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Decision-Making

by **John Day**

Trial lawyers are required to make a number of decisions throughout the life of a case. Some are minor (*e.g.,* Do I ask this interrogatory in this case?) and some are major (*e.g.,* Should I settle with one of multiple defendants in a case in which several liability applies? Should I accept this case on a contingent fee basis?)

The best trial lawyers have confidence in their judgment and know that after due consideration of the relevant factors, their decision will usually be right. They also know that most problems that arise from a wrong decision can be fixed. These trial lawyers know that if the decision is one more significant - such that an erroneous decision cannot be fixed or that harm is unavoidable - more caution is required in the decision-making process (but a timely decision must still be made). They know which decisions they can make on their own and which decisions require informed consent from the client.

Register for our Fundamentals of Civil Litigation Seminar (see insert) by March 31st to receive copies of John's Books: *Compendium of Tennessee Tort Reform Statutes and Related Case Law* AND *The Law of Civil Trial* **ABSOLUTELY FREE!**

Most importantly, the best trial lawyers know that an erroneous decision is usually not as bad as the failure to make any decision at all. Too many lawyers become frozen when making a tough decision and the resulting delay all too often causes a different kind of harm. You must do what you can to avoid analysis paralysis.

This does not mean that outstanding trial lawyers make uninformed judgments. Rather, they gather the relevant information before making a decision, *i.e.,* they search out the facts necessary to make the decision and do appropriate legal research to assist in the decision-making process. If during the decision-making process it becomes apparent that more information is required, excellent trial lawyers will identify what information is needed, decide how to obtain that information, gather that information, and then make a decision.

For example, what facts should you explore and gather to allow the trier of fact to evaluate an issue? You are urged to start with the law, and not just a headnote or two. Look into the case law and gain an understanding of the types of facts previously articulated by the courts as they apply the law. What facts were important to the court in reaching the result in a given case? Do you know if those facts exist in your case? If not, how can you find out quickly and inexpensively whether they exist? *(Continued on Page 4.)*

IN THIS EDITION

QUICK TIPS

TO MAKE YOUR BRIEF BETTER

by
Liz Sitgreaves

Finding that spot-on case citation or authority when writing an appellate brief can be a magic moment. However, if you have ever found case law that you thought would be the best authority to cite in your brief, only to realize that the case has been designated "Not For Citation," it can be quite the opposite. Thus comes a lesson in citation to authority: not all authority is created equal (by the rules). This lesson is one that we as attorneys began to learn in law school. Citations to Supreme Court opinions and statutes are better than lower court opinions and treatises.

The first tip for making your briefs better is to remember the rules regarding citations. Tennessee Supreme Court Rule 4 states that unpublished opinions (*i.e.*, opinions not published in an official reporter) shall be considered controlling authority between the parties to the case when relevant under the doctrines of the case, *res judicata*, collateral estoppel, or in a criminal, post-conviction or habeas corpus action involving the same defendant.[1] Rule 4 goes on to state that unpublished opinions are persuasive authority unless designated as "Not For Citation" "DCRO" or "DNP." Cases that have been designated "Not For Citation" have no precedential value. Tenn. R. Sup. Ct. 4.

Similarly, Tennessee Court of Appeals Rule 10 provides that the Court may issue opinions known as "Memorandum Opinions." Memorandum Opinions are ones that affirm, reverse, or modify the actions of the trial court when the Court determines that a formal opinion would have no precedential value. Tenn. Ct. App. R. 10. Rule 10 provides that a Memorandum Opinion "shall not be published" and "shall not be cited or relied on for any reason in any unrelated case." Keep in mind these citation rules can be especially useful when researching for authority to support your position in a brief. It also can be useful to keep these rules in the back of your mind when reviewing cases cited by opposing counsel. Being able to point out to the Court that authority the other side has relied upon cannot be used for citation purposes can be a victorious moment in a brief (though obviously doing it with tact is preferred).

Lastly, when reviewing any opinion to determine whether it will serve as persuasive authority, it is important to consider the weight of the opinion in terms of whether the case law you intend on pointing to is a holding of the Court on the legal issues presented in the appeal or *judicial dictum*. Though even if the language may arguably be "*judicial dictum,*" the Tennessee Supreme Court makes clear that their statements must be given the appropriate weight:

> [T]rial courts must follow the directives of superior courts, particularly when the superior court has given definite expression to its views in a case after careful consideration. Accordingly, inferior courts are not free to disregard, on the basis that the statement is *obiter dictum*, the pronouncement of a superior court when it speaks directly on the matter before it, particularly when the superior court seeks to give guidance to the bench and bar. To do otherwise invites chaos into the system of justice.

Holder v. Tenn. Judicial Selection Comm'n, 937 S.W.2d 877, 822 (Tenn. 1996) (internal citations omitted).

Keeping in mind these rules regarding citation of authorities can make your briefs better and most importantly can make sure that you are citing to the appropriate authority to make your argument on appeal the most persuasive.

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[1] Though most practitioners are likely aware of this change, Tennessee Court of Appeals Rule 12 now states that a party is not required to furnish the court with a copy of an unpublished opinion if the opinion is available from an Internet-based electronic database (*e.g.*, Westlaw or Lexis) and if the citation to the unpublished case includes both the appropriate citation to the electronic database and whether a notice of appeal was filed or the outcome of such a filing in accordance with subsection (b) of Rule 12.

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SOME NOT SO MINOR CONSIDERATIONS

FOR SETTLEMENTS FOR MINORS

by
Caroline Hudson

When a minor child has a claim as a result of a personal injury, there are a few things to consider in your representation, including that a minor's personal injury settlement must be approved by a judge. A minor settlement hearing can be scheduled with either the court clerk or the judge's assistant. Generally, the judge hosts the hearing in his or her chambers.

Whether a minor is required to be present at the hearing depends on the amount of the settlement. If the settlement is under $10,000.00, the minor does not have to be present at the hearing. The legal guardian or parent does not have to attend so long as the judge approves of this arrangement and the legal guardian or parent completes an affidavit.[1] If the settlement is over $10,000.00, the minor and the legal guardian must be present at the hearing.[2]

Before the hearing, prepare a Petition / Motion for Court Approval of Minor Settlement and an Order Approving the Settlement to present to the judge. The minor settlement documents generally include a description of the tort, description of the minor's injuries, name of the minor's parent / legal guardian, and the amount of the proposed settlement. Any subrogation, rights of reimbursement, outstanding medical bills, hospital liens, and requests for attorneys' fees and expenses can also be included in the minor settlement documents. The Petition / Motion should state where the petitioners are requesting the settlement funds be held by the court clerk in an interest-bearing account until the minor reaches majority, disbursed directly to the parent / legal guardian, placed in a special-needs trust, or held by any other means that is in the best interest of the minor.

If the case is not in litigation, a fee to file the petition is usually required. Call the clerk before the hearing to find out the petition costs, or better yet, request that the at-fault party's insurance carrier pay the fees during negotiations.

Minor settlement hearings can differ depending on the judge. Be prepared to tell the judge a summary of the case; though in some jurisdictions, the judge may ask the minor's parent / legal guardian to answer questions under oath, or the judge may want the attorney to ask the parent / legal guardian questions (much like a direct examination). Most non-lawyers have never been in front of a judge or been asked questions under oath before – so preparing the client for this possibility generally makes the hearing easier on everyone involved (and less stressful on the client).

The judge has discretion to approve the minor's settlement and the attorneys' fees.[3] Attorneys' fees are governed by *Wright ex rel Wright v. Wright*, 337 S.W.3d 166 (Tenn. 2011) and Rule 1.5(a) of Tennessee Rules of Professional Conduct. An attorney is entitled to a reasonable fee when representing a minor, and a judge determines whether a fee is reasonable.[4] An attorney's declaration or affidavit can be submitted to the judge to support his or her request for attorney's fees. A declaration or affidavit in support of attorney's fees generally includes the name of the attorney / firm; who the attorney / firm is representing; how the firm was retained; the amount of hours expended on the case; a description of the attorney's / firm's activities on the case; and states the requested attorney's fees and expenses incurred by the firm. Before the hearing, re-read the *Wright* case and Rule 1.5(a). The rest is up to the judge!

QUOTES FOR TRIAL LAWYERS

A traditional story of Marshal Wright's was that when Jeremiah—otherwise "Jerry"—Wilson began an elaborate opening by citing many of the fundamental authorities, he was interrupted by an Associate Justice who said that Mr. Wilson ought to take it for granted that the Court knew some elementary law. To this "Jerry" Wilson replied: 'Your Honors, that was the mistake I made in the Court below.'

-Charles Henry Butler, A Century at the Bar of the Supreme Court of the United States, 88-89 (1942).

[1] Tenn. Code Ann. § 29-34-105. The affidavit should include a description of the tort; a description of the injuries of the minor involved; a statement that the affiant is the legal guardian; a statement that it is in the best interest of the minor to settle the claim in the approved amount; and a statement of what the legal guardian intends to do with the settlement proceeds until the minor reaches the age of eighteen.

[2] *Id.*

[3] *Id.* § 34-1-121; *Wright ex rel Wright v. Wright*, 337 S.W.3d 166 (Tenn. 2011).

[4] *Wright*, 337 S.W.3d at 176.

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Decision-Making

(CONTINUED FROM P. 1)

by
John Day

Does the case law articulate other factors that may have influenced the outcome of the case but were not applied because the facts supporting those factors were not before the Court? If so, investigate and determine whether those facts can and should be developed in your case.

Finally, consider the current case law on your issue, and determine whether you have or can develop facts supporting other factors the court (or a jury) should consider in making a decision (even though those factors have not been previously discussed in the case law.) Give thought to developing those facts and preparing to articulate to trier of fact that it should add these factors (supported by your facts) to its analysis of the issue. Good trial lawyers think outside the box and craft creative arguments within the boundaries of the law.

The best trial lawyers are aware that decisions often have both short-term and long-term consequences. For example, the decision to withhold the production of documents or information that should have been produced may result in that information being excluded at trial – and an adverse inference jury instruction. It will also result in harm to your reputation – both opposing counsel and the trial judge (and likely others) will know that you have (and presumably will again) play games with discovery. Think about the ramifications of your decisions on your future ability to represent your clients.

Other decisions will also have long-term consequences: A decision to accuse a defendant of intentional misconduct may invalidate any liability insurance coverage applicable to the claim. A decision to make public embarrassing or scandalous material about the defendant may reduce his or her incentive to settle the claim – once the bullet is out of gun, it cannot be shot again. Think long and hard about making even known embarrassing and scandalous material about your adversary public.

Good trial lawyers are very wary of making case evaluation decisions early in a case. A decision to tell your injury client at the initial meeting the value of a personal injury case is almost always a mistake, as is telling a divorce client that he will receive alimony, and telling a criminal defendant that he will walk on pending felony charges. You will rarely have facts available to you at that initial meeting that allow you to make informed decisions, and you set yourself up for unrealistic client expectations in the short-run and harm to your reputation in the long-run.

So, as you make decisions in your cases, think of the long-term and short-term consequences of your conduct, first on your client and his or her case, and second on you. Your reputation is an asset to your clients as well, so consider whether the decisions you make today will impact the clients your represent in the future.

John Day is the founder and owner of the Law Offices of John Day, P.C. where he has been practicing personal injury law for more than 30 years. His credentials include hundreds of successful cases, several printed books, multitudes of articles, publications, and speeches; and many, many satisfied clients.

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The Law Offices of John Day, P.C., with offices in Brentwood and Murfreesboro, serves plaintiff personal injury and wrongful death clients across the state of Tennessee in truck and car wrecks, medical malpractice, products liability, premises liability and other tort cases. Our highest honor is to be called to assist other lawyers in pursuing cases outside their practice area, or which require the investment of time or money beyond their comfort zone. Referral fees are paid in accordance with the Rules of Professional Conduct. To discuss a case referral, call John Day at (615) 742-4880 or email *referral@johndaylegal.com*. To request a free copy of our book about the process and ethics of case referrals, email *referral@johndaylegal.com*, ask for a copy of "Win Win," and give us your contact information. It will be sent by return mail.