ANATOMY OF A CLAIM – TRIAL

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This article is the third of Gallagher Sharp's "Anatomy of a Claim" series, and will provide an overview of the trial process. Our first article outlined the initial steps in claim handling from first notice to suit. Our second article discussed the discovery process and exploring mediation. The next step is trial.[1]

Assuming one or more of the parties made a jury demand in the initial pleadings, they may revisit whether they want to try the case to a judge or jury. Ohio Civ.R. 38, 39. This is an important decision that takes into account a variety of factors including the judge's prior rulings for or against a party, how complicated the case is, how sympathetic a party may appear, and time constraints, as trying the case to the bench may be more expedient.

The trial court generally has a pre-trial litigation schedule that governs the due dates for motions in limine, trial briefs, jury instructions, jury interrogatories, stipulations, and the exchange of exhibits and witness lists.

Motions in limine are filed before trial to seek a pre-trial ruling on an evidentiary issue. The "purpose of a motion in limine is to avoid the injection into a trial of a potentially prejudicial matter which is not relevant and is inadmissible." *Rhinehart v. Toledo Blade Company*, 21 Ohio App.3d 274, 278 (1985). Although not expressly provided for by rule or statute, a trial court has inherent power to entertain a motion in limine. *Rich v. Quinn*, 13 Ohio App.3d 102, 105 (1983). Common motions in limine seek to exclude expert testimony, prevent the plaintiff from referring to insurance, or exclude the other party from introducing an exhibit.[2]

It is difficult to know exactly when an expert witness will have to be available to provide trial testimony because the trial schedule can be inexact. It may be costly or logistically difficult to have an expert witness on standby for a day or more to testify, particularly when the expert is not local. Therefore it is common to have one or more experts appear at trial by pre-recorded video,

[1] We note that this article describes what generally takes place when a case goes to trial. Specific courts and judges may have their own unique procedures that can be found in the local rules or the trial order.

[2] If there is a claim for punitive damages the defendant should make sure that the punitive and compensatory portions of the trial are bifurcated. R.C. 2315.21(B)(1) requires a two-stage bifurcation of the trial upon the motion of any party in a tort action that is tried to a jury and in which a plaintiff makes a claim for compensatory damages and a claim for punitive or exemplary damages. In *Havel v. Villa St. Joseph*, 131 Ohio St.3d 235, 2012-Ohio-552, the Supreme Court of Ohio held that the statute creates a substantive right and, therefore, takes precedence over the discretion conferred by Civ.R. 42(B) to grant or deny bifurcation. In cases governed by R.C. 2315.21(B), upon the motion of any party the trial court must grant the two-stage bifurcation required by the statute.

and often the trial testimony is recorded after settlement discussions have been exhausted in the weeks before trial. *See* Ohio Civ.R. 40.

The parties may also present interrogatories to be filled out by the jury to clarify a verdict. Ohio Civ.R. 49(B). These are particularly useful if there is an insurance coverage issue that may not necessarily be addressed by a simple verdict form for a party. For example, jury interrogatories are commonly used to determine whether a party acted intentionally which would invoke an intentional act exclusion, or to determine what portion of a verdict is insured if one or more claims are not covered.

The trial court often allows the parties to draft a set of proposed jury instructions, and may ask them to confer and submit a joint set.[3] There are standard state and federal jury instructions on common legal issues, but when there are unique issues parties may have to draft their own based on case law. In these instances the exact language of the instruction that the court adopts is extremely important, as it will serve as the legal standard for the jury in making its decision.

Once the day of trial arrives the attorneys and parties appear in court. The attorneys may meet with the judge before the trial begins to discuss any outstanding matters or motions. Potential jurors are brought into the courtroom and the attorneys engage in jury selection, also called voir dire.[4] The court may give the jurors a brief introduction of the case to aid their understanding of what is going on. Ohio Civ.R. 47(A). The jurors are examined under oath to determine their qualifications for trial. The court may permit the attorneys to conduct the examination of the prospective jurors or may itself conduction the examination. Ohio Civ.R. 47(B). The parties may then strike jurors "for cause," which includes an inability to apply the law, manifest prejudice for or against a party, or fitness to sit through the trial. R.C. 2313.17.

In addition to challenges for cause, each party may peremptorily challenge three prospective jurors. Ohio Civ.R. 47(C). This allows a party to strike otherwise qualified jurors because they consider the jury unfavorable to their position. *See Golden v. Wirts*, 3rd Dist. No. 1-02-24, 2003 WL 244863, ¶ 10.

Once a jury is selected the trial begins. The attorneys each present an opening statement with the plaintiff going first. Opening statements are not evidence but are a "road map" the attorneys present to the jury as a preview of the evidence that the attorney believes will be introduced during the case. *City of Columbus v. Rano*, 10th Dist. No. 08AP-30, 2009 WL 311434, ¶ 6.

After the attorneys have finished their opening statements, the plaintiff presents its case first and calls witnesses one by one to testify. The defense is given an opportunity to cross-examine each witness, and the plaintiff is given the opportunity to clarify issues brought out during cross-examination. Once the plaintiff's witnesses have testified and the plaintiff has introduced the exhibits it wishes to move into evidence, the plaintiff rests its case. The defense may then move for a directed verdict (called a judgment as a matter of law in federal court), which is an order from the court determining that the plaintiff's evidence was so insufficient that no reasonable jury could reach decision in its favor. Fed. Civ R. 50; Ohio Civ.R. 50.

[3] The parties may submit legal briefs to the court if the matter is tried to the bench.
[4] If it is a bench trial before the judge, voir dire is not necessary because there is no jury.

The defense presents its side of the case with its witnesses and exhibits. After the conclusion of its presentation the defense will rest its case. The parties then give closing statements. Like the opening statement, the closing statement is not evidence. The closing statement is counsel's summation of the evidence presented and the party's position. *See Allen v. Lawhorn*, 131 S.Ct. 562, 564 (2010). The court allows the parties a good deal of leeway, and closing statements are often referred to as "closing arguments."

The judge will read the instructions to the jury and the jury will begin deliberations. Jury deliberations can last hours or days. In federal court a civil plaintiff's verdict must be unanimous, while in an Ohio state court a plaintiff's verdict needs only three-quarters of the jurors. Fed. Civ.R. 48(b); Ohio Civ.R. 48. Once the jury reaches a verdict, the parties are notified and the verdict is read in open court.

