

Significant Changes Ahead for Missouri Litigators - Part III

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The Missouri Supreme Court approved two completely new jury instructions for civil cases that require the immediate attention of Missouri civil litigators, becoming effective July 1, 2017. Rules E1.00 and E1.01 allow the Court to read an Early Case Summary to the jury before the beginning of *voir dire*. The instruction is not mandatory, but left to the discretion of the trial judge.

These Early Case Summaries will include a brief description of the case, the plaintiff's claims and the defendant's defenses, the appropriate burden of proof instruction and boilerplate instructions to be included in the final instruction packet (i.e. the definition of negligence instruction). This format is similar to the Pre-Trial Orders under Federal Rule 16 that are read to juries in some federal District Courts. Those litigators with experience negotiating the language of federal Pre-Trial Orders already understand the how important Rules E1.00 and E1.01 will be.

The Early Case Summary will very likely be the first time the jury hears the circumstances of the case. Given the gravity of first impressions, both sides will need to ensure that what the jury hears is consistent with trial themes and certainly not prejudicial. A summary of the plaintiff's allegations will precede any commentary on defenses. This allows plaintiff's attorneys, without even speaking, to put lenses on the jury's analysis via the reading of "facts" from an impartial judge. For the defense, responding with "The defendant disputes these allegations" is probably not sufficient to overcome a detailed recitation of the plaintiff's allegations. Defense counsel can, however, work to weave weaknesses of the plaintiff's case into these initial statements. Like so many other components of trial presentation, crafting and negotiating artful language for presentation to the jury will be vital to success.

Skilled counsel could incorporate the terms of the Summary into their jury selection. Because the trial judge will be reading the Summary to the jury, prefacing questions with "You heard the judge say . . ." stamps what follows with a seal of truth and authority. The jury will be admonished to await the presentation of all the evidence before making a determination, emphasizing a somewhat common defense jury selection theme. The burden of proof, almost universally a part of both sides' presentation during jury selection, will now be presented verbatim to the jury as it will appear in the final instruction.

The brains of civil litigators throughout our great State will soon surge with techniques for these new instructions that will aid their client's claim or defense. Law firms will be filled with lively banter as to how to best entwine trial themes into the supposedly impartial language of the Case Summaries. Trial judges will be faced with synthesizing the competing interests of the parties into an impartial and brief rendering of sometimes very complex fact patterns. In addition to the legislature's recent amendments to tort law, Missouri civil litigators are facing a tangled future rife with multiple mechanisms to try to control in order to make a cohesive and successful presentation to a jury.