June Cleaver: Trial Consultant

By Perrin Rynders

On October 1, 1960, having finished their Saturday night dinners, Americans gathered in front of their television sets to watch the season premiere of *Leave it to Beaver*. The Beav's misadventure this time was refusing to eat his Brussels sprouts. "Gee, mom, my stomach is filled up to my throat," he said.

Eight lonely sprouts remained. While Ward and Wally talked about football, Beaver started slipping the slimy buds into his shirt pocket. June discovered the scheme (no surprise) and warned Beaver he was not allowed to leave the table until he had eaten all his vegetables.

The rules governing the litigation process are a lot like Brussels sprouts. Lawyers want to shove them into their shirt pockets; it is all the better if a court rule can be avoided with some sleight of hand.

Our dislike of rules is not absolute, of course. Some rules are indelibly impressed on our sense of well-being—traffic, food safety, and licensing rules, for example. There are also welcome court rules that apply to litigation, e.g., the federal court rule that electronic service is to be treated in the same manner as like service by mail, which allows the recipient an extra three days to respond.[1] Most of us accept and appreciate rules offering protections.

When it comes to rules that impose responsibilities or limits on us, however, we resist. We almost make a sport out of finding ways to get around them. Yet we are better off in the long run if we follow the rules—not only because we stay out of trouble, but following the rules helps us win. Consider some examples.

Pleadings

MCR 2.111(D) provides that, when denying an allegation in a complaint, "[e]ach denial must state the substance of the matters on which the pleader will rely to support the denial." Merely denying an allegation is not allowed. The problem is that stating the substance of the matters supporting a denial takes a fair amount of work and renders form responses unusable.

> Don't leave the table of truth-seeking without finishing your vegetables.

However, it turns out we are at an advantage if we work hard at the beginning of a case to understand as much about it as possible before answering the complaint. Our response may not be better, but we will be in an improved position to assess the case for our jittery client if we take the time to follow the court rules in answering the complaint. We will have a head start knowing what needs to be done once the discovery process begins, and our strategic planning will be more refined. In other words, we will be better prepared for victory.

Discovery

Nobody likes answering discovery requests. We formulate discovery so we can uncover all relevant evidence and eliminate any possibility of a loophole allowing the other side to keep smoking guns hidden. In contrast, we answer the requests by parsing every word and scrutinizing every grammatical feature in the hopes of finding such loopholes. Discovery practices become the end instead of the means.

MCR 2.309(B)(1) says "[e]ach interrogatory must be answered separately and fully in writing," and answers "must include such information as is available to the party served or that the party could obtain from his or her employees, agents, representatives, sureties, or indemnitors." We lawyers are masters at the artful non-answer, but fully answering interrogatories brings us closer to success. Valid objections are worthy of careful consideration, but finding and producing what the other side legitimately seeks is beneficial in the long run. As with Beaver's reluctance to eat his vegetables, answering interrogatories may leave a bad taste in your mouth at first, but when it comes time to prepare your case for trial, you will have already marshalled the information necessary for a successful presentation.

Another benefit from taking MCR 2.309 (B)(1) seriously is that your client might be able to settle the case earlier and more cheaply. The other side will know what it faces. There will be fewer unrealistic expectations frustrating settlement. After all, a fair resolution is a successful resolution.

Trial procedure

The notion that following the rules is like eating your vegetables applies to more than the rules of civil procedure. Consider the frequent judicial admonition to avoid arguing the case during jury selection. Many lawyers scoff at this "rule" (MCR 2.511(C) says the trial judge does not need to let the lawyer do anything, so the only rule is that

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the judge gets to make the rules). The selection process is our first opportunity to make an impression on the jury. It is important to use it for its legitimate purpose. Some lawyers advocate that the jury selection rule should be circumvented to predispose the jury to their client's legal position.

That is poor advice. Many people are suspicious of lawyers they do not know, and at the time of jury selection, the would-be jurors do not know the trial lawyer. Because the trial lawyer has yet to build any credibility, arguing the case will likely backfire. Building rapport, identifying biases, and establishing you are trustworthy—the appropriate goals of jury selection—are much harder than clumsily arguing during jury selection.

The same goes for the rule against arguing your case during the opening statement (here there are actual rules).[2] We must limit our remarks to a "full and fair" statement of the case; doing so will pay dividends in the long run because jurors are not interested in hearing opinions and arguments at the outset of the case. Persuasion early in the case comes through the hard work of telling a story built on facts recounted in the proper order so that right and wrong do not need to be argued—they will be obvious. Thus, following the court rules puts your client's legal position in better stead with the jury and closer to a trial victory.

Briefs

What about page limits? Mark Twain is credited with saying, "I didn't have time to write a short letter, so I wrote a long one instead." Twain was echoing Blaise Pascal, who in 1657 wrote, "I have only made this letter longer because I have not had the time to make it shorter." Shorter is better. Making briefs shorter takes more time and more work. It's harder. But pinching our noses and swallowing those Brussels sprouts is good for us.

Evidence

Rule 602 of the Michigan Rules of Evidence provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Is it really necessary to go through the trouble of laying the proper foundation every time? Our opponent is probably not going to object. We can probably get away with not always jumping through this hoop.

But taking a shortcut here shortchanges the witness. Laying the proper foundation helps the witness build credibility with the jurors because they want to know why the witness was in a position to know the all-important facts. Adhere to this rule. It brings us closer to victory.

The same holds true when it comes to avoiding leading questions on direct examination. MRE 611(d)(1) generally prohibits the use of leading questions on direct examination. Some attorneys, however, ask their witnesses leading questions if they can get away with it. However, taking that shortcut is counterproductive. Leading questions make sense given an expectation that the attorney and witness are battling over the truth. But when the attorney and witness should be aligned, leading questions undermine the witness's credibility. Why, the judge or jury will ask, do we not trust the witness to tell the truth without being pushed?

Ethics

Rule 1.4 of the Michigan Rules of Professional Conduct plainly requires us to keep our clients "reasonably informed about the status of a matter…." This should not be hard to do, but poor communication is often a factor in client dissatisfaction with an attorney. Keeping clients reasonably informed is not merely our duty; it is good practice, because informed clients are happy clients, and happy clients pay their bills. Plus, it is surprising how often a client says something that sparks a thought leading to a good idea that inspires action and puts the case in a better posture. Communication enhances winning.

So take a lesson from June Cleaver. Don't leave the table of truth-seeking without finishing your vegetables. Bon appétit! ■

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ENDNOTES

1. FR Civ P 6(d).
2. See MCR 2.507(A) and MCR 2.513(C).