmissible evidence” from being “suggested to the jury by any means.” Fed. R. Evid. 103(d). The main reason to make proffers outside the hearing of the jury is to avoid whatever prejudice might result from exposing the jury to the evidence that is ultimately excluded.

When Should I Make My Offer of Proof?
The rule says nothing about the timeliness of offers of proof. But when a party proffers evidence that the trial court considered irrelevant, immaterial, or otherwise inadmissible, the party must be given opportunity to put in the record a fair statement of what is intended to be proved. M.A.B. v. State, 718 S.W.2d 424, 425–26 (Tex. App.1986). The best practice would be to make the offer of proof immediately after the objection or the court’s ruling on the objection. The witness is likely to be present or readily available, the point in question is fresh in everyone’s mind, and the trial court has the immediate familiarity with context that helps make a sound decision. U.S v. Nacchio, 519 F.3d 1140, 1154–55 (10th Cir. 2008), vacated in part on other grounds, 555 F.3d 1234 (10th Cir. 2009) (judge erred in excluding defense expert without allowing proponent to present arguments for admissibility; judge “has to let” lawyers argue). Yet that is not always practicable, and the trial court has the power to postpone the making of an offer of proof to a later time to avoid disrupting the trial by removing the jury in order to comply with rule 103(d). If that occurs, remain diligent and request to present the offer of proof as soon as practicable. Montgomery v. State, 383 S.W.3d 722, 726 (Tex. App. 2012) (where party acceded to trial judge’s urging that offer be made at later time, objection not preserved where offer never made).

What Are the Necessary Requirements for Offer of Proof?
The rule dictates that the proponent must explain what it expects to show and the grounds for which the party believes the evidence to be admissible. Sounds simple, right? Like everything we do, preparation is key. An offer of proof may come in a variety of forms: written statements, affidavits, summaries, or live question-and-answer presentations. But no matter the form, trial counsel should be prepared to argue succinctly how and why a particular fact, piece of evidence, or line of testimony advances the inquiry by addressing the following five requirements:

Counsel must inform the trial court of the nature or content of the evidence being offered. An appellate court will not pass on the issue of error in excluding evidence when the record is inadequate to show what the excluded evidence would have been. U.S v. Muncy, 526 F.2d 1261, 1263 (5th Cir. 1976). In the case of testimony, that means spelling out in some detail the facts sought to be elicited or specific facts the witness would establish and not simply saying that the witness will address a certain issue in the
case. The most thorough method of making the offer is to put the witness on the stand, ask questions, and put his answers in the record. Rule 103(c) authorizes the court to require such thoroughness by providing that it “may direct that an offer of proof be made in question-and-answer form.” If the evidence excluded consists of a document authenticated by offer of proof, counsel should request that the reporter mark and insert the exhibit in the record. The key is to describe the aspects of the evidence that would render its exclusion prejudicial to your client.

Counsel must describe the purpose of the evidence. This should include some account of the issue or issues on which it bears and sometimes a reference to other testimony that the proffered evidence is to address, explain, or refute. Counsel must give the court the reasons for admitting the evidence, especially in cases where the evidence may be admissible if offered for one purpose but not for another.

Explain the evidence’s relevance to the trial court. This may appear to go hand-in-hand with describing the evidence’s purpose, but it still could be unclear just what consequential facts the evidence is expected to prove. So a statement regarding relevance should be articulated, especially in cases where it is circumstantial and its meaning is not obvious on the face of a description of its content. There is no error on the part of the trial court in restricting cross-examination of a witness where the cross-examining party does not tender for the court’s consideration any line of questioning or arguments that would show the relevancy of the questioning. U.S. v. Medel, 592 F.2d 1305, 1314 (5th Cir. 1979).

If the proffered evidence is the only proof on point, the proponent should show that the evidence is sufficient to prove the consequential fact to which it is directed, either alone or with other proof the proponent expects to offer late in the case. In this circumstance, the proponent may have to commit to offering whatever other evidence is necessary to make the proffered evidence count in an appropriate way in the case. See Perkins v. Silver Mountain Sports Club & Spa, LLC, 557 F.3d 1141, 1147–48 (10th Cir. 2009).

Counsel must articulate why the evidence is competent and present the legal theories or grounds under which the evidence is admissible. U.S. v. Roti, 484 F.3d 934, 935–36 (7th Cir. 2007). This includes presenting any evidence needed to prove any preliminary questions of fact required to make the evidence admissible under rule 104—or at least to surmount the specific objection relied upon by the trial judge in excluding the evidence. On appeal, the sufficiency of the offer is judged only in the light of the ground of admissibility and the purpose stated at trial, and not by reference to a ground or purpose advanced for the first time on appeal. Tate v. Robbins & Myers, Inc. 790 F.2d 10, 12 (1st Cir. 1986); U.S. v. Cruz, 894 F.2d 41, 43–44 (2d Cir. 1990). But a proponent probably does not need to cite chapter and verse when identifying a hearsay exception. The proponent need only make it clear which exception he means and why the statement
fits. *U.S. v. Miller*, 904 F.2d 65, 67 (D.C. Cir. 1990) (in offering grand jury testimony, defense obviously relied on former testimony exception and alerted court to legal basis; claim of error was preserved despite failure to cite relevant provision).

The offer of proof is a difficult skill to perform competently, much less master. But if done properly, an offer of proof not only preserves the issue for appeal but also gives trial counsel another valuable chance at persuading the trial court to admit the proffered evidence.

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When Do You Need an English Translator in Civil Depositions?
By Robert E. Sumner, IV, and Charles R. Scarminach

“Make sure you understand the question being asked of you, and only answer that question.” All litigators have given this advice to clients preparing for deposition. For clients who speak English as a second or third language, understanding the question may only be possible through the use of a translator. If a non-English-speaking client is denied the use of a translator, the potential harm to their legal interests and the general truth-seeking process is significant. In fact, access to a translator has been deemed so vital to the judicial system that Congress has enacted legislation granting the right to a translator in all “judicial proceedings instituted by the United States.” 28 USCS § 1827(b)(1). In a civil deposition, not including cases instituted by the United States, there is no such right to a translator. Rule 30 of the Federal Rules of Civil Procedure is silent on when it is appropriate to use a translator. The decision to allow the use of a translator at deposition is left to the discretion of the court. See Bethlehem Area Sch. Dist. v. Zhou, Case No. 09-3493, 2011 U.S. Dist. LEXIS 45661 (E.D. Pa. Apr. 26, 2011); EEOC v. Beauty Enters., Case No. 3:01-cv-378, 2002 U.S. Dist. LEXIS 13520 (D. Conn. May 21, 2002); Naqvi v. Oudensha America, Inc., Case No. 88-c-6966, 1991 U.S. Dist. LEXIS 502 (N.D. Ill. Jan. 16, 1991); Tagupa v. Odo, 843 F. Supp. 630 (D. Haw. 1994).

Determining when to use a translator can be problematic because there is little related case law to guide a judge’s decision. Judges are left to make a judgment call on whether a witness with questionable English-speaking ability should be forced to provide deposition testimony without a translator. This subjective standard can be particularly troubling when the witness is the defendant or corporate representative in a high-stakes litigation matter.

Courts have generally addressed using a translator at deposition in one of two ways: (1) weighing evidence of the witness’ ability to communicate in English to make the determination or (2) providing a translator regardless of evidence of the witness’s ability to communicate in English. An example of the first line of cases is seen in Naqvi v. Oudensha America, Inc., Case No. 88-c-6966, 1991 U.S. Dist. LEXIS 502 (N.D. Ill. Jan. 16, 1991). In Naqvi, the defendant employer requested that its office manager be permitted to use a Japanese interpreter at her deposition. Id. at 2. The magistrate judge denied the defendant’s request, and the defendant moved the district court for reconsideration of the ruling. Id. The district court considered the following evidence in its review of the magistrate judge’s order: (1) the office manager managed the office and directed all employees in English; (2) the office manager studied English in college and was hired because of her English skills; and (3) the defendant did not deny the office manager’s ability to speak English. Id. at 5. The district court affirmed the order and concluded that the office manager had “sufficient English skills to comprehend the judicial proceedings, understand questions presented to her at her deposition, and answer questions in English.” Id. at 6.

An example of the second line of cases is available in REFCO v. Afincomex, Case No. 93-cv-2251, 1993 U.S. Dist. LEXIS 16787 (S.D.N.Y. Nov. 30, 1993). In REFCO, Afincomex insisted that Afincomex’s principal, German Rodriguez, be allowed to use a Spanish-language interpreter at deposition. Id. at 1. The party taking the deposition “objected to the request, on the ground that...
Rodriguez is fully fluent in English, and that the presence of the interpreter would add expense, complicate and delay the deposition.” Id. In support of its objection, the taking party claimed that

Rodriguez possesses advanced degrees from Harvard University and Cambridge University for coursework conducted in English; that he has successfully taken a securities broker licensing examination in English; that he habitually conducts business in English with persons who speak no Spanish, including transactions that are central to [the] lawsuit; and that he converses with his attorneys in English.

Id. In light of these facts, the district court even noted that it was “inclined to believe that the request by Afincomex to have Rodriguez’s deposition conducted through an interpreter is made in bad faith.” Id. at 2. Ultimately, however, the district court allowed the use of the interpreter and reasoned that it was “reluctant to deny the opportunity for an interpreter to a deponent whose first language is not English.” Id.

Given the uncertainty surrounding how a court will rule on this issue of using a translator, attorneys seeking to use a translator are tasked with performing a difficult strategic analysis. From the standpoint of the taking attorney, inserting a translator into the equation means a more cumbersome, time-consuming, and expensive deposition. Additionally, the time delay involved with translation decreases the likelihood of eliciting a spontaneous statement against interest from the witness. The taking attorney must weigh these inconveniences against the possibility that a judge will not look favorably on an attempt to force a witness to be deposed in their second or third language. In contrast, the attorney advocating the use of a translator must consider the credibility ramifications. A skeptical taking attorney will paint the use of the translator as an attempt to hide from tough questions and to intentionally obfuscate the deposition testimony. As was seen in the Afincomex case, when presented with evidence of fluency in English, it is possible for a judge or jury to view the request for a translator as one made in bad faith. A skillful trial lawyer should attempt to defuse these credibility concerns by filing a motion in limine to prevent questions that seek to impugn a witness’s credibility based on the decision to use a translator.

For those parties truly in need of a translator, the issue is ultimately one of fairness. The party facing the daunting task of being subject to a deposition should be allowed to participate in their first language, if needed. Unfortunately for practitioners, courts have done little to clarify the factors that should be analyzed to determine when using a translator is warranted. As business in the United States continues to become more diverse and internationally focused, questions about using a translator in civil depositions will become more commonplace. Trial lawyers should pay careful attention to the advantages and disadvantages associated with using translators to determine if using a translator is in the best interest of their clients.

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Tom Brady, Roger Goodell, and Your Next Arbitration
By Theresa W. Parrish

What do Tom Brady and Roger Goodell have to do with your next arbitration? Plenty, perhaps. The extraordinary and recently concluded dispute between the New England Patriots legend and the NFL commissioner included some interesting arguments about the fundamentals of arbitration and the need for confidence in a system increasingly utilized to decide not only traditional labor disputes such as grievances over disciplinary action but also commercial, employment, and virtually any other dispute that might otherwise end up in traditional litigation.

Admittedly, the way the dispute arose was unusual. A claim that footballs had been improperly and maybe deliberately underinflated in a playoff game in which Brady played led to an investigation and a decision by Goodell to impose discipline. The proceedings were pursuant to the collective bargaining agreement between the NFL and the NFL Players Association. That agreement allowed Goodell to oversee the initial imposition of discipline after an investigation and then serve as the arbitrator of an appeal of that discipline. Where the matter escalated into Brady literally making a federal case out of it (NFL Management Council et al. v. NFL Players Association et al.) was when Goodell arguably abandoned the original grounds for discipline and made new findings while he served as the arbitrator.

Brady appealed first in U.S. District Court in New York, where he succeeded in challenging the suspension. But the matter then proceeded to the U.S. Court of Appeals for the Second Circuit, where a three-judge panel, in a 2-1 vote, reversed the district court. Brady then petitioned for an en banc rehearing, which would have involved 13 appellate judges from the circuit.

Theodore B. Olson, attorney for the NFL Players Association, explained in a television interview that “Our two primary arguments are that the commissioner in the first place conducted an investigation and then the commissioner imposed discipline. Then the commissioner appointed himself as an appellate judge or an arbitrator and then decided something new in the appellate process, abandoning the grounds that were the original basis for the supposed discipline.” Olson continued: “That’s number one, and an appellate judge is supposed to look at the record and make a decision on the basis of what happened before. He departed from what happened before. Secondly he ignored important provisions of the CBA [collective bargaining agreement] about discipline that might be imposed for equipment violations. He departed from that completely and went off the track.”

The proceedings in the Second Circuit attracted some major players who weighed in with amicus briefs. Two of the briefs were filed by the Patriots and by a group of scientists who addressed how the underinflation of footballs could be explained by the application of “ideal gas law.” The final two amicus briefs filed were perhaps the most significant in the attempt to establish major ramifications for arbitration proceedings everywhere. The first came from the country’s largest labor union federation, the AFL-CIO. In its filing supporting Brady, the AFL-CIO told the Second Circuit that it had a “significant interest” in making sure that union contract arbitration
clauses are properly applied. Most of the employees in the AFL-CIO’s unions have arbitration built into their labor contracts with employers. “While the NFL and [NFL Players Association] bargained to allow the Commissioner to hear appeals of disciplinary decisions, they did not agree to let the Commissioner, sitting as an appellate arbitrator, to act in a manner that is arbitrary and capricious,” the AFL-CIO said in its brief. “Regardless of who hears appeals, labor arbitration always must be fundamentally fair.” The AFL-CIO asserted that Goodell acted more as an employer “seeking to justify his own disciplinary decision” than the neutral arbiter Brady deserved under his union contract.

Kenneth R. Feinberg, a high-profile attorney and arbitrator with 35 years of experience who oversaw compensation funds for the victims of such noteworthy tragedies as the September 11 terrorist attacks, the Deepwater Horizon oil spill, and the Boston Marathon bombing also entered the fray with his own amicus brief in support of Brady. Feinberg said the case had major implications for the role of arbitration. “This case is of exceptional importance to arbitrators in light of the issues it raises about the power of arbitrators to disregard relevant portions of the parties’ arbitration agreement in issuing their judgments, and to rely on new grounds in affirming employer discipline,” he wrote.

On the first page of his brief, Feinberg wrote that “[he] comes before this court not to support the unfettered aggrandizement of arbitral powers for [him] and his fellow arbitrators—but to caution against it.” He added, “If the restrictions on arbitrators acting outside the scope of their authority, imposing their own industrial justice, or acting with bias are weakened so greatly as to permit the enforcement of the Commissioner’s award, it will fundamentally erode the public’s trust and confidence in arbitration.” Feinberg argued that Goodell’s decision “lacked even the basic hallmarks of due process—a fair process, before a fair tribunal” and that Goodell’s actions were “simply beyond the bounds. Feinberg said this “must be recognized as such to preserve the public’s faith in the arbitration process.” Feinberg next argued that the decision from Goodell exceeded the scope of his authority under the CBA, and that he acted with bias. He claimed that the primary problem arose from Goodell’s changing of the basis for the suspension, creating “new violations” and imposing discipline “far in excess of that previously prescribed.”

Finally, Feinberg stated that the decision to select someone who isn’t neutral to handle an arbitration does not eliminate the obligation of that person to act without bias. The primary evidence of bias, according to Feinberg, comes from Goodell enforcing the NFL’s ability to gather potentially relevant information by finding that Brady had obstructed the investigation, while also limiting Brady’s ability to gather potentially relevant information that could have helped him prevail, by denying access to materials generated by the investigation. “The notion that only one side would be entitled to the materials of the independent investigator is so egregious that it cannot be the result of a good faith mistake,” Feinberg wrote. “It is instead yet another clear indicia of the bias that permeated this proceeding.”

What is the point for litigators everywhere who are handling arbitration proceedings and enforcement of arbitration awards in court proceedings? Always go back to the basics. Know
what was bargained for by the parties. Review the agreement to arbitrate and all of its rules carefully. Do a thorough vetting of your arbitrator. Make a complete record in the arbitration hearing for any subsequent review. Keep in mind the often-limited scope of that subsequent review. Watch for fundamental fairness throughout. Enforce the boundaries of the arbitrator’s authority. And if you have to challenge the proceedings, check out the briefing in this extraordinary case that almost went to the United States Supreme Court.

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Telling Stories to Reverse the Tide: How Minorities Change Majorities
By Sidney K. Kanazawa and John G. McCabe

The Story—You’re Creating It Faster Than I Can Write It
In a windowless soundproof room, Jack lay dead with blood smeared across his chest. Moments earlier, a determined George had entered the room, and now a grim-faced George walked out of the room spattered with blood. A knife coated with blood slipped from George’s hand and dropped with hardly a sound. No one stopped him.

[You’ve already formulated a story about what happened in your head. You can picture the scene. You can see the characters. Right?]

George had cajoled Jack to enter the windowless room. He knew once inside the room, he could thrust a knife into Jack’s chest without restraint.

[You’re now fitting this new fact into the story you’ve instantly created to further support and expand your story. Correct?]

Obsessed with fast cars, beautiful women, fabulous restaurants, and exotic travel, George saw putting a knife in Jack’s chest as an opportunity to fund his lifestyle. He knew he had to do it. He relished the chance.

[You’re now adding these new facts to the George character you created at the beginning. True?]

After giving Jack time to think it over, Dr. George sat at his desk and watched Jack sign a release that allowed Dr. George, a world-class heart surgeon, to cut into Jack’s chest to perform a desperately needed heart bypass, despite Dr. George’s explanation to Jack that there was a very real risk of Jack dying during the surgery.

[Does this fit the story you told yourself, or do you have a new picture in your head?]

Tell Me a Story
How do you stop and reverse a stampede against you? How do minorities change the hearts and minds of majorities? How do trial lawyers bend the arc of justice in their favor?

You change the story. While we all believe in justice and fairness, what is just and what is fair depend on the story we see running through our heads as we listen to the facts unfold. Sometimes more facts completely reverse the movie we thought we were seeing. In other instances, a close-up on a single fact focuses the mind and simplifies the clutter of a complicated story. And in every story, the credibility and believability of the storyteller and the story are critical to how the story is received.
A Bomb of Emotions Can Be Defused
The case was dripping with emotion.

In an open-highway head-on collision, a thin (one-tenth of an inch) spare tire bracket in the rear compartment of an SUV ripped and hurled a heavy-duty full-size spare tire forward into the passenger compartment where a beautiful two-year old-girl was sitting properly strapped in her car seat in the right rear seating area.

A thicker version of that same bracket had torn repeatedly in crash test videos for earlier model year vehicles. No one fixed the problem. Instead, the bracket was thinned to one-tenth of an inch for the model year of the accident to accommodate a sporty spare tire and wheel. In the following model year, the thin bracket was replaced with a thicker and more robust bracket that never broke in frontal crash tests.

Black tire marks on the ceiling and interior of the vehicle and cracks in the plastic car seat tracked the 50-pound spare tire to the little girl, who died of an almost complete decapitation of her head. At the time of the accident, the SUV was being driven by the little girl’s mother, who swerved and lost control of the vehicle when she was cut off by a speeding teenage boy who initiated this head-on collision into an opposing vehicle driven by an emergency room doctor heading to work. Paramedics on the scene knew both the broken and crushed mother and nearly decapitated little girl. One of their fellow paramedics (not on the scene) was the mother’s husband and the little girl’s father.

The case pitted a small, tightly knit community against an outside SUV manufacturer. Counsel for the plaintiffs, a renowned Fellow of the American College of Trial Lawyers, felt the emotional pull of the case and kept raising his punitive damage settlement demand as the case neared trial and the evidence against the manufacturer grew darker and darker. The first panel of jurors included two close friends of the little girl’s mother and father. Indeed, nearly all of the local witnesses knew the little girl and her mother and father or the plaintiffs’ attorneys.

All the other defendants, including the baby seat manufacturer, settled and bailed from the trial. No one expected a defense verdict. The hope was only to persuade the jury to return an award less than the last settlement demand.

But, with a little help from the plaintiffs’ counsel, the SUV manufacturer managed to do better than simply reduce the size of the award. The SUV manufacturer reversed the seemingly inevitable stampede to a punitive damage award by connecting with the jurors and delivering a message “made to stick.”

What did the manufacturer do? The manufacturer changed the story by focusing on a few facts and by chipping away at the credibility and believability of the story and storyteller.
First, the manufacturer embraced the facts—good and bad—and kept its position crisp and simple. The first words of the defense voir dire and opening statement acknowledged and sympathized with the plaintiffs’ tragic loss and severe injuries. No effort was made to minimize the tragedy or the plaintiffs’ suffering. An exemplar 50-pound spare tire was used in the defense opening statement and was loudly slammed to the ground multiple times to emphasize—not minimize—its massive size and weight. The tearing of the bracket in this crash, the failure of even thicker brackets in earlier model crash tests, and the absence of failures in the more robust bracket used in subsequent models were readily admitted. No attempt was made to defend the design, manufacture, or failure of the accident bracket. Instead, the manufacturer focused on (1) the violent forces of the head-on crash and the effect of those forces on the little girl’s unrestrained head and neck, and (2) whether a 50-pound tire could slam into the head of a two-year-old child—nearly decapitating her—and leave only a small bruise, the size of a nickel.

Second, the plaintiffs’ counsel opened voir dire by introducing himself and his team and the manufacturer’s counsel’s team, and noted that the manufacturer’s lead counsel resided in a different state. This attempt at distancing the manufacturer’s lead counsel had an unexpected effect. It opened the door for the manufacturer’s lead counsel to talk about his upbringing in the jurisdiction and his identification with the community in which the case was tried.

Third, the plaintiffs used surprise witnesses who very slightly exaggerated their recollections, which undercut the credibility of these witnesses and effectively undercut the credibility of the plaintiffs’ entire team.

Why did this work? How did these actions reverse the tide that was overwhelmingly in the plaintiffs’ favor?

We Fit Reality into the Stories We Believe
The stories that flash into our brains the moment we see or hear a bit of information form a template into which new information is then incorporated. Once formed, it is hard to shake our story. Thereafter, we selectively receive new information with a bias toward confirming our original story. Psychologists call this “confirmation bias.” Ancient people believed sacrifice improved their crops. They confirmed that story by remembering all of the times when the crops improved after a sacrifice, and they made up explanations for why the crops were bad in other years. This is common.

Social science research has repeatedly found that our minds, even when we are infants, are not blank slates. To survive, our brains have developed an instant “flight or fight” reaction that quickly evaluates incomplete information. When we hear a loud sound, we are startled and react immediately. As we gain more experience and training, our reaction becomes more refined. A sudden loud sound may cause some to drop to the ground, others to run away, and some trained emergency first responders to run toward the sound. Our training of our brain’s instant reaction is often unconscious. The color of a person’s skin, gender, a facial expression, an occupation, or the
location where one resides often triggers implicit biases—instant stories—that we react to with little understanding of why.

Even those who think they are not biased are often surprised when they take an Implicit Attitude Test (IAT) and find themselves unconsciously making assumptions based on limited information. Mahzarin R. Banaji & Anthony R. Greenwald, Blindspot: Hidden Biases of Good People (2013). We see an Asian person and assume that person is good at math and science and knows how to use a camera. All we see is a person of Asian descent. But we instantly fill in the picture with a story about the characteristics we associate with the image of persons of Asian descent.

As we explore this concept further, we find that the stories and pictures running through our heads create beliefs that define the world we see. Once defined, we selectively observe events around us and force those events to fit into our story and, in a circular motion, confirm the truth and legitimacy of that story. Michael Shermer, The Believing Brain: From Ghosts and Gods to Politics and Conspiracies—How We Construct Beliefs and Reinforce Them as Truths (2012).

Through Stories, We Categorize
As in the “fight or flight” instant stories, we use stories to categorize, organize, and interpret incomplete information. An animal smells a strange odor and instantly assesses whether it is something to be feared or not. The odor—of a predator or food—triggers an instant reaction to run or be drawn to it, even if it is an artificially created odor to repel or bait the animal. We similarly categorize people and situations by bits of incomplete information—color of skin, age, education, occupation, marital status, accent, weight, clothes, and political party affiliation. Knowing a bit of information instantly puts a story in motion in our mind that completes the pictures and explains the situation to us.

New Facts Present a Critical Juncture for Persuasion
New facts either confirm our original story or create dissonance. Dissonant facts cause us to do one of three things: (1) reject the new fact as unreliable or unimportant, (2) accept the new fact and fit it into our story, or (3) accept the new fact and use it to change our story.

Here is the critical juncture for persuasion. Will the new facts and arguments you present cause the listener to reject your facts and arguments or use your facts and arguments to either reinforce the listener’s story or alter his or her story?

First Step: Can I Trust You? Are You with Us or Against Us?
The first and most important step in persuasion is trust. Can I trust you? Can I accept what you say as true? Can I believe in you? Unless you overcome this first hurdle, the facts and arguments you present are meaningless. No matter how much they may contradict the story in the listener’s head, the listener is not listening and is discounting your facts and arguments because he or she doesn’t believe they have any validity.
Trust is more than just truthfulness. We do not trust someone unless we believe that person is truthful, competent, and sincere. We would not trust the most honest person to perform surgery on us if that person has not demonstrated by credentials, reputation, track record, or in some other manner the skills to ably perform. Similarly, even if someone is truthful and competent, we are not inclined to trust that person and follow his or her lead unless we feel that person has integrity and has our best interests in mind. We need to feel he or she is on our side and jointly seeking the same ultimate goals as we are. We need to feel that the speaker sincerely cares about us before we are inspired to follow his or her lead. With trust, not only are we willing to hear what the speaker has to say; we feel we are part of the speaker’s story and are willing to modify our own story to be a part of that story.

Second Step: Empathy—Can You See and Feel What I See and Feel?
The second step of persuasion is empathy—can you connect to the pictures and feelings in the listener’s head and heart? No matter how truthful or sincere the sounds from our mouths or our actions may be, we cannot persuade if we do not understand how those same sounds and actions are being interpreted by the other. What we may think we are conveying is of no consequence. What is received—no matter how distorted—is the only thing that matters.

A skillful and sincere visiting opposing player suggests a play to the coach of the home team. In the visiting player’s mind, he just wants to help. What is conveyed, however, is not his intention. What is conveyed is the act, which will be interpreted by the home team through its own template of stories. The visiting player is the opposition. Not one of us. The visiting player wants to win for his team. Not for us. The visiting player has a vested interested in misleading us. Not helping us. The visiting player does not care about us and cannot be trusted to be acting in our best interests. Whether true or not, the stories dictate how the act is received.

Sometimes an unexpected act and how it is presented can change the story in another’s head and completely transform the other’s perspective. In 2008, Sara Tucholsky hit a three-run home run out of the park (the first of her career) and hurt her knee rounding first base. The umpire ruled her teammates could not help her around the bases. In a remarkable display of sportsmanship, the opposing team’s player on first base, Mallory Holtman, asked the umpire if she could help Sara around the bases. The umpire saw nothing in the rules to prevent it. So Mallory and her teammate Liz Wallace carried their opponent Sara around the bases and had Sara touch every base, including home plate. In that inspiring moment, everybody in the stadium—regardless of which team you were previously rooting for—felt a transformation of the story in their heads and hearts. All were part of the same team cheering and tearing up for Mallory and Liz. The act transcended the game and created a new story that included everyone. Good stories do that. They change our perspective by redefining the boundaries between us and by changing the context of acts and events before us.

Good Stories Transport Us and Show Us a World We Never Saw Before
Like movies and novels, good stories transport us from where we are to far-away places and distant thoughts. We are exposed to new perspectives through the eyes of the characters. Stories
help us empathize and see beyond our biases. The key to an effective story is how it defines the
group with which we identify.

Martin Luther King created a movement that stretched far beyond the black community by
creating inclusive images of America and its people that left no one out. He repeatedly used
words like “we” and infused his speeches with phrases from the U.S. Constitution, the
Declaration of Independence, and the Bible—conceptual instruments encompassing more than
one subset of America.

Nelson Mandela unified an apartheid South Africa by governing with a vision that included all
South Africans—white and black. Despite being jailed for years by the white apartheid
government, Mandela shunned visions of black revenge and instead became the nation’s leading
cheerleader for a mostly white national rugby team that brought blacks and whites together in
support of their country’s team against the world.

**Reversing Tides**

Changing hearts and minds requires trust, empathy, and a story that transforms our views about
each other and the context of the events before us.

**Keywords:** litigation, trial practice, confirmation bias, Implicit Attitude Test, incomplete
information

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PRACTICE POINTS

Fourth Circuit Allows Appeal Where Appellant Gives "Functional" Notice of Appeal

On July 12, 2016, the Fourth Circuit Court of Appeals held that a document filed by a pro se litigant as an extension of time to request a certificate of appealability qualifies as the notice of appeal required by Rule 3 of the Federal Rules of Appellate Procedure. Clark v. Cartledge, No. 15-6248, decided: July 12, 2016.

In 2006, a jury convicted Keith Alan Clark guilty of kidnapping and assault with intent to commit criminal sexual conduct. He was sentenced to concurrent sentences of 30 years. After a series of unsuccessful appeals and post-conviction procedures in South Carolina courts, Clark filed a pro se petition for writ of habeas corpus in the U.S. District Court for the District of South Carolina, pursuant to 28 U.S.C. § 2254, alleging several constitutional violations stemming from his conviction, including, among others, that he received ineffective assistance of counsel in violation of the Sixth Amendment. On December 4, 2014, the district court granted summary judgment for the defendant. In that same order, the district court denied Clark a certificate of appealability, finding that he failed to meet 28 U.S.C. § 2253(c)’s standard for issuance of such a certificate. On December 18, 2014, Clark, still pro se, filed a motion for extension of time to request a certificate of appealability.

Federal Rule of Appellate Procedure 3(c) requires that a “notice of appeal must specify the party or parties taking the appeal; designate the judgment, order or part thereof being appealed; and name the court to which the appeal is taken.” Fed. R. App. P. 3(c). The requirements of Rule 3 are mandatory and “jurisdictional in nature.”

Here, the Fourth Circuit held that “functional” rather than formalistic compliance is all that is required. The Fourth Circuit, has previously held that the policy of construing notices of appeal liberally applies “especially” to pro se filings. “Therefore, as long as the pro se party's notice of appeal provided the notice required by Rule 3, evinced an intent to appeal an order or judgment of the district court, and the appellee was not prejudiced or misled by the notice, then the notice's technical deficiencies will not bar appellate jurisdiction.”

Appellant attorneys, who are asked to review a recently dismissed pro se appeal, may seek refuge in “function” rather than form.

— John Austin, Austin Law Firm, Raleigh, NC
First Circuit Affirms Lower Court’s Substitution of Parties Post Judgment

Where the judgment debtor purportedly transferred its interest in intellectual property belonging to the debtor to the mother of the president of the debtor, Malek Benin, prior to the lawsuit, the First Circuit Court of Appeals held that the district court properly employed rule 25(c) to substitute the mother and subsequently incorporated company as joint judgment debtors to the original party. Rodriguez-Miranda v. Benin et al, Nos. 14-1334, 14-1518, decided July 13, 2016.

Nearly a year after obtaining the original judgment, Rodríguez filed a motion asking the district court to order the sale of Coquico’s assets to satisfy the judgment, which was approved by the Court. Three days prior to the sale, Benin’s mother, Acquanetta Benin sought to intervene in the collection action and to stay execution, claiming that she was the record owner of the property set for sale having previously purchased the relevant intellectual property from Coqui years before. Benin moved to stay the sale of the intellectual property, arguing, for the first time, that Acquanetta was an “indispensable party to the action” because she, not Coquico, owned the property. Throughout the previous action, Benin represented “that Coquico—not Acquanetta—was the owner of the copyrights. Now, Benin alleged his mother “purchased” the intellectual property back in 2006. The district court denied both Acquanetta’s motion to intervene and Benin’s motion to stay the sale.

On appeal, Benin argued that “the district court erred in using rule 25(c) to hold them liable for the judgment entered in favor of Rodríguez.” Rule 25(c), which governs the substitution of parties, provides, in relevant part:

(c) Transfer of Interest. If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party.

Although rule 25(c) applies only to actions that are “pending,” it “does not preclude substitution during subsequent proceedings brought to enforce a judgment.” A proceeding to enforce a judgment is “pending again, and Rule 25 applies.” The court found the debtors’ arguments “disingenuous, to say the least, . . . to argue now that the district court erred in its application of Rule 25(c) because the transfer of interest occurred after judgment had been entered,” given their prior representations and claims.

In addition to using a fraudulent conveyance claim, creditor rights’ practitioners can also look for relief under rule 25(c) where debtors allege valuable assets have been transferred to third parties.

—John Austin, Austin Law Firm, Raleigh, NC