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How to Prepare a Protest and a Defense

By Bill Ficker

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Note by Dave Perry

In the 1981 Congressional cup, I was Russell Long’s tactician and we were disqualified in a protest for tacking too close. After the series was completed, Bill Ficker, who was on the jury, came over and volunteered some advice on how we could have presented a bitter defense. Sure enough, two weeks later I was involved in almost exactly the same situation, but this time successfully defended myself applying the principles Bill had described. To anyone who has ever lost a series by being disqualified in a protest hearing, it’s clear that developing excellent protest handling skills is as important to winning regattas as having superior boat speed or brilliant tactics. But it’s fair to say that among even the best sailors, the protest handling skills are not as refined as they could be, and this is one area we could all improve in.

Bill Ficker is a welcome authority on the subject, based not only on his successful experiences as both a competitor and a judge, but even more importantly because his success is the result of his very organized and thorough approach to what he does, making his presentation full of useful details and easy to follow. As a competitor, Bill has been racing all his life. Growing up in Southern California, he has raced Sabots, Snipes, National One-Designs, Pacific 14’ dinghies, and finished second in the Intercollegiate National Championship. Since then he has won the Star Worlds, Class A of the SORC skippering “Charisma,” and the Congressional Cup. In 1970 he successfully defended the America’s Cup as skipper of “Intrepid.” As a judge, he has served on the jury for Congressional Cup, California Cup, San Diego Lipton Cup, and numerous other series over the years. He was a US SAILING certified Senior Judge for many years and has been a member of the US SAILING Appeals Committee.

Calmness under pressure is certainly one of the keys to success in a protest hearing, as well as confidence in the rules and an analytical attention to all the details of the incident. Through his experiences, Bill has demonstrated a mastery over these elements, and the insights he shares in this piece, if practiced, should prove extremely helpful.

Before talking about the protest process, let me say a few words about the actions leading up to the need for a protest. It always seems incredible to me that so many world class sailors give so much attention to boat speed, crew training, and development of the state-of-the-art equipment and almost totally ignore an equally significant part of their campaign: learning the rules. The rules are the foil in the art of fencing with sailboats and without the sharpest foil and the understanding of how to use it, you are jeopardizing your entire effort or at least compromising it. Insecurity with the rules leads to hesitation on the race course and not only loss of races, but ultimately the respect of your competitors. As everyone who has sailed

in top competition knows, the building of a reputation is important in order to dominate a fleet, and those who want to reach the top have to know the rules cold and act with confidence when engaged in a rules conflict. So study the rules and use the US SAILING Book of Appeals Decisions and the ISAF Cases. By carefully studying the appeals, you will not only gain a better understanding of the rules, but you will also be helped tremendously in the preparation of your protest, especially with regard to the diagrams.

As for protesting, I often hear sailors say that protesting is for others and that they have never been in the protest room in their life. That makes good barroom talk, but the hard facts are that each year sailing, like other sports, is becoming more competitive with more good sailors in each fleet. No longer are fleets dominated by one or two good sailors who can easily stay clear of the others. More close situations are occurring on the starting lines, at turning marks, and throughout the race, so you had better be prepared to finish more races and series in the protest room. Finally, if protests are the result of your being involved in or witnessing a foul, or the result of an honest difference of opinion or differences in observation of a particular situation on the water, they should not have the taint of bad sportsmanship. Competitor enforcement of the rules is the tradition in our sport, and when the rules are not followed, we owe it to ourselves and our fellow competitors, for the quality of the racing, to protest. Remember, for your protest to be valid, it must comply with the requirements in rule 60.1 and rule 61.

PREPARATION FOR THE HEARING

As any lawyer will tell you, the most important step in winning a case is the preparation. If you are thoroughly prepared, everything else will fall into place.

Boat performance table

One tool that will dramatically improve both your protest presentation and your tactical decisions on the race course is a table with all your boat performance precisely worked out in feet and seconds. It should include how many feet-per-second your boat travels in varying wind velocities (see attached), the approximate speed of your boat on all points of sail, how long it takes your boat to go from one tack or gybe to another in varying wind and sea conditions, how far upwind your boat travels in a tack, how long it takes to accelerate to full speed from a standstill, and how long it takes to make a complete circle in both directions and how large the circle is. Write the table inside the front cover of your rule book. We'll discuss the reasons for this later.

Filling out the protest form

The protest form you file will usually be the first encounter the jury has with your incident. Therefore, make sure the first impression you make reflects your thoughtfulness, your knowledge of the rules and the boats you are racing, and your care for detail and doing things the right way. Most regattas use the standard US SAILING Protest Form (printed in the back of the rule book). Take care in filling out each line on the first page. Print clearly, think first to avoid unnecessary cross-outs, and be sure all the information is correct, particularly the names and sail numbers of the other parties to the protest. Also be sure to use a dark pen, and don't get the protest form wet with soggy cuffs or wet hands. Rule 61.2 lists the information required on the protest form. Note, however, that as long as the form identifies the incident, other required details may be corrected before or during the hearing. Rule 61.2(c) asks for the rule(s) alleged to have been broken, but there is no requirement that you must state the correct rule. Rule 64.1(a) reads, "When the protest committee decides that a boat that is a *party* to a protest hearing has broken a *rule*, it shall disqualify her unless some other penalty applies. A penalty shall be imposed whether or not the applicable *rule* was mentioned in the *protest*."

The diagrams are perhaps a little more difficult if you are not an engineer, architect, or otherwise graphically gifted, but with practice almost anyone can do a good diagram. *Always be sure to work everything out in a rough diagram before putting it on the protest form.* A pad of 8 ½ by 11 quarter-inch graph paper is useful for perfecting your diagram before committing it to the form. (It's also useful for studying the rules and doing sample situation analyses.) Usually the three or four boat positions directly preceding the incident are all that is needed to give the jury a clear picture of how the situation developed. In addition be sure you include all relevant information, such as the strength and direction of the wind and current, the direction to the next (or from the previous) mark, any topography or other obstructions that had an effect, the compass course and speed your boat was going throughout the incident, and the like. Again, exact awareness of time and distance traveled and their relationship to each other are extremely important. The more information you have and the more exact your diagram, the more credibility your case will have in the hearing. Use rule F2.2(c) as a checklist.

The written part or "description" of the incident should be brief and should stick to the facts. Again, I suggest listing the important facts and points you wish to make in a rough draft before putting them on the protest form. I like to number the sentences as they refer to the diagram, and obviously the diagram and description should match perfectly.

Filing the Protest

At the outset of the regatta, it's very important to find out where to get the protest forms and where to file them in case of a protest. Don't wait until you're involved in one because things are usually hectic then. Also, as soon as you come in from the race, find out when the time ends for filing your protest. This is critical so you know if you have time to shower, eat something, and just relax, without the risk of missing the cut-off time. Unfortunately, usually you don't. When possible, have your crew or friends put the boat away and contact possible witnesses. When you file the protest, be sure you note *who* received it and the time, and ask them to put the time and their initials on the form, if they haven't done so already. Finally, keep a copy for yourself.

Witnesses

Good witnesses can be very helpful to your case. The idea behind a witness is to verify the facts you have presented in your testimony. The key attributes of a good witness are: a) they were in a position to see the incident clearly; b) they were close by and watching as the incident developed; and c) they understand sailboat racing (if not a competitor). Obviously the jury should be aware when a witness is associated with one of the parties, such as a crew or teammate, but good juries often learn from these witnesses too.

On the other hand, a poor witness can destroy your case. Don't bring a witness into the hearing who merely told you that they saw the incident and feel you were in the right. Thoroughly screen any witnesses to be sure they understand the protest clearly and that they are definitely on your side. I certainly don't want to imply that you should bring in a witness who has been coached or reflects anything but total integrity, but you must find witnesses who corroborate your observation one hundred percent. There often seems to be a feeling that bringing in a witness you haven't talked to establishes some feeling of credibility. It doesn't. You only look foolish and it usually wastes the time of a lot of people. I can't tell you how many times I've sat in a hearing and the jury has had to ask which boat the witness was for. Also, I would suggest minimizing the number of witnesses. Besides the fact that witnesses are generally poorly prepared, keep in mind that when five people see an incident, they may each see it a little differently. The more witnesses you call who saw it slightly differently, the more doubt it casts on your credibility.

Your right to call and question witnesses, including your crew, is stated in rule 63.6. If a member of the protest committee intends to bring their observation of the incident into the deliberation, rule 63.6 requires them to give their evidence as a witness in front of you and be questioned. Although the protest committee is required to hear all witnesses presented by a party to the hearing, it is nevertheless wise to minimize the number of witnesses you call.

Preparing your protest

The final step is to review your facts and how you will substantiate or prove them to be true. One good technique is to role-play the hearing, with friends acting as the judge and protestee. It is key to prepare yourself for any questions the jury or other parties to the protest might ask you. They might include: What was your crew doing as the situation developed? What conversations took place on your boat and between the boats? How fast were you going? How can you be sure there was an overlap? What were the numbers of some of the other boats in the vicinity? How much time was there between the establishment of the overlap and the initial contact? You should be testing yourself and your witnesses with these types of questions before you go into the hearing. Also review the copies of your protest form to refresh your memory about what you said, and to see if there are any additional points or clarifications you need to make.

Preparing your defense

You should prepare a defense exactly as though you were filing a protest. Write down all the facts that support your claim that you were not in the wrong, as well as the evidence you will use to substantiate or prove your facts. Get all the speeds and distances organized and think through the possible questions. Even if you haven't filed a counter-protest, having everything written out will serve as a good reference. Also, under rule 63.2, you are entitled to see a copy of the protest against you before the hearing begins. Doing this is very important. The hearing room is not the place to start putting together your defense. The protesting boat will be extremely well prepared with all the facts written down and thoughtfully organized. You want to go into the hearing just as well prepared.

To get a copy of the protest, you may have to ask for it. Rule 63.2 requires only that the protest information be made available to all parties, not that it be supplied to them if they have not requested it. As a practical matter, a copy of the protest is often given to the parties when they check in at the jury desk. If that doesn't happen, however, ask for a copy.

One last thought on preparation. Rule 61.1(a) requires that the protesting boat hail "Protest" at the first reasonable opportunity when her protest concerns an incident in the racing area that she is involved in or sees. In all other cases, a protesting boat shall always inform the other boat at the first reasonable opportunity. Be sure to comply with this and to personally notify the other skipper(s) either on the water or as soon as possible after you come in that you are protesting. If you know it, tell them the time and place of the hearing so it will commence smoothly and on time. It is not to your advantage to have the hearing held up or postponed while people look for the other parties. Also, be sure you are on time, even a bit early in case the jury is ahead of schedule, and that your witnesses are standing by right outside the hearing room. Your case can be weakened if the hearing has to be in-

errupted while your witnesses are being looked for. If you are the protestee, be doubly sure that you and your witnesses are there on time. Jury duty is a very demanding, time-consuming activity, which often requires the jury to be in session for hours at a time. So it doesn't endear one to them when they've given up their cocktail hour, dinner, and probably some much more engaging social event to be kept waiting in the hearing room while the competitor is at the snack bar or elsewhere and unwilling to spend five or ten minutes in readiness to be called.

THE HEARING

Rule 63.3(a) makes it clear that you have the right to be present throughout the hearing of all the evidence. Rule 63.3(b) adds that if a party fails to attend the hearing, the protest committee may nevertheless decide the protest.

The rules governing the actions of the protest committee and providing you with your procedural rights are covered in Part 5, Section B, of the RRS. If the protest committee, during the course of dealing with a protest, improperly denies you any of your procedural rights under the rules of Part 5, Section B, you have the right to object.

You can either voice your objection at the time, or seek redress after the hearing under rule 62.1(a) when you believe that an improper action of the protest committee has made your finishing score significantly worse through no fault of your own. Note that US SAILING prescribes that the time limit for filing a request for redress from an action/omission of a protest committee is the protest time limit or two hours after the incident, whichever is later.

When the testimony portion of the hearing is over and the parties have been excused, the first task of the jury is to list the facts they have deduced from the testimony. Then, based on these facts alone, they apply the rules and make their decision (rule 63.6). Remembering that in most cases the jury will not have seen your incident or the events leading up to it, the strength of your case lies in your ability to describe the whole scene to them. The more logical, precise, and complete your description is, the better your chances are that the facts will be found as you have presented them.

Opening Testimony

First the protestor has the opportunity of presenting his case, then the protestee presents his. At this point, the questions between them and from the jury are usually restricted to clarifying what each has said. There will be differences of opinions, usually due to different points of observation. But after listening to the complete presentations of the competitors and witnesses, the jury can usually tell which observation is most credible. When making your opening testimony, keep it brief and speak slowly and clearly. Obviously, this is an opportunity to transmit infor-

mation to the jury more directly, so the diagram and description on the protest form can be expanded on. But try not to add any new dimensions orally to what has already been stated in writing unless you have left something off the form that is critical to your case, in which case mention that you are adding it. The important thing is to focus very hard on the facts you are trying to present and prove. Also, be complete. Omitting a part of the overall picture or filling in details later in response to questions is very unsettling and indicates gaps in your testimony.

Using the Models

When using the boat models, hold your hands so everyone can see what you're showing. If you are explaining that you were two lengths ahead of the other boat, be sure to accurately place your boat two of the model's lengths ahead. If the boats weren't overlapped, don't carelessly place them overlapped; and if the models have booms, be sure the booms are always on the correct side. Here again let me emphasize how important it is to give the exact relationships of the boats, their angles, and their speeds. Remember, if you are going to guess, guess at them before you go into the hearing room, but don't force the jury to interrupt your presentation in order to get these facts. They are absolutely necessary and if you don't know them, your case will be severely weakened. (Another reason for precluding interruptions by the jury is that it doesn't give your opponent any tips prior to presenting their testimony.) Also, don't just start moving the boats around the table. Go through the various positions as you did in preparing your diagram, and go back only as far in the evolution of the event as you feel is necessary. If the jury wants you to go back further, they will ask you.

Using notes and the rule book in the hearing

Don't hesitate to bring notes with you into the hearing. In fact, it's a good idea to outline the points you wish to make as well as the possible questions to ask. Also, you should be taking notes while your competitor or the witnesses are giving testimony. You have the opportunity to make a final statement and if the protest is at all lengthy, it is often difficult to recall all the comments that were made. And when making reference to a rule or appeal, don't hesitate to open the books. It doesn't diminish your credibility, and you'll always be sure to get it right.

Questions

Before and during the hearing write down the questions you will ask your competitor and witnesses. These should be used for unearthing facts, not making accusations. Also, don't ask your competitor to verify your assumptions, because they are too easily refuted and usually don't have much to do with the facts. During your competitor's testimony, listen carefully for inconsistencies. When question-

ing your own witness, never ask a question to which you don't already know the answer. And don't feel obligated to ask questions of your competitor or the witnesses. Evaluate their statements, and if you feel that their statements have not been detrimental to your case, don't give them the opportunity to open up new avenues of information.

In responding to questions, there are three basic stages an attorney will advise: First, listen to the question; second, think about it; third, give the answer. It is always important to directly address the question asked. Don't use it as a springboard for adding to your testimony. A good jury will only reprimand you and tell you to stick to the facts in questioning. You'll have the chance to give more testimony later. When answering, it's fair to take some time to think about your response. A thoughtful answer is much more useful than a quick one. Also, no matter how bad a question might seem, don't judge the person asking it or give a facetious answer. Sometimes your competitor might merely want to demonstrate that you don't think clearly in a tense situation. That may be all that's needed to convince the jury that you acted irrationally on the race course. Often a jury member will ask what seems to be an absurd question or might indicate they don't understand the boats or the rules. Some very experienced and clever judges get information by asking questions that might seem way off the track. So always maintain your poise and show you can field tough questions that may even be intended to confuse you.

How to deal with suspected lying

Although protests can sometimes be very disagreeable, my advice is to never take antagonism into the hearing. I think it undermines your case to indicate to the jury that you feel the other person is lying or has acted in an unsportsmanlike manner. Some of the very young competitors will sit and roll their eyes, throw their hands in the air, and make all kinds of gestures and noises while their opponent is giving his testimony. Trying to influence a jury by that kind of action is strictly bush league, and a championship competitor should be more poised than to submit to it. Instead, you should focus on a very precise presentation of your own testimony and, if necessary, focus some direct questioning on certain areas of your opponent's story. If your opponent's story is inaccurate or fabricated, it will usually break down somewhere along the line.

Final Statement

The last step in the hearing of the testimony is a final statement by each competitor. Focus on the key points and be brief. If you have made notes during the testimony, you'll be able to quickly review the facts that support your case and any other key issues. Never introduce new facts or statements. Also, avoid explaining the rules or implying that if you lose your case it will be a miscarriage of justice. If

you suspect your competitor was lying or giving distorted facts, avoid facetious remarks but address the fact that in your opinion your opponent presented a very inaccurate description of the incident. Lastly, state the rule(s) you feel should be applied.

One last word about protest hearings. No matter how objective the jury members are, we are all influenced by people's behavior and the way they present themselves in this type of human interaction. It's to your advantage, always, to establish a good rapport with the jury. The best way is to follow the advice above in both your preparation and presentation. Good jurors will immediately pick up your thoroughness and respect you for it. Also, always take yourself seriously, and especially when around the judges. Horsing around on the water or on shore or becoming a regular in the hearing room with inane protests will lower the esteem of any judge. Keep in mind that as you get nearer the top of the sport, the names and faces of the competitors start becoming familiar to the top judges, and your reputation will become well known. Be sure it's the kind of reputation you're proud of, and you'll get a lot of mileage from it.