

ESTABLISHING & PROVING DAMAGES
PROF. DAVID COTELLESSE
FALL 2011

COURSE INTRODUCTION

Texts

Required:

Malone & Zwier, *Effective Expert Testimony* (2d Edition)

Case Materials: *Nova Consulting Group, Inc. v. Engineering Consulting Servs., Ltd.* will be furnished.

Recommended:

O'Connor, *O'Connor's Texas Rules Civil Trials*

Smith, *O'Connor's Federal Rules Civil Trials*

General Course Information

This class will meet on Thursday evenings, from 4-6 pm. The course has two components: (1) individual/small group performance exercises & demonstrations and (2) lectures.

1. Individual/small group exercises and demonstrations. The emphasis in this course will be on acquiring the practice skills necessary to establish and prove economic damages by performing oral and written tasks as trial counsel during the life of a typical business case. You will be divided into small groups representing either plaintiff or defendant for the weekly assignments. You will actually interview a potential expert, evaluate damages, prepare damages discovery and responses, prepare an expert for deposition, take an expert deposition, prepare and argue *Daubert/Robinson* motions to exclude expert testimony, conduct direct and cross-examination of an expert witness, and make a closing damage argument. You will perform at least once in each individual/small group exercise. Students not performing will serve as witnesses. Demonstrations of certain skills will be presented during the semester.

You will be using selected portions of an actual business tort case during the semester. The case, *Nova Consulting Group, Inc. v. Engineering Consulting Servs., Ltd.*, Slip copy, 2008 WL 3889995 (5th Cir., August 22, 2008), was an unfair competition case involving allegations of misappropriation of trade secrets and interference with employment contracts. You will represent either the plaintiff or the defendant.

The individual/small group sessions will be a combination of oral on-your-feet performances, written assignments and demonstrations. The written assignments will be prepared outside class and discussed during the performance session. Two written assignments will be graded: a motion challenging expert testimony and a response to such a motion. There will be two graded oral performance assignments. The class mid-term will be oral arguments for and against the motions challenging expert testimony. The class final will be closing jury argument on damages.

Unless otherwise announced, all individual/small group sessions will meet on Thursdays, from 4-5 pm. There will be no individual/small group session the first evening of class. The last day of class will be closing arguments.

2. Lecture. Immediately following the individual/small group sessions, there will be a one-hour lecture. The lecture will focus on the skill you will be performing the following week in your individual/small group session. PowerPoint presentations for each lecture will be available online following each lecture.

3. Oral argument. There will be two graded oral arguments. The first will be argument on motions to exclude expert testimony, on Thursday, October 20, 2011, from 4-6 pm. The second will be closing arguments on damages on Thursday, December 1, 2011, from 4-6 pm. There will be no lecture on the days of oral argument.

4. Attendance and grading. Attendance at both the individual/small group sessions and lectures/demonstrations is mandatory. You will be allowed one absence during the semester, unless prior arrangements are made with the professor for such approved activities as mock trial and other advocacy competitions. Ten percent of your grade will be based on participation. Unapproved absences will affect the participation portion of your final grade.

Your final grade will be based on (i) a written motion to exclude expert testimony, (II) a response to such a motion, (III) oral arguments for and opposing the motions, (iv) closing argument on damages, and (v) class participation. The written motion and response will account for 20% of your final grade; arguments for and against the motions to exclude expert testimony will account for 30%; participation will account for 10%; and closing argument on damages will be 40% of your final grade.

5. General rules for individual/small group performance sessions.

A. You must be prepared to play the role of all witnesses for all assigned problems.

B. Conduct all examinations of witnesses while seated at the counsel table, except when handling documentary or other evidence or when told otherwise.

C. We will follow the All Object rule. Everyone, except the witness, should object when there are legal grounds for objection. Do not hold back for tactical reasons unless instructed otherwise.

D. When objecting or otherwise addressing the judge, stand up immediately and remain standing until the judge rules on the objection.

E. Objections should be addressed to the judge and should include a brief statement of the reason for the objection. Do not argue unless invited to do so by the judge. If argument is requested, approach the bench and present your argument to the judge. Counsel should not engage in discussions with each other.

F. Be prepared to conduct examinations and arguments in their entirety. You will usually be expected to examine witnesses or otherwise perform for five to ten minutes. After being asked to stop, you may be asked to perform again. The next performer may be asked to start where the previous performer left off, so be prepared to be flexible.