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# "You Play the Judge": Teaching Persuasion by Casting the Novice Legal Writer as Legal Reader and Decision-Maker

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Putting new law students in the role of a legal reader/decision-maker is a powerful tool for getting across the message that CREAC structure, citation use, comma placement, overuse of passive voice, and the like matter to a legal reader. I have found that simply telling them that it mattered is not as effective. Frankly, some students just do not believe me and are convinced that I fantasize about an ideal legal world run by legal writing professors, grammar teachers, and judges with too much time on their hands. Thus, I decided to try the time-tested method of all teachers, young and old: show and tell. If I can show a student that he will have the same reaction that I tell him a judge/senior attorney/client will have to writing problems in a legal document, that student can convince himself that what he is learning about writing does matter. It makes my job easier – I am not merely lecturing to a roomful of students with droopy eyelids and elbows propped up on Torts books – and more fun too!

The following two exercises are examples of the "show" exercises that I use in class during the second semester, when I teach persuasive writing. I have found these exercises work better second semester simply because I have more time to do them and students have more experience with reading critically and editing. In the past, I have also modified the "Poor Memo/Better Memo" exercise using a predictive memorandum in the first semester; this worked well too, although I found I had to provide a little more prompting during the exercise. Following is a breakdown of how I approach these exercises:

## Exercise #1: Friend or Foe

Object of exercise: To show students that places of emphasis in a sentence (or paragraph) do carry persuasive weight and will affect how a reader perceives the subject matter in a document.

Operation: At the end of a class period prior to the one during which I will discuss persuasive writing techniques and prior to any reading on the subject, I pass out a slip of paper to each student; half of the class receives one sentence, while the other half receives a second sentence. I do not tell students they have different sentences. The sentences are the following:

*Although Jon is sometimes lazy and is tardy to class, he performs well in Contracts.*

*Although Jon performs well in Contracts, he is sometimes lazy and tardy to class.*

I ask the students to read their sentence, and then I tell them that they need to pick a new member of their fictitious Contracts study group. I also tell them that all members agree that the new member should be "able to carry his own weight and be a productive member of the group." Then I ask who would recommend Jon to join the group.

Generally (it has never been 100%), the half of the class with the first sentence recommends Jon, while the second half of the class disfavors him. I conclude the class by letting them in on the exercise: that I circulated two different sentences, yet both had the exact same information. Students are very interested to see that the same information, with different emphasis positions, can make a difference in a reader's perception. This has the added benefit of making them eager to read the material for the next class!

Time: Very easy and short – no more than five minutes.

**Exercise #2: Poor Memo/Better Memo**

Object of exercise: To put students in the role of a frustrated reader and decision-maker. I mainly use this exercise to show that overall structure (CREAC) and detail matter to a reader. This exercise is easily modified to focus on other skills, such as rule synthesis or citation. It can also be modified and made shorter by focusing only on one aspect of the entire memorandum, such as the background portion or the roadmap.

Operation: I give the students a copy of the "Poor Memorandum," but *I do not tell them that there is anything wrong with it.* Instead, I ask them to play the judge by reviewing it and returning to class the following day with a decision: should we grant the motion or deny it? This exercise can also be done over one long class period, with the first half devoted to reading the memorandum and the last half devoted to discussion. Students can either work individually in reading and deciding the outcome of the motion, or they can work in groups. I find the latter choice works best when I use the exercise as an in-class exercise.

Once the students have read the memorandum and reconvened, I ask for their decisions by a show of hands. I also ask if anyone had a hard time with it; inevitably, most students raise their hands when I ask this question (warning: students will also approach you during the reading portion of the exercise to express frustration; I tell them I will entertain no discussion until the discussion period). This opens up the discussion period, when I then ask the students how this memorandum could be improved to help them render a decision. We go through the memorandum paragraph by paragraph, and I write student suggestions on the board; of course, I add some too as necessary. At the end of the discussion, I then produce the "Better Memorandum" for them to read and compare with the "Poor Memorandum." I sometimes annotate the "Better Memorandum" in the margins to show structure (CREAC) and policy.

Student response to this exercise is overwhelmingly favorable. Because I give this exercise between the two drafts of their trial motions and memoranda, many students readily apply the lesson to their own writing and respond with "I forgot the roadmap too," or "Yep. I didn't compare facts with facts either." This exercise then gives them an idea of things to improve on their rewrites.

Time:

I devote an entire class period to this exercise. I also give this exercise between drafts of their trial motions and memoranda. Some students have suggested that this exercise would be helpful earlier (before the first draft is due), but I find that if it is given too early, then students do not have any of their own writing to compare it with for learning purposes.

# POOR MEMORANDUM

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

| | |
|---|---|
| BEN WERKIN,<br>Plaintiff,<br>v.<br><br>U.R. FYRED CO.,<br>a Delaware corporation,<br>Defendant. | Case No. 004-TSH-012345 |

## MEMORANDUM OF POINTS AND AUTHORITIES

Dr. Kay Meleon would like to testify that she now adopts the expert opinion of Dr. O. Riginal. Dr. Riginal cannot be in court. Dr. Riginal found that Ben Werkin indeed suffers from post-traumatic stress syndrome. The Federal Rules of Evidence only allow this kind of expert testimony in certain instances. Our client, the Defendant, does not believe this is one of those instances. The Court must grant its Motion in Limine.

### Background

Both Dr. O. Riginal and Dr. Kay Meleon believe that Ben suffers from post-traumatic stress syndrome, even though Dr. Meleon originally believed that he did not have the disorder. Ben is upset with Defendant because Defendant fired him, and he has sued the Defendant. Defendant had other reasons for firing Ben, however, and believes that it is not liable.

In any event, Dr. Meleon should not be allowed to testify because she changed her mind and has no independent understanding of Dr. Riginal's methods or reasoning.

I. DR. KAY MELEON'S TESTIMONY IS NOT PROPER UNDER RULE 703 AND CANNOT BE INTRODUCED INTO COURT. HER TESTIMONY IS ALSO INADMISSIBLE HEARSAY.

The issue is whether the Federal Rules of Evidence allow one expert to adopt wholesale the opinion of an out-of-court expert. Rule 703 contemplates the proper bases for an expert's opinion, and it does not address this issue directly. In fact, Rule 703 seems to allow any "fact or data" that an expert relies on to be the proper basis for expert testimony, whether or not the fact or data are otherwise admissible. This is too broad for the following reasons.

A. Inadmissible hearsay.

There is no exception to the hearsay rule that allows one expert to testify to another out-of-court expert's opinion. Unless a specific exception applies, hearsay is not admissible in court. Because Dr. Meleon's testimony is hearsay, the Court should not hear it.

B. Dr. Meleon's opinion is inadmissible under Rule 703.

Dr. Meleon changed her independent conclusion and wholly adopted another expert's opinion; she also admitted that she does not know the methods and reasoning behind that opinion. Therefore, the Court should grant the motion in limine to exclude her testimony.

An expert may base his opinion on information not in evidence, including the opinion of other experts, as long as it is proper under Rule 703. *TK-7 Corp. v. Estate of Barbouti*, 993 F.2d 722, 731-733 (10th Cir. 1993) (explaining when adoption of another's opinion is allowed).

In *TK-7 Corp.*, 993 F.2d at 722-724, the court found the plaintiff's expert's testimony improper under Rule 703. This case was about an alleged conspiracy to take over a corporation for purposes of illegally transmitting chemicals to Libya. The court found no evidence that the corporation sustained damages because of the alleged conspiracy. *Id.* at 735. The court also rejected the testimony of an expert because it violated Rule 703:

> That rationale is certainly not satisfied in this case, where the expert failed to demonstrate any basis for concluding that another individual's opinion on a subjective financial prediction was reliable other than the fact that it was the opinion of someone he believed to be an expert who had financial interest in making an accurate prediction. Dr. Boswell's lack of familiarity with the methods and the reasons underlying Werber's projections virtually precluded any assessment of the validity of the projections through cross-examination of Dr. Boswell.

*Id.* at 732.

Because the situations are the same in *TK-7 Corp.* and the case before this Court, Dr. Meleon's testimony is inadmissible under Rule 703.

## Conclusion

The Court must grant Defendant's Motion in Limine to exclude the testimony of Dr. Meleon.

Respectfully submitted this ____ day of _____, 2004.

By_____
Attorney for Defendant

# BETTER MEMORANDUM

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

| | | |
|---|---|---|
| BEN WERKIN<br>Plaintiff,<br>v.<br><br>U.R. FYRED CO.,<br>a Delaware corporation,<br>Defendant. | ) | Case No. 004-TSH-012345 |

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION IN LIMINE TO EXCLUDE TESTIMONY OF DR. KAY MELEON**

U.R. Fyred has filed a motion in limine with this Court to exclude Dr. Meleon from testifying about Plaintiff's alleged disability. Dr. Meleon's opinion is unreliable and inadmissible, as it is not based on her independent medical judgment but is instead merely a parroting of Dr. O. Riginal's opinion. Federal Rule of Evidence 703 only allows experts to rely on opinions of other experts for background facts and data. It does not allow experts to adopt wholesale the opinions of other experts. Plaintiff and Dr. Meleon cannot circumvent the hearsay rules and its requirements by putting Dr. Meleon on the stand to testify to Dr. Riginal's opinion. For these reasons, this Court should grant U.R. Fyred's motion in limine to exclude Dr. Meleon's testimony as a matter of law.

## Background

U.R. Fyred terminated Plaintiff for excessive absences when he missed 140 days of work during 2003. Before he was terminated, Plaintiff never offered any reason for his absenteeism. Although Plaintiff's complaint alleges he suffered from post-traumatic stress syndrome during 2003, Dr. O. Riginal is the only doctor to find this. Because Dr. Riginal is not testifying, Plaintiff is counting on the testimony of Dr. Kay Meleon.

Dr. Meleon's original finding was that Plaintiff did not suffer from post-traumatic stress disorder. This finding was based on a thorough independent medical analysis of Plaintiff during early 2004. In March 2004, Dr. Meleon changed her opinion and now adopts Dr. Riginal's initial assessment. She has not stated any reason for her changed opinion, nor has she admitted an understanding of Dr. Riginal's methods or reasoning.

## II. THE COURT SHOULD GRANT THE MOTION IN LIMINE TO EXCLUDE DR. MELEON'S TESTIMONY BECAUSE THE FEDERAL RULES OF EVIDENCE PROHIBIT HER FROM ADOPTING ANOTHER EXPERT'S OPINION AND TESTIFYING TO IT AS HER OWN.

The wholesale adoption of another expert's opinion is prohibited the Federal Rules of Evidence. Rule 703 contemplates the proper bases for an expert's opinion testimony as follows:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

This rule only patently addresses facts and data relied on by experts, and not the wholesale adoption of another's conclusion, for good reason. Allowing an expert to testify to an out-of-court expert's opinion would rob the parties of any chance to examine the basis for that opinion in court. The wholesale adoption of another's conclusion is expert opinion testimony that should not be heard by any court because (1) it is inadmissible hearsay, and (2) it is not the type of "fact or data" information contemplated by Rule 703. *Cf. In re: James Wilson Associates*, 965 F.2d 160, 173 (7th Cir. 1992) (finding the judge must make sure that the expert is not being used as a vehicle for circumventing the rule against hearsay).

### A. Dr. Meleon's opinion is inadmissible hearsay because she seeks only to repeat an out-of-court expert's opinion.

Hearsay is a statement, made by one other than the one testifying in court, which is offered to prove the truth of the matter asserted. Fed. R. Evid. 801(b). Unless a specific exception applies, hearsay is not admissible in court. Fed. R. Evid. 802. No exception to the hearsay rule patently allows an expert to adopt the entire opinion testimony of another out-of-court expert.

Dr. Meleon seeks to introduce the opinion of Dr. Riginal in court as her own opinion. Because Dr. Riginal is out-of-court, Dr. Meleon's opinion merely parroting his opinion is inadmissible hearsay.

### B. Dr. Meleon's opinion is inadmissible under Rule 703 because Dr. Meleon is unfamiliar with the methods and reasoning underlying Dr. Riginal's conclusion.

Although an expert may base his opinion on facts and data not in evidence, including the opinion of other experts, the key issue is whether the expert would reasonably rely on the second expert's opinion as *background* material in reaching her own independent conclusions. Adopting the entire conclusion of an out-of-court expert is

not permitted under Rule 703, if the conclusion goes to the very matter at issue on which the expert was called to express her opinion. *TK-7 Corp. v. Estate of Barbouti*, 993 F.2d 722, 732 (10th Cir. 1993).

Lack of any independent knowledge of the out-of-court expert's methods and reasoning is the key ground for excluding an expert's wholesale adoption of another expert's conclusion. In *TK-7 Corp.*, the plaintiff's expert adopted the sales projections of a second expert in making his opinion regarding damages in a loss of a joint business venture. The plaintiff's expert had no expertise regarding sales projections, and he was unfamiliar with the methods of the second expert. *Id.* at 731. Specifically, "Dr. Boswell's lack of familiarity with the methods and reasons underlying Werber's projections virtually precluded any assessment of the validity of the projections through cross-examination of Dr. Boswell." *Id.* at 732. Dr. Boswell merely assumed the second expert's conclusions on the very matter at issue on which he was called to express his opinion. Thus, the court found the plaintiff's expert's testimony improper under Rule 703. *Id.*

Like the plaintiff's expert in *TK-7*, Dr. Meleon changed her independent conclusion and wholly adopted another expert's opinion; she also admitted that she does not know the methods and reasoning behind Dr. Riginal's opinion. If Dr. Meleon were allowed to testify to Dr. Riginal's opinion, U.R. Fyred would be unfairly prejudiced by its inability to fully cross-examine the methodology and reasoning supporting the opinion. Therefore, the Court should grant the motion in limine to exclude her testimony.

## Conclusion

For the foregoing reasons, U.R. Fyred asks this Court to grant its Motion in Limine to exclude the testimony of Dr. Meleon.

Respectfully submitted this ____ day of _____, 2004.

By_____
Attorney for U.R. Fyred

## Guide to Making the Poor Memorandum a Better Memorandum

(or what the students should spot when asked to critique the poor document)

Title:

1. It is too general. There may be several pending motions (indeed, motions in limine) before the court at the same time. The title should be specific with party's name and subject of motion.

Introduction:

1. It does not frame the issue clearly.
2. It personalizes the other side (Plaintiff) by calling him "Ben Werkin."
3. It dehumanizes our client by calling our client "Defendant."
4. It gives no general rule to apply. It would be helpful to mention Rule 703 here.
5. It does not identify the client until the last sentence.
6. It tells the court that it must do something. This language is too strong.

Background:

1. It is not told in any discernable order, preferably chronological.
2. It personalizes the other side (Plaintiff) by calling him "Ben."
3. It dehumanizes our client by calling our client "Defendant."
4. It is told from the Plaintiff's perspective in the first few sentences and uses language sympathetic to Plaintiff (ex. fired).
5. It does not give enough background facts (ex. why did U.R. Fyred terminate the Plaintiff).

Point Heading I:

1. It is orphaned at the bottom of a page, which is distracting.
2. It has two sentences when the convention is to use one sentence.
3. It does not follow the formula: "The Court should _____ because_____." In other words, it does not tell the court what the party would like it to do, and it does not include relevant facts.

Roadmap:

1. It does not give a roadmap (ex. "The court should grant the motion for two reasons. First. . .. Second. . . .").
2. It starts with the objective phrase, "The issue is whether. . . ." It should start with a conclusion.
3. It gives no general rule to apply. It would be helpful to quote the requirements of Rule 703 here.

Sub-heading A:

1. It is a label and not a complete sentence.
2. It does not give a rule/conclusion and the relevant facts.

Body of A:

1. It does not give a complete Rule. It does not tell the reader the definition of hearsay; it assumes the reader knows this.
2. It does not give a full factual Analysis; it is too conclusory. It should explain why the doctor's testimony is hearsay by using the facts.

Sub-heading B:

1. It has no relevant facts to support the conclusion.

Body of B:

1. It is not in CREAC format, so it is hard to follow. Instead, it is in "ACREC" format.
2. It does not state a complete Rule; it makes the reader read the case to find out the Rule.
3. It places irrelevant information (conspiracy in Libya) in the Explanation of precedent section. This wastes space and is distracting and misleading.
4. It uses a long, unintelligible quotation in the Explanation instead of giving it in the writer's own words.
5. It starts the Explanation with a distracting interruption: "In [case name]" plus the citation. It should use a topic sentence and put the citation at the end.
6. It uses no specific analogies (or distinctions) of facts to facts. Instead, there is an analogy to conclusions. This is not helpful and causes the reader to make the factual connection.

Conclusion:

1. It tells the court that it must do something. This language is too strong.
2. It dehumanizes our client by calling our client "Defendant."

Overall Concern:

1. There are no policy or equity arguments made in the document.