

## APPENDIX TO “Trying your First Case”

### MindMaps Software Programs

**For the PC:** [www.mindjet.com](http://www.mindjet.com)

**iPhone/iPad** iMindMap & Mindjet

**Mac:** IThoughtHD

### Timeline Software

**For the PC:** [www.casesoft.com](http://www.casesoft.com) (Note it can be used as a visual, as part of the CaseMap Program & the software will convert the timeline to a Word format in two “clicks” of your mouse.)

**iPhone/iPad:** Timeline Eons

**Mac:** Timeline 3D


## TIMELINE in Word Format

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CaseMap Facts Report

Case: CLE for first time trial  
Created: 5/27/11 3:53:39 PM

Date & Time	Fact Text
Fri 05/07/1999	Parties started dating. At time, both were working for XXXXX.
Wed 04/12/2000	Date of Marriage
08/??/2001	H started to work at XXXXXXXXXXX.
05/??/2002	Both parties graduated from college.
06/??/2002	H began to work full-time at XXXXXXXXXXX.
08/??/2002	W enrolled Law School
02/??/2003	BOUGHT FIRST HOME FOR \$1M.
Wed 09/03/2003	1ST CHILD BORN.
Sat 12/18/2004	2ND CHILD BORN.
Wed 05/04/2005	W GRADUATES FROM LAW SCHOOL.
Thu 09/01/2005	Wife begins working for law firm as an associate.
Tue 11/01/2005	Wife sworn in as an attorney having passed the bar exam.
Fri 08/01/2008	Parties separate.

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## **BOOKS TO TAKE TO COURT**

SC Family Lawyer Tool Kit, 2d edition

SC Family Law Annotated, 2011, West Corporation, tabbed for frequently used sections

South Carolina Evidence Handbook Annotated, by Justin Kahn

South Carolina Rules of Civil Procedure Annotated, by Justin Kahn

Making and Meeting Objections II, Judge Robert A. Wenke

South Carolina Family Court Handbook, by Sandi Parise

Marital Litigation in South Carolina (Fourth Edition) by Roy Stuckey

Professor Syd Beckman's laminated Evidence Objection & Foundation list

## **BOOKS TO PREPARE FOR TRIAL**

The Divorce Trial Manual, From Initial Interview to Closing Argument, Lynne Z. Gold-Bikin and Stephen Kolodny

So You're Going to Try Your First Case..., A Primer for Federal and State Jury Trials in South Carolina, by Warren Moise (While written for jury trials, Warren includes helpful information for bench trials as well.)

Evidentiary Foundations, Edward J. Imwinkelreid, 2008

Cross-Examination, Science and Techniques, Posner and Dodd

Cross-Examination for Law Students, Posner and Dodd

Trial Handbook for South Carolina Lawyers, 4<sup>th</sup> Ed. 2010, Alex Sanders and John S. Nichols

Nut and Bolts of South Carolina Substantive and Procedural Law, A Trial Notebook 2<sup>nd</sup> Ed, Judge Ralph King Anderson, Jr.

## **FIRST AID TRIAL KIT CONTENTS**

Legal pads Laptop + charger Power strip with long cord iPhone & iPad + chargers Laser pointer with extra batteries Flash Drives Sticky notes (all sizes) Highlighters Pens Pencils and erasers Dry erase markers (multiple colors) plus dry-erase eraser Black Sharpie (permanent marker) Stapler, staples, and staple remover Scissors	Paper clips and large binder clips Rubber bands (large and small) Clear tape Duct tape Roll of quarters Bottled water Power bars Aspirin Breath mints Extra pair of stockings or clean, matching tie (as appropriate) Lipstick Chapstick
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### **MORE SOFTWARE + APPS**

SC: **Traxler Child Support** and **Alimony Calculator** software Programs

SC: **Sean Keefer's Child Support App** for your I-phone or I-pad

One of my favorite blogs to follow is **iPhoneJD**. Here is a link to the recent presentation he and a few other techie attorneys gave at the ABA Tech show in Chicago in April as well as links to his favorite 60 apps for 2009, 2008 & 2007:

**<http://www2.americanbar.org/calendar/TECHSHOW/Pages/60Sitesin60Minutes.aspx>**

### **Alex Rosen's Favorite Apps (local trial preparation expert)**

**RLTC Evidence** (\$4.99) Evidence is image presentation software built for trial lawyers. Organize and annotate documents and images on the iPad, then present them via the standard Apple iPad VGA Adapter. Engineered to support standard 1024 x 768 resolution displays for near universal usage with projectors or external displays in courtrooms and presentation venues. However, it can only work with pdf's and it does not display what is on your screen. They hope to upgrade the app for use with the iPad2.

**Exhibit A** (\$9.99) Exhibit A is a powerful tool for organizing and presenting information. Ideal for presentations in the courtroom, in the boardroom, and in the classroom, Exhibit A gives you the tools to plan and present your message with power, clarity and precision.

**TrialPad** (\$89.99) TrialPad for iPad is an easy-to-use app for preparing and presenting compelling presentations for trial. It literally puts your next presentation into your own hands, at a fraction of the cost of traditional courtroom presentations.

**Noterize** (\$3.99) Noterize allows you to view and annotate any available PDF or PowerPoint document. The built-in web browser enables direct importing of files from the web (including university and corporate sites), while integration with Box.net and Dropbox makes transferring documents between your computer and iPad as simple as can be. Once your documents are in Noterize, use the PDF search functionality to quickly find what you are looking for. Annotate your documents in freehand using the pen and highlighter tools, or add typed text and sticky notes with the text box function. Insert extra pages of blank, lined, or grid paper wherever necessary if you need more space to take notes. Palm protection (both left and right-handed) is available.

**iAnnotate** (\$9.99) iAnnotate is an elegant PDF reader and a powerful annotation tool - and consistently one of the best-selling apps for the iPad. You can open documents from email, fill out forms, sign and send out contracts, enter notes for edits, sketch diagrams, copy text, and add highlights or underline with the drag of a finger! Join the thousands of students, researchers, lawyers, doctors, investors -- and even governments -- that are using iAnnotate every day to go paperless and work from anywhere.

**SignMyPad** (\$3.99) SignMyPad is a simple to use PDF reader and annotation tool. No more printing documents to sign them, then find a fax machine or scanner to send them back. Save trees!! With SignMyPad you can load PDF's right from your email, or dropbox and add text, date and your signature. Email it right back out from the app!

**Power Presenter** (\$1.99) This application is for Presentation. If you save the powerpoint as PDF file, this app will help you do the presentation on projector. If you can upload your file to a web site, it also can present that website for you. It automatically detects the projector and send the signal to the projector when connecting with the VGA cable. It actually mirror the screen to the projector using software. Therefore, you can not only see the presentation on the iPad screen but also on the projector. No need to turn your head back all the time as in Keynote. You can now also draw, highlight text on the slides and send your drawing to email. It also contains a blackboard and web content presenter so you can write your formula on a whiteboard or blackboard, show video clips using a single app. It is great tool for education.

**CustomShow** (Free) lets you play presentations right from your iPad, so you're always ready to present.

- Lets you play entire CustomShow presentations, including videos.
- Works both online and offline, so you never need an Internet connection to pitch.
- Presentations automatically update themselves when changes are made, so you always have the most up-to-date slides.
- Works with a projector or monitor, so you can lead big meetings right from the iPad.
- Creating and updating presentations is done from the CustomShow desktop application\*, so you can make changes from both Macs and PCs and the updates are sent directly to the iPad over the Internet.
- Lets you email presentations from your iPad.

Create, manage, and update your slides in CustomShow and present them anywhere: on your computer, online, and now on your iPad.

## **A Texas Trial Attorney's favorite iPad Apps**

**Perfect Downloader.** It allows you to download videos from the internet (including YouTube) and save to your iPad to include in presentations. It doesn't help the average lawyer that much but for those of us doing presentations it is great.

<b>Dropbox</b> <b>Goodreader</b> <b>Fastcase</b> <b>Keynote</b> <b>Elements</b> <b>WhitePages</b> <b>Wikipanion</b> <b>Instapaper</b> <b>LogMeIn</b> <b>Zinio</b>	<b>ABA Journal</b>  <b>Photoshop Express</b> <b>Zite</b> <b>Evidence</b> <b>Texas Legal</b> <b>DropVox</b> <b>Digits</b> <b>WPD Viewer</b> <b>Objections2</b> <b>Bing</b>
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<p><b><u>Evidence Apps:</u></b>  <b>courtevidence</b>  <b>Objections2</b></p> <p><b><u>Document Apps:</u></b>  <b>DropBox</b>  <b>DocsToGo</b>  <b>Sign It!</b>  <b>Evernote</b>  <b>ShapeWriter</b> (write with pen or your finger)  <b>Write Now</b> (write with pen or finger)</p> <p><b><u>Presentation apps:</u></b>  <b>i-Clkr</b> (turns phone or iPad into a remote control for your Powerpoint Presentation &amp; shows notes)  <b>Remote</b> (same thing for Keynote)  <b>SnagIt</b> (Easily captures and edits images from websites, documents &amp; allows editing and insertion into documents and presentations such as PowerPoint &amp; Keynote)</p> <p><b><u>Dictation:</u></b>  <b>Dragon Dictation</b>  <b>Dictamus</b> (dictates e-mails and texts)</p> <p><b><u>Billing:</u></b>  <b>My Timesheet</b></p> <p><b><u>Contacts Apps:</u></b>  <b>Bump</b>  <b>Copy2Contact</b>  <b>Groups</b> (organizes contacts on iPhone iPad)</p>	<p><b><u>Law:</u></b>  <b>Fastcase</b> (and it is free)  <b>civilprocedures</b> (provides the civil procedure rules for all states; sadly, for SC, it does not include the Family Court rules)  <b>Blacks Law Dictionary</b>  <b>Cost and Prep</b> (designed by Texas family lawyer to help prepare clients for cost of their case)</p> <p><b><u>Child Support Guideline App:</u></b> SC has an app for calculating our Child Support Guidelines (check your state)</p> <p><b><u>Organizational Apps:</u></b>  <b>ActionMethod</b>  <b>Toodledo</b>  <b>Calvetica</b> (organizes your calendar on iPhone and iPad better than apps that come with phone)</p> <p><b><u>Travel:</u></b>  <b>Flightcheck</b>  <b>Navigon</b> - great gps (allows for cars, bikes or walking directions)  <b>GPS</b> (motion x)  <b>Yelp</b> (good restaurants in area)</p> <p><b><u>Social:</u></b>  <b>Facebook</b>  <b>Echofon</b>  <b>Twitterific</b>  <b>TweetDeck</b>  <b>LinkedIn</b>  <b>You Tube</b></p> <p><b><u>Other:</u></b>  <b>Light</b> - turns iPhone into a bright light  <b>HeyTell</b> – A great free app that turns your iPhone into a walkie talkie</p>
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## Making the defendant testify in the plaintiff's case in chief

Posted Saturday, February 12th, 2011 by Gregory Forman

Filed under [Litigation Strategy](#), [Of Interest to Family Law Attorneys](#), [South Carolina Specific](#)

### Blog

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## Making the defendant testify in the plaintiff's case in chief

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I have never understood the general preference of litigants and attorneys to be the plaintiff in family court proceedings. "You get to go first," is the sole explanation for this preference, which is indubitably true. The collerary is that the defendant gets to go last. In most competitions going last is considered a big advantage. I certainly find it an advantage in family court. Probably half the family court trials I have lost, I feel I lost because the opposing party testified last—after all the other witnesses had testified. The opposing party could then dance around gaps in my evidence (a fancy way of saying he or she lied like crazy) with relative impunity.

There's huge advantages in one's client testifying last even if the client isn't inclined to lie under oath. Testifying after one has heard all the other witnesses testify allows the client to comment on all past testimony and attempt to harmonize slightly conflicting testimony. It allows the client to comment on gaps or flaws in the other party's evidence. Finally, where the client's recollection of an event is different than previous witnesses for the client, one can simply have the client avoid testifying on that issue (assuming the issue is relatively unimportant) to avoid problems of the client or past witnesses appearing uncredible due to conflicting testimony. These advantages are one reason I will always try to have my client testify last in his or her case in chief.

However, the plaintiff has the ability to take the advantage of going last away from the defendant by calling the defendant as the plaintiff's first witness.<sup>[1]</sup> [South Carolina Rule of Evidence 611\(c\)](#) specifically allows an attorney calling the adverse party as a witness to elicit testimony through leading questions ("When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions"). In my seventeen years of family law practice, I have never seen plaintiff's counsel do this to my defendant-client (though they have, on occasion, called my defendant-client in the plaintiff's case in chief). I routinely call the defendant as my first witness if I represent the plaintiff and, as noted above, have been repeatedly burned when I failed to do so.

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It has been my experience that calling the defendant as the first witness in the plaintiff's case in chief leads to much more cautious and honest testimony from the defendant and makes it easier to highlight the defendant's lack of credibility through subsequent witnesses. Unable to be sure what evidence might be presented by subsequent witnesses, a defendant called as the plaintiff's first witness is typically less likely to make bold claims that might be contradicted by later testimony or evidence. Unable to know what gaps might exist in the plaintiff's evidence, the defendant is unable to testify in a way that highlights these gaps. Finally in being forced to testify first, rather than being allowed to testify last, the defendant loses the ability to harmonize his or her testimony with other witnesses.

Based on distinctions between the [South Carolina Rule of Evidence 611](#) and the [Federal Rule of Evidence 611](#), in South Carolina there are two big risks for a plaintiff's attorney calling the defendant in the plaintiff's case in chief. The first risk is that the defendant's attorney will be allowed much greater latitude in questioning the defendant after the plaintiff's attorney is done with his or her examination of the defendant. Under the [Federal Rule of Evidence 611\(b\)](#), "Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness." Under [South Carolina Rule of Evidence 611\(b\)](#), "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." Thus, while in Federal court a defendant's attorney would be limited in questioning the defendant to issues plaintiff's attorney raised in his or her examination of the defendant, in South Carolina court a defendant's attorney is entitled to an "open cross" of his or her client and can present *all* desired testimony within the plaintiff's case in chief.

The second important distinction between South Carolina and Federal court is that the defendant's counsel is typically allowed to ask leading questions of the defendant on cross-examination in state court and isn't allowed to do so in Federal court. Under both the [South Carolina](#) and [Federal](#) Rule of Evidence 611(c), "Ordinarily leading questions should be permitted on cross-examination." The [notes to Federal Rule of Evidence 611](#) place a limitation on this general right to lead on cross-examination:

The purpose of the qualification "ordinarily" is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as for example the "cross-examination" of a party by his own counsel after being called by the opponent (savoring more of re-direct) or of an insured defendant who proves to be friendly to the plaintiff.

Applying these notes, a Federal judge will typically not allow defendant's counsel to lead the defendant when the defendant is called by the plaintiff. However South Carolina family court judges typically, although not uniformly, allow defendant's counsel to lead the defendant when the defendant is called by the plaintiff.

Applying these notes, a Federal judge will typically not allow defendant's counsel to lead the defendant when the defendant is called by the plaintiff. However South Carolina family court judges typically, although not uniformly, allow defendant's counsel to lead the defendant when the defendant is called by the plaintiff.

Despite the risks of calling a defendant as the first witness in a plaintiff's case in chief, there are too many countervailing risks in allowing the defendant to hear all the evidence before he or she is required to commit his or her story to oath.

A few caveats and warnings:

Sometimes one will want to cross examine a defendant using documents that may need to be authenticated. There is some risk that the defendant may challenge the authenticity of a document. While **South Carolina Rules of Evidence 104** and **1008** would seem to indicate the court should conditionally allow questioning on a document the defendant will not authenticate, subject to admitting the document when a subsequent witness authenticates the document, not every family court judge will allow such questioning. Often I prefer to have a defendant unreasonably refuse to authenticate a document—sometimes the defendant will refuse to authenticate his or her own document—so that a later authenticity witness can impeach the defendant. Sometimes it is better to call a witness to authenticate the document before calling the defendant.

When the defendant is called in the plaintiff's case in chief, defendant's counsel will be tempted to do a full "direct" examination of the defendant as part of the defendant's "cross-examination." The ability to lead one's client through his or her direct testimony is generally too tempting to pass up. However the advantages of testifying last is only partially lost if the defendant is called in the plaintiff's case in chief. Doing a full direct of the defendant within the plaintiff's case means these advantages are fully lost. If seeking to do a limited cross examination of one's client with the intent of recalling the defendant in the defendant's case in chief, make sure you seek leave of the court to recall the defendant in his or her case in chief before concluding one's examination. **South Carolina Rule of Evidence 611(d)** might preclude the defendant from being recalled otherwise ("After the examination of the witness has been concluded by all the parties to the action, that witness may be recalled only in the discretion of the court").

Finally if one is going to call the defendant in the plaintiff's case in chief, call the defendant first and definitely avoid calling the defendant after the plaintiff. Only one time in my career has an opposing attorney called my client in her case in chief after the plaintiff testified. During my "cross examination" of my client, I had him do his full direct examination and testify regarding disputes he had with the plaintiff's prior testimony. In my client's case in chief I avoided calling him as a witness even though there were a few items I wouldn't have minded him clarifying

In plaintiff's rebuttal, she attempted to dispute some of my client's testimony. I objected, noting that rebuttal was limited to challenging my client's case in chief and that my client had not testified in his case in chief. The plaintiff's attorney was completely precluded from having her client challenge my client's testimony. I have never understood opposing counsel's strategy in calling my client in her case in chief (a generally good idea) after my client testified (an inexplicable idea).

Despite the risks of allowing a defendant to present all of his or her testimony in my plaintiff's case in chief, while being led by his or her own attorney in doing so, I have routinely been burned when I have allowed the defendant to testify last and have often destroyed the defendant's credibility by preventing the defendant from hearing the other witnesses before committing his or her story to oath. Calling the defendant as the first witness in a plaintiff's case in chief is a strategy more family law attorneys should employ.

#### **RULE 611 MODE AND ORDER OF INTERROGATION AND PRESENTATION**

**(a) Control by Court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

**(b) Scope of Cross-Examination.** A witness **may be cross-examined on any matter relevant to any issue in the case**, including credibility. (DIFFERS FROM FRE!)

**(c) Leading Questions.** Leading questions should not be used on the direct examination of a witness **except as may be necessary to develop the witness' testimony**. Ordinarily leading questions should be permitted on cross-examination. **When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.**

**(d) Re-examination and Recall.** A witness may be re-examined as to the same matters to which he testified only in the discretion of the court, but without exception he may be re-examined as to any new matter brought out during cross-examination. **After the examination of the witness has been concluded by all the parties to the action, that witness may be recalled only in the discretion of the court.** This rule shall not limit the right of any party to recall a witness in rebuttal.

**Note:**

The language of subsection (a) of this rule is identical to that used in the federal rule. It is consistent with the general rule in this State that the conduct of the trial, including the examination of witnesses, is within the sound discretion of the trial judge. See McMillan v. Ridges, 229 S.C. 76, 91 S.E.2d 883 (1956); State v. Nathari, 303 S.C. 188, 399 S.E.2d 597 (Ct. App. 1990). It should be noted that Rule 614 controls the calling and interrogation of witnesses by the court.

Under South Carolina law, cross-examination is limited only by the requirement that the inquiry relate to matters pertinent to the issues involved or to impeachment of the witness. See State v. Ham, 259 S.C. 118, 191 S.E.2d 13 (1972); Hansson v. General Insulation and Acoustics, 234 S.C. 177, 107 S.E.2d 41 (1959). The scope of cross-examination is within the discretion of the trial judge. State v. Sherard, 303 S.C. 172, 399 S.E.2d 595 (1991). Subsection (b) rejects the more restrictive language of the federal rule which limits cross-examination to the subject matter of direct examination and matters affecting the credibility of the witness.

Subsection (c) is consistent with former law. See Rule 43(b)(1), SCRCP; Rule 43(b)(2), SCRCP. The use of leading questions when examining a child, State v. Hale, 284 S.C. 348, 326 S.E.2d 418 (Ct. App. 1985), cert. denied, 286 S.C. 127, 332 S.E.2d 533 (1985), is still permissible under the first sentence of subsection (c) which allows leading questions when "necessary to develop the witness' testimony."

There was no provision in the federal rule as to re-examination and recall of witnesses. The provision concerning re-examination and recall of witnesses was added to the rule to make it consistent with South Carolina law. See Levy v. Outdoor Resorts of South Carolina, Inc., 304 S.C. 427, 405 S.E.2d 387 (1991); State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984); Huff v. Latimer, 33 S.C. 255, 11 S.E. 758 (1890).