

PROGRAM:

“Guerilla Tactics for Defense Lawyers”

Real-Time Agenda

- 00:00 – 0:02:15 Introduction: What do we mean by “Guerilla Tactics”?
- I. Going the extra mile.
  - II. Cultivating independence.
  - III. Innovative thinking.
  - IV. Challenging conventional wisdom.
  - V. Using tools for success in the courtroom.
- 0:02:15 - 0:08:40 Part One: The Critical Path
- I. The critical path as a project-management tool for litigators.
  - II. Structure and components of a useful critical path.
  - III. How to use the critical path.
  - IV. Rules for docketing deadlines.
- 0:08:40 - 0:53:30 Part Two: Defensive Pleadings
- I. Drafting a clear and coherent answer to a complaint.
  - II. Use of a qualified, general denial.
  - III. Pleading affirmative defenses.
    - a. Waiver of defenses not pled under Rule 8(c).
    - b. Amendment of defenses under Rule 15(a).
    - c. Trial amendments under Rule 15(b).
    - d. Effect of denial of leave to amend.
    - e. Application of Rule 11 to affirmative defenses.
    - f. Pleading defenses hypothetically under Rule 8(e).
      - i. Pleading intervening/supervening/insulating negligence hypothetically.
        1. Inapplicability of hornbook rule regarding liability for subsequent malpractice in North Carolina.
        2. NC Pattern Jury Instruction 102.14.
        3. NC Pattern Jury Instruction 102.65.
        4. Duty to request instruction on insulating negligence.
      - ii. Pleading the statute of limitations hypothetically.
        1. Long-term care cases.
        2. Wrongful death cases converted to injury claims by the jury under the *Alston* rule.

0:53:30 – 1:44:45

Part Three: Discovery

- I. Communicating with your client about discovery duties.
  - a. The initial representation letter.
    - i. What to expect.

- ii. Records to be preserved.
  - iii. Hazards of failing to preserve records.
  - iv. Segregating attorney-client communications.
  - v. Advice against statements to third parties.
- II. The Chronological Index of the Evidence
  - a. Assign a Bates number to each page of discovery produced or received.
  - b. Note the Bates numbers of relevant documents when reviewing discovery.
  - c. Use the Chronological Index of Evidence to weave relevant discovery documents into a narrative story of the case annotated with the Bates numbers of those documents.
  - d. Using the Chronological Index of Evidence with experts.
  - e. Protecting the chronological index of evidence from discovery.
- III. Using Bates numbers to prevent disputes regarding documents produced in discovery for use at trial.
- IV. Witness interviews
  - a. Recording interviews for later use in impeachment.
- V. Joint Defense Agreements
  - a. What is a joint defense agreement?
  - b. What is the joint defense privilege?
  - c. North Carolina cases on the joint defense privilege.
  - d. Discoverability of the joint defense agreement.
  - e. Inadmissibility of the joint defense agreement.
  - f. What to do if the jury learns of a joint defense agreement.
  - g. Essential clauses in a joint defense agreement.
  - h. Caution when defendants are reluctant to agree.

1:44:45 – 2:24:12

Part Four: Jury Selection

- I. Obtaining the jury pool list from the clerk of court.
- II. Uses for the jury pool list.
- III. Identifying the biased potential juror.
- IV. Online searches for information about potential jurors.
- V. Avoiding constructive contact with potential jurors online.
- VI. Questioning the juror who admits sympathy for the defense.
- VII. Selecting a corporate representative for jury selection and trial.
- VIII. Preparing the corporate representative for jury selection and trial.
  - a. Dress and demeanor.
  - b. Keeping confidentiality.
  - c. Conversation manners.
  - d. Social media concerns.
  - e. Courtroom etiquette.
- IX. The importance of intimacy and connection in jury selection.
- X. Questioning techniques to use in jury selection.
  - a. The question you need to ask first.
  - b. Educating the jury about the burden of proof.
  - c. Inoculating the jury against sympathy.

- 2:24:12 – 2:33:32      Part Five:      Opening Statement
- I.      What opening statement is and is not.
  - II.     How to give a persuasive opening statement.
  - III.    Learning to tell a story.
  - IV.    How to memorize your opening statement.
  - V.     Limiting the use of demonstrative aids.
- 2:33:32 – 2:46:05      Part Six:      The Charge Conference
- I.      Revising the pattern instruction on proximate cause.
  - II.     Revising the pattern instruction on impeachment by prior inconsistent statement.
- 2:46:05 – 03:04:34      Part Seven:    Closing Argument
- I.      Find a cause, not a defense.
  - II.     Give your cause transcendent meaning and a higher purpose.
  - III.    Repurpose your corporate client in the person of its human actors.
  - IV.    Inspire the jury to care about your defense by giving them a shared sense of higher purpose.
  - V.     Examples from closing arguments in three trials.

**Total CLE Instruction Time: 184 minutes (3 hours 4 minutes)**