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Introduction

In this issue of the Quarterly, we are pleased to bring you eight articles that will appear in the Masters Manual, which we introduced in the 2008 winter edition of the Quarterly. These articles continue the tradition of providing practical advice about issues common to litigation.

Every defense attorney hopes to someday handle "the case of a lifetime" but also approaches this endeavor with some degree of trepidation, which must be overcome by skill, organization, knowledge, and preparation. In this issue, we are pleased to include a road map for handling "the case of a lifetime" written by Andrew B. Downs, John M. Intondi and W. Douglas Berry. In "Managing the Case of a Lifetime: How to Survive and Prosper Without Imperiling Your Sanity, Personal and Client Relationships, and the Self-Insured Retention on Your E&O Policy," these experts draw on their wealth of collective experience to explain how to manage all aspects of your practice along with the case of a lifetime. The article also provides an in-depth explanation of the insurer's perspective and how to manage discovery in a bad-faith case of a lifetime.

Recognizing that one of the traits of a great lawyer is that he or she is always learning and improving, we also bring you two articles written by non-lawyers who offer fresh perspectives on trial strategies for defense counsel. In "Effective Use of Plot to Convey a Corporate Client's Story," Martha Alderson, a plot consultant and author of *BLOCKBUSTER PLOTS: Pure and Simple* explains why using a plot consultant can enhance your litigation expertise. The article also describes how to use a plot planner to prepare and examine witnesses at trial, time the presentation of critical evidence, and build a dramatic and compelling message for the client. The second article, by Dr. Paulette Robinette, a jury consultant and founder of JurySync, is entitled **"**An Overview of Juror Perceptions of Witnesses and How to Prepare Witnesses to Properly Convey a Trial Story." In this article, Dr. Robinette explains how using an affirmative offense when defending a case will not only help the jury perceive a defense verdict as a just result, but will also

help corporate witnesses to convey their testimony in an effective manner. Though Dr. Robinette's suggestion that defense lawyers take an affirmative approach at trial may simply confirm the wisdom of the approaches that many of our readers take at trial, Dr. Robinette also explains a theory of cognition relating to what testimony jurors accept and reject, and counsel can use this theory to maximize the likelihood that jurors will hear and accept the defense witnesses' message.

Next, because we recognize that effective witness preparation is a key component of a winning trial strategy, we included the article "Rule 30(b)(6) and the Crisis Client," in which Larry E. Hepler focuses on choosing, educating, and preparing the corporate designee when opposing counsel notices a deposition under Federal Rule of Civil Procedure 30(b)(6). In his article, Mr. Hepler explains that for a crisis client – the client who has everything (future profits, good will, and jobs) riding on the outcome of litigation – it is critical that counsel manage, the entire Rule 30(b)(6) process. Drawing on his extensive expertise, Mr. Hepler provides insights and recommendations that every member of the defense bar will appreciate when faced with the daunting challenge of representing the client in crisis.

How can an expert effectively "assist" the jury to either understand evidence or decide a fact-based issue? In "An In-Depth Look at Direct Examination of Expert Witnesses," Deborah D. Kuchler provides a comprehensive answer to this question. In this thoroughly researched article, not only does Ms. Kuchler summarize what others have written about expert witness testimony, but she also uses her many years of litigation experience as lead trial counsel to illustrate and explain these points. Among the many insights contained in this article, Ms. Kuchler explains not just how to choose, manage, and prepare an expert, but also how to question an expert on direct examination so that the expert's testimony resonates with the jury and effectively aids in telling the defense client's story.

Because it seems that more and more cases are mediated instead of (or in addition to) being tried, we bring you the article entitled, "Mediation: Not If, But When and How." There, Elizabeth Lorell and Jeffrey Lorell offer guidelines for determining when mediation will be most fruitful. They also

offer advice regarding how to choose the right mediator, how to shape the mediation, and how to effectively advocate during mediation. Their advice is sympathetic to clients' desires to reduce defense costs without increasing corporate exposure to liability. The authors use their experience to explain how during the mediation process, a skillful litigator must change to become an effective, settlement-minded advocate who is mindful of the creative, value-added opportunities for achieving consensus.

Finally, we are pleased to bring you two very important articles that explain how FDCC members and others from their firms successfully defended toxic tort cases. In "Pre-Trial Preparation: The Key to Success in Toxic Tort Litigation," Barbara Barron, Frank Domino and Molly Moore write about recent cases in which their thoughtful and creative investigations and other pre-trial preparations led to favorable outcomes. Written in an engaging style, this article will really get our readers thinking and will likely be an article that many will want to reread as soon as the letter of engagement is signed. In the same vein, in "Successful Trial Tactics in Toxic Tort Cases," David Governo, Brendan Gaughan, and Julian Jordan write about trial tactics they used successfully in a recent case. For example, they explain how they debunked use of the "bucket theory" — a purported device for proving causation in toxic tort trials. Focusing on examination of witnesses and the verdict sheet, the authors show how they were able to cast doubt on the effectiveness of a warning, convince the jury that causation was lacking, and point to other more culpable defendants. We think that this article will be another that our readers are likely to read over again and recommend to their new associates as they prepare any complex case for trial.

We hope that you enjoy reading all of the articles and that you find them both interesting and helpful. In addition to thanking all of the authors for their contributions to this issue of the Quarterly, we also wish to thank Frank Ramos, who seconded the choice of each of these articles as appropriate for inclusion in the Masters Manual.

Patricia Bradford
Alison Julien
Co-Editors, FDCC Quarterly

Managing the Case of a Lifetime: How to Survive and Prosper Without Imperiling Your Sanity, Personal and Client Relationships, and the Self-Insured Retention on Your E&O Policy[†]

Andrew B. Downs
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I.
Introduction

If it has not already occurred, at some time in the future you may suddenly receive the "case of a lifetime." Both a blessing and a curse, the case will be both profitable and all consuming of both your time and your firm's resources. If left uncontrolled and unmanaged, this "blessing" can ruin your sanity, your relationships with your family, co-workers, and other clients. The case, and the resulting stress, can swallow your practice and leave you at risk of being accused of malpractice not only in that case, but in your other cases as well.

Fortunately, you can control and manage this case, and you can thrive. In this article, we hope to offer you some help in doing so. We first provide factors to help you determine whether a case really is the "case of a lifetime." We then offer guidance on managing both your overall practice and the case itself. Finally, we consider the case of a lifetime from an insurer's perspective, including advice on using defensive discovery practices that may be necessary if an insured initiates a bad faith claim as a result of the insurer's handling of the case.

[†] Submitted by the authors on behalf of the Property Insurance and Extra-Contractual Liability sections.

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II.
The Case of a Lifetime

What is the case of a lifetime? It is any case that is significantly larger and more complex than the cases you customarily handle. In most instances, it will have many of the following characteristics:

- The case will require significantly more staffing than the "one partner, one associate, one paralegal" norm enshrined in many insurers' billing guidelines.
- The case will be highly visible to the client, and you or the person to whom you report are likely to be working with relatively high-level executives.
- There may be multiple lawsuits in multiple jurisdictions.
- The discovery and electronic discovery issues in the case are not present in your "run of the mill" cases.

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- The plaintiff(s) will have the time, resources, and motivation to litigate far more aggressively than the typical plaintiff.
- How the case is defended and resolved will have a collateral impact on other matters that you may be handling.
- Some or all of the litigation will be outside your local area.
- You and your team may need to learn and adapt to technology tools that you do not use on a daily basis.
- You may be working with a second firm that also represents your client.
- Speed is of the essence.

How can the case of a lifetime turn into a problem? The answer lies in how the business of law is currently practiced. More than ever, the business of law is a relationship-driven enterprise where clients hire lawyers, not firms. Thus, suddenly focusing much of your atten-

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tion to a single matter for an extended period of time imperils your relationships with your other clients, who have faithfully supported you in the past. Long hours can cost as much in relationship deterioration as they add to the bottom line. Handling cases out of town for extended periods of time is difficult. The problem is not that all Marriotts look alike inside; it is that none of them look like your home or your office. With such extensive time devoted to a single case, it becomes easy to lose track of your other cases. Not surprisingly, neglect is a major cause of malpractice suits. Accordingly, if you are ill-prepared to handle the case of a lifetime, you may face difficulties in that case and in your practice as a whole.

III.
Managing Your Practice When Confronted with the Case of a Lifetime

Luckily, successfully tackling the case of a lifetime need not come at the expense of the rest of your practice and potential exposure to malpractice suits. What follows are several

steps and considerations to ensure that your practice is adequately prepared to handle the case and that your practice will continue to thrive once the case is concluded.

A. *Assessment*

As with any case, quick assessment is necessary. Equally important, however, is a measured response. Before devoting significant resources to pursuing the case, determine what the issues and priorities are. Keep in mind that what seems important at the beginning of a case can be less important at the end. A prompt assessment from a practice management perspective covering these topics is essential, whether or not litigation is already pending:

- What issues and activities are most likely to consume significant resources in the next thirty, sixty, and ninety days, and six months from now?
- What type of time commitments will be needed by various categories of time keepers?
- What organizational work, if done now, will save significant time and money in six to twelve months?
- Do you need local counsel? What characteristics do you need in that attorney and firm? What role does the client need local counsel to play?
- Does your firm have the technical infrastructure needed for an effective defense? If not, can you outsource it? Will your system work with local counsel, if local counsel is hired?
- How much will the litigation cost the client?

The answers to these questions will dictate both your short and long-term staffing needs and also how you organize the case.

B. *Local Counsel*

Whether or not you are licensed in the jurisdiction where the case is pending, if the case is outside your immediate area, you should seriously consider retaining local counsel. Before you retain local counsel, decide what role local counsel will play. There are several common alternatives: (1) The Mailbox: Local counsel does nothing but act as a conduit for service and court filings; (2) The Public Face: Local counsel is well known in the community and will serve as the client's public face in court and in the local press; (3) The Counselor: Local counsel will not be lead trial counsel but will contribute advice regarding the defense of the case based on their knowledge of the local community and courts.

Hiring "mailbox counsel" is rarely a good idea. Unless you practice regularly in a jurisdiction, you are unlikely to know the unwritten rules and mores of a community and court system. You will need local counsel to provide you with that information.

Therefore, it is usually better to hire local counsel to act as a public face and/or counselor. Whoever you hire, make them a meaningful part of your litigation team. Local counsel

should be involved in strategic and tactical discussions. They should participate meaningfully in all aspects of the defense so that they have sufficient knowledge to offer meaningful advice. Finally, listen to local counsel. Even if they are not specialists in the particular area of the law, and even if they do not have the ear and confidence of your client's home office or general counsel, your local counsel should be first-class lawyers who will have ideas and insights different from yours.

Even if litigation is not yet pending, if you believe you will need local counsel, hire them quickly before your opponents do.

C. *Staffing*

The case of a lifetime needs paralegals, and it needs them early. Assign a paralegal to serve as the lead or coordinating paralegal, and let him or her serve as the principal, but non-exclusive, conduit of communications between you and the other paralegals who will eventually be recruited to join your team.

The lead or coordinating paralegal needs to know the case as well as you do, if not better. This person's primary role is organization. You must develop a document management protocol early for both substantive documents and pleadings and correspondence. You need a unified system that allows for quick and easy retrieval of relevant documents, correspondence, and pleadings by any member of the litigation team.

If you anticipate e-discovery issues (and you should), assign a paralegal and an attorney other than you to take the lead position on all e-discovery issues, both offensive and defensive. Hire an outside e-discovery consultant who can serve as your expert witness in e-discovery disputes early. Talk to your client before you hire this consultant because the client may have had past experience with various e-discovery companies. The e-discovery paralegal will play a crucial role if you do "offensive" e-discovery against your opponents because he or she should be the primary person searching the electronic data produced by other parties.

Assign another attorney to take the lead role in legal research and briefing. While this attorney may also have other roles, you and your client will benefit from consistency in this role. This person should also be your first choice for drafting pleadings.

Unless depositions start immediately, you do not need to assign attorneys to deposition coverage at the outset. Similarly, you are likely to need one or more paralegals for deposition preparation and document database work. Again, you can wait until you have sufficient information or documents before making those assignments. Wait and see how the case develops before you do so. You may be able to free resources by using Joint Defense Agreements that will give you greater flexibility in staffing depositions.

Finally, get one of your partners involved early, so that there is someone of comparable skill available to cover critical hearings, mediations, and depositions when you are unavailable. Not only does this arrangement benefit the client by having backup, but it is an important part of preserving your sanity.

If your firm does not have people with the appropriate levels of expertise to spare, give serious consideration to assigning certain of these roles to your local counsel. Doing so is

an excellent method of leveraging your resources and skills, and it helps ensure that local counsel is able to provide meaningful assistance.

D. *Client Management*

1. Develop a Common Strategy and Set of Expectations

In many instances you will be fortunate to be working with employees of your client who have the experience and authority to deal with problems of the magnitude that the case of a lifetime presents. But, now and again, that will not be the case, and it is important to understand and manage client expectations at the outset.

First, whether or not the client requires a written budget in a particular format, prepare one for your own use. Then, with appropriate contingencies and qualifications, tell your client what the case is likely to cost in the next month, quarter, and year. Clients understand that budgets can change, so as the case enters new stages, like depositions, close of discovery, eve of trial, and so on, update that budget and communicate the changes to your client.

Second, educate the client regarding the degree to which defending the case will consume the client's internal resources. Will there be e-discovery requests? If so, not only do you need to manage the litigation-hold process, but you also need to identify who on the client's end will be responsible for complying with those requests. Similarly, educate the client early regarding the resources necessary to prepare the client's employees for depositions. Meet with the witnesses, in person if at all possible, at an early date so that you can discuss any special preparation needs (such as witnesses who need more extensive preparation than is customary). Make sure that the likely witnesses' immediate supervisors understand and agree to the time commitment that will be required of each witness. Find out if the witnesses have any special time constraints that will make them unavailable (pregnancies, night school classes, etc.). Find out from your contact whether any of the prospective witnesses are likely to be separated from employment, either by layoff or termination.

Third, find out early how the client defines "victory." Is the client's goal to settle the case, or is it prepared to go to trial even if the demand is not outrageous? While the client's views may change, the earlier you know what the client really wants, the better off you are.

Fourth, ask whether the client faces possible or actual collateral consequences related to the case. Are there cases in other jurisdictions that raise similar issues? Would an adverse result force a change in business practices elsewhere? Would discovery into certain issues expose institutional issues that the client would prefer to keep private? Are there reinsurance market consequences? Any of these collateral consequences, or others, can play a very important role in determining the best strategy as the case develops.

2. Avoid Well-Intentioned Interference

Everyone wants to be helpful, especially when a case like the case of a lifetime comes around. However, well-intentioned interference from your client's employees can create inadvertent consequences. While some may legitimately need to be involved in certain aspects of the business' operation that have some relation to the case, others simply are

unaware of the potential collateral consequences of their actions. It is important that you discuss with the client the need to designate someone (whether it is the person to whom you report or someone else) who is the hub or point person for internal communications relating to the case. Ideally, all communications from your client regarding the case will be filtered through this point person.

Well-intentioned collateral risks can come from many directions. For example, in an insurance company, what happens with a claim (or group of claims) can have an impact on the business activities of groups outside the claims department, including underwriters, people responsible for relationships with agents and brokers, people responsible for reinsurance, the IT Department, the internal training department, and regional administrative claims managers who do not have technical supervision responsibilities. All of these constituencies need to be informed that even the most seemingly innocuous internal communications and external actions can have a collateral impact on the lawsuit against the client. All these constituencies also need to understand that defending the case may require the use of resources from their areas of responsibility, which they will be required to provide when requested, even if it is inconvenient for their operations.

Regardless of their internal roles, the corporate employees outside the case management chain need to be politely advised that unnecessary involvement in the case increases the likelihood that they will become witnesses. This risk is particularly true in connection with internal communication. Both the client contact and the affected employees need to be reminded that in many instances, the fact that litigation is pending does not make internal communications non-discoverable.

You and your client should also discuss establishing some type of internal protocol that identifies the type of ordinary business decisions that can have an impact on the case (and are not so important to the client that the consequences to the case are a secondary consideration) and identifies the employees who may be faced with those decisions. If it is already likely that these employees will be witnesses, they need to be advised to take into consideration the fact that they are likely to be testifying in the future when they are making or receiving communications regarding decisions that may have an impact on the case.

E. *Technology*

It is difficult to handle the case of a lifetime in today's world without the assistance of technology. If you are not tech-savvy yourself, make sure that other members of your team are. If you do not have the technology infrastructure in house (and most firms do not), hire an outside consultant at the outset.

Technology makes it possible to have people in different places or different firms working together on the same case. It also can prove a lifesaver when depositions are progressing on multiple tracks, as they often do in large cases.

1. Types of Technology

Today, almost everyone uses e-mail and word processors, but not everyone uses litigation support software beyond the Microsoft Office suite. You should consider four types

of technology support when handling any large case: (1) litigation document software; (2) case organization software; (3) deposition testimony software; and (4) e-discovery tools.

a. Litigation Document Software

This category of software includes a variety of database programs that are used to organize and maintain documents. If your firm uses a document management program for its word processing and related documents (such as iManage, Interwoven FileSite, or PC Docs), that software is important, but it is not the solution.

Litigation document software includes both "pure" database programs, such as dbText, and litigation support programs, such as Summation (which can also handle deposition transcripts) or Concordance. These programs allow the electronic storage of evidentiary documents, and in most instances they have optical character recognition qualities that allow full-text searching.[1]

Storing documents in electronic form has several benefits: (1) It saves a substantial amount of storage space (the typical records company storage box holds 2,000 to 2,500 pages); (2) It allows for document review by people who are in different locations without incurring the cost of making full duplicate sets of documents (scanning costs about the same as an initial photocopied set); (3) With full text searching and proper coding, specific documents can be found rapidly; and (4) The documents can be made accessible to an attorney sitting in a deposition with a laptop computer without the need to physically carry all of them.

Electronic document storage does carry costs. Aside from the software costs and any media costs for storage (a recent matter with more than one million pages of documents and more than 150 video depositions occupied over 300 GB of storage space), the documents need to be "coded" with at least basic information such as author, recipient, date, type, description, and so on. Time and expense considerations permitting, they can also be coded with attorney notes, and tagged to issues and witnesses. Coding is typically done either by paralegals or dedicated "coders" who are less expensive than paralegals. Depending on the nature of the documents (handwritten documents slow the process), a good paralegal or coder can code twenty to twenty-five records per hour

In some cases, whether because there are multiple firms involved in the defense, or due to a Joint Defense Agreement, the document database should be hosted by an offsite provider and accessed via the Internet.

b. Deposition Testimony Software

Deposition testimony software is available in two types: software that allows for the annotation and searching of electronic transcripts, such as LiveNote or Summation, and

[1] This article does not review or endorse any of these programs. Rather, how they are used is what is important.

software for working with videotaped depositions, such as Sanction II or Trial Director. There are pros and cons to each product, and to some degree which is preferable depends on the end user's personal preferences.

In any mega-case (and for some of us, in any case) the attorney should obtain an electronic (ASCII, eTran, or Amicus) copy of each deposition transcript. Most larger reporting firms will also provide imaged copies of the exhibits that, in some software applications (such as LiveNote) can be linked to the electronic transcript. If you can obtain these copies in your case, it is worth doing. Again, by putting the transcripts on the laptop computers of the attorneys attending depositions, the amount of paper that needs to be carried can be reduced significantly, and relevant testimony can be quickly located.

In addition, if it is available, you should seriously consider using real-time reporting. When depositions are occurring on a daily basis, sometimes on multiple tracks, having real-time reporting allows you to share the depositions among team members. It also can be a lifesaver when there are fifteen to twenty lawyers in the room examining, and portions of the testimony have no bearing on the claims against your client. Finally, some court reporters are able to stream depositions over the Internet. While this service is expensive (LiveNote is the primary vendor), with video depositions, it is an effective way for an attorney to attend a deposition remotely when that deposition is not of critical importance to the client, thus saving travel time and expenses. The stream will include the transcript as well as the video and audio. To have an internet stream, you must have real-time reporting. In addition, in most court reporting agencies, the real-time reporters are among the best reporters the agency has, thus ensuring that you get better transcripts.

In a mega case (and for some of us, in most cases) depositions should also be videotaped. Video is the most effective way of presenting deposition testimony at trial, whether to impeach or to present the testimony of unavailable witnesses. The video recording should be purchased in a software compatible format (usually MPEG1), not in a traditional television DVD format. Software such as Sanction and Trial Director can then be used to present the testimony at trial.

c. Organizational Software

Software such as the CaseMap suite from Lexis (CaseMap, TimeMap, TextMap) can assist in organizing the factual aspects of the case. The software can be linked to particular documents, permitting easy reference. Its greatest value may be for paralegals to compile information in a more attorney-friendly output that an attorney may then use as a checklist for depositions or as a way to keep track of the facts relevant to a particular issue.

d. E-Discovery

Any time e-discovery is used, the e-discovery consultant is critical. Whether you are producing or receiving electronic discovery, someone needs to search it. Competent e-discovery consultants will provide software tools to permit those searches to be made more easily, generally via a secure Internet site.

IV.
Managing the Case of a lifetime

Once you have taken the proper steps to ensure that your practice can handle the case of a lifetime, it will be time to consider the best way to manage the case itself. It may seem obvious, but in the case of a lifetime, just as in most other cases, being proactive pays off. Indeed, in the case of a lifetime, getting behind can create insurmountable problems. Fortunately, by taking a number of steps, counsel can keep the case manageable.

First and foremost, obtain and at least skim the *Manual for Complex Litigation* by the Federal Judicial Center and published by West.[2] It is full of information that will help the parties and the judiciary manage a complex case. If you are in state court before a judge unfamiliar with complex litigation, refer the judge to it. Some of the more important case management strategies that the *Manual* refers to are discussed below. These include the use of Liaison Counsel and coordinating committees, Case Management Orders, and Joint Defense Agreements. Each of these strategies can help facilitate communication between parties, establish agreed-upon protocols, and keep you and your team sane.

A. *Case Organization, Liaison Counsel, Coordinating Committees and the Like*

The case of a lifetime is likely to involve multiple parties. In these circumstances, organizing the lawyers is a critical first step toward maintaining your sanity. Depending on the number of parties and the degree to which their interests diverge, it may be appropriate for the court to appoint Liaison Counsel for each side or group of parties, or to appoint coordinating committees to manage the litigation. If your client is anything other than a peripheral party, attempt to be appointed to a committee – that way you are in the room when the decisions that will affect you and your client are being made. Liaison Counsel needs to be someone who is trusted by all the parties and his or her client, and that attorney also needs to have personal credibility with the court. It is a time-consuming job. If you barely have sufficient resources in your firm to handle the case, you should not seek this position. The same is true for a position on a coordinating committee – if you and your client are not prepared for you to do the work, do not seek the position.

If you are a peripheral party and part of your defense strategy is to be inconspicuous, then you should not seek committee appointment. At the same time, beware of the risk that the more significant parties may settle shortly before trial, leaving your client at risk of being a target defendant. Thus, even if you are a peripheral party, prepare as if you will be defending the case with few if any allies; just do not advertise the scope of your preparation.

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[2] Manual for Complex Litigation (Fourth) (2004).

B. *Case Management Orders*

If possible, volunteer to write the initial draft of the Case Management Order as well as any amendments to that Order. In preparing an order, consider including provisions relating to the following issues:

- Document production protocols, including the establishment of a central document depository whose costs are shared by all parties, and a requirement that all documents be deposited in electronic form (the depository should be capable of making the documents accessible through a password-protected website).
- Deposition protocols, including the following:
  - Centralized scheduling under the auspices of the Case Management Committee or Liaison Counsel.
  - The selection of a single court reporting vendor.
  - Provisions for video depositions.
  - Provisions for real-time reporting.
  - Provisions for a common and mandatory exhibit-numbering system.
  - Provisions regarding where depositions will be taken.
  - Provisions regarding the beginning and ending hours for depositions.
- Written discovery protocols, including requiring the provision of electronic copies of interrogatories, requests for admissions and requests for production when those requests are served (your secretary will thank you).
- Provisions regarding law and motions, in particular the designation of a common and ordinarily exclusive date each month for motion hearings.
- If permissible in the jurisdiction and not already mandatory (as it is in the federal courts), electronic filing and service of all documents.

In particular, the establishment of deposition protocols can make a significant contribution to your sanity. The scheduling protocols should allow sufficient lead time so that the Case Management Committee or Liaison Counsel can transmit a monthly schedule in advance of the depositions. If you are the committee member responsible for that schedule, you can protect your own calendar by scheduling depositions of minimal interest to you when you need to be elsewhere. Also, in the case of a lifetime, it is likely that a significant portion of the witness depositions will require travel by you. Controlling the schedule permits a more rational travel schedule (for example, for a case with west coast lawyers, avoid setting depositions for Mondays on the east coast; conversely for a case with lawyers from the east coast, avoid setting depositions for Fridays on the west coast).

Having a single court reporting firm (and paying the reporters to travel to out-of-town depositions) is also beneficial because the reporters learn the case and will provide better transcripts.

A common exhibit-numbering protocol (if not already mandated, as it is by some courts) is necessary to avoid confusion. If there are multiple tracks, set up the numbering protocol to keep the numbers for each track separate.

Deposition location protocols help prevent discovery disputes over whether a party will produce an out-of-town witness in the jurisdiction. Generally, if you represent an out-of-town client with out-of-town witnesses, it is in your client's best interest to have the Case Management Order provide that all depositions will be taken within seventy-five miles of the witness's residence or business address.

Deposition time protocols are an important consideration both for traveling attorneys and local ones, particularly those with child care responsibilities. To get maximum use of the day, try to persuade the parties to start your depositions at 9:00 a.m., not the more customary 9:30 a.m. or 10:00 a.m. Provide that they must end by 5:30 p.m. absent agreement by all counsel present. This arrangement provides certainty for those booking return airline reservations and for the local attorneys who have child care obligations. It will go a long way to keeping the relations between counsel cordial and towards keeping you and your team sane.

Having a common law and motion date (if the court has not already set one) allows counsel to turn what could be four to six separate appearances every month into a single, albeit longer, appearance.

Electronic filing and service are a boon to out-of-town counsel who need to be kept apprised of litigation developments. Even if the court is unable to accept electronic filing, attempt to have the Case Management Order mandate e-mail service of documents in pdf format. The paper flow in large cases can quickly overcome both attorneys and support staff. Therefore, electronic storage and organization are necessary to keep documents quickly accessible. You should not need to conduct a manual search of forty volumes of pleadings to find a particular discovery request or pleading.

C. *Joint Defense Agreements*

If there are similarly-situated defendants with whom your client does not have a conflict of interest (at least on certain issues), give serious consideration to entering into a Joint Defense Agreement with these parties. Whether the agreement is as informal as simply coordinating who will take the lead on particular depositions or is more complex with common document databases or expert sharing, a Joint Defense Agreement can reduce defense costs and the burden on any one attorney or firm.[3]

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[3] The drafting of Joint Defense Agreements is beyond the scope of this paper. However, if one is used, make sure that it includes provisions for the protection of work product and experts in the event that one of the participants settles before the remaining participants.

V.
Managing the Case of a Lifetime: An Insurer's Perspective

For a Claims Professional, what is a "case of a lifetime?" Is it a case that has a value up to the limit (whatever that may be) of that claim professional's authority? Is it a claim whose file material is contained in multiple volumes that consume several shelves in the file room? Is it a claim that has gone through several layers of appeal in the courts? Is it a complex Directors & Officers class action securities claim with billions of dollars in damages? Is it a class action product liability claim venued in a "judicial hellhole" with the class represented by a nationally-known plaintiffs' attorney?

All of these claims will present challenges to the Claims Professional assigned to manage them, dependent in part on his or her experience and level of authority. To some, it will be a case of a lifetime; to others, it will be just another claim in a career of endless claims that will need to be managed with too little time and too few resources. Ultimately, no matter how complicated the case may be or what the quantum of damages might be, the Claims Professional knows that he or she will have to resolve it for an amount at or within the policy limits of the insurer for which he or she works.

From the insurer's perspective (not the perspective of the Claims Professional assigned to handle the claim) the case of a lifetime is a case that exposes the insurer itself to damages that are not limited to the proceeds of an insurance policy. For an insurer, any claim, no matter how big or small, can turn into the case of a lifetime if the Claims Professional handling it is not conversant with and attentive to the need to handle each of his or her claims reasonably and in good faith. Doing so will certainly not prevent the filing of bad faith litigation against the insurer, but it will make such litigation more defensible and should mitigate the damages that might flow from it.

Not every claim that is processed by an insurance company results in a bad faith claim. Countless thousands of claims of every size, type, and description are handled by insurers every day and do not result in controversy or contention because the insurer handles the claims in a manner that meets the insured's expectations of what was due him under the deal he struck with his insurer when he paid his premium for coverage.

Problems arise, and bad faith litigation often ensues, when the insured's expectations are not met, forcing the insured to deal with whatever financial shortfall results from those missed expectations. Stated plainly, bad faith litigation often arises when the insured has to find a way to force the insurer to pay something it does not owe.

Insured versus Insurer litigation is the inevitable result of a dispute that cannot be resolved amicably. However, the complaint generally does not allege bad faith in isolation. It typically includes a cause of action for a breach of contract pertaining to the insurance policy. It will undoubtedly allege that the insurer was contractually bound to have done something that it did not do, to the detriment of the insured. The most commonly alleged breaches are the following:

- Wrongful denial of coverage, in whole or in part.
- Wrongful refusal to defend the insured or someone claiming insured status.
- Wrongful refusal to settle a claim within the policy limits, thus exposing the insured's personal assets.

In addition to these causes of action, the insured will likely state a separate cause of action (where permitted) that alleges that the insurer breached the contract in violation of existing insurance law and/or in bad faith for which separate (and often punitive) damages are sought against the insurer. Those damages, of course, are in no way limited by the policy under which the original claim arose.

Once the insurer receives the suit against it, the Claims Professional will almost certainly need to notify supervising management that the company has been sued for bad faith. Sometimes the Claims Professional will be named as a defendant as well. Every insurer will have very specific (and likely different) procedures in place to address these circumstances, but they will have these commonalities:

- Claim handling of the underlying claim will come under very close scrutiny – the claim may be reassigned away from the "offending" claim handler.
- Counsel to defend the insurer (and perhaps the claim handler, if named) will have to be identified and the case sent to them for appearance and answer.
- The defense of the company will very likely be managed by someone other than the claim handler. At many insurers, the General Counsel's Office will take over handling of the bad faith aspects of the case. At others, it will be a senior claims officer.
- Once preliminary opinions are received from defense counsel, the insurer may need to provide notice to its E&O insurer. It may also need to put reinsurers on notice if the reinsurance coverage applies to these circumstances.
- As the matter progresses, if the exposure to the insurer is deemed material, it may retain independent counsel to provide an opinion about the exposure to be included in the insurer's annual statements.

As noted above, whoever is charged at the insurer with the responsibility for managing this bad faith case of a lifetime, he or she must engage defense counsel. The selection of defense counsel is not always made with an eye toward economy or even necessarily subject matter expertise. Counsel selection may instead be made based on the application of forward-looking hindsight. That is, in the future, if things have gone really wrong, and the Board of Directors wants to know why panel counsel was used in a case that returned a headline-grabbing multi-million dollar punitive damages verdict against the company, it may have been wiser to have retained a high profile or politically-connected lawyer or firm with an unassailable reputation so that Monday morning quarterbacking or second-guessing is minimized.

Once outside counsel has been engaged and the defense effort has begun, it will become necessary to create claim management solutions to address two primary goals:

1. Providing for a clear and relatively simple chain of responsibility and authority at the insurer/client; and
2. Reducing the risk of harm to the defense effort by officious intermeddlers elsewhere in the organization. In order to accomplish the second goal, the chain of responsibility must be endorsed at a relatively senior level in the organization and must be communicated to would-be officious intermeddlers.

The internal point person for the case needs to have time to handle it, so it may be necessary to move other work off that person's desk. Given the realities of insurance company staffing, that solution will likely be unavailable. The claim handler will instead have to find a way to manage the case of a lifetime along with whatever else he or she is working on.

Ideally, that claim handler would also have sufficient authority to make day-to-day decisions and sufficient assistance from lower authority levels to avoid handling ministerial issues such as filing and invoice payment. This should not be a problem in most insurance companies since the claim handler on a bad faith case of a lifetime will almost certainly be fairly high up in the claims or legal department pecking order.

In addition to managing the claim, the claim handler must also manage the flow of information about the claim, particularly if it is in any way newsworthy. In an insurance company, what happens with a claim (or group of claims) can have an impact on the business activities of groups outside the claims department, including underwriters, people responsible for relationships with agents and brokers, people responsible for reinsurance, the IT Department, the internal training department, and regional administrative claims managers who do not have technical supervision responsibilities. All of these constituencies need to understand that they are not authorized to speak for the company in response to external inquiries without going through the internal point person. They also need to appreciate that the defense of the case may require the use of resources from their areas of responsibility, which they will be required to provide when requested even if it is inconvenient for their operations.

Well-meaning employees who have some peripheral knowledge of or tangential responsibility for some aspect of the claim also need to be politely advised that unnecessary involvement in the case increases the likelihood that they will become witnesses. If it is already likely that they will be witnesses, they need to be advised when making or receiving communications regarding a claim to take into consideration the fact that they are likely to be testifying in the future.

At the same time, outside counsel needs to be managed. There needs to be a steady flow of communication, regarding both litigation events and strategy and the company's expectations for outside counsel. Steady communication can be achieved by conducting conference calls, video conferences, or even face-to-face meetings at specified intervals.

These events should not be so frequent as to become significant time-wasting activities, but serious substantive and strategic discussions and re-evaluation should occur at least quarterly.

VI.
Managing Discovery in a Bad Faith Case of a Lifetime

The boom in plaintiffs' bad faith litigation against insurers has given new meaning to the term "fishing expedition." Not only are plaintiff-insureds requesting more documents and information, well beyond the limits of their own individual claims and policies, but the courts are going along with them. Moreover, in many instances, the plaintiffs' attorneys already possess the documents and information they request, and the discovery is aimed not at obtaining admissible evidence but at catching the insurer in a misstep based on its actions elsewhere in unrelated litigation. This is particularly true in the case of a lifetime, where the plaintiffs' attorneys can afford to do the extra work, and there can be significant collateral consequences of a mistake on the defendant's part.

A. *Scope of Discovery*

1. Broad Scope of Plaintiffs' Discovery Requests

Plaintiffs are going on fishing expeditions and coming back with quite the catch. Among the broad requests for production insurers routinely confront are the following:

- The claims file concerning the insured plaintiff
- All claims files concerning similarly-situated plaintiffs
- All claims files concerning claims arising out of similar provisions and policies
- All claims files concerning claims which were denied on grounds similar to the plaintiffs.

The insurer's claims files are unmined treasure to the insured. The files may include a hotbed of information that the plaintiff can relate to his or her claim, the insurer's practices in general, and how or whether the practices were followed in the insured-plaintiffs' particular case. Even if ultimately not useful in the case of a lifetime, the discovery can be shared with other policyholders' attorneys for their possible use in other actions.

In addition, in their effort to paint the insurer as an "evil empire," plaintiffs will also request the following:

- Underwriting Guidelines
- All claims manuals, directives, correspondence, letters, e-mail, newsletters, and interoffice memoranda
- All claims control/containment/severity policies
- All promotional materials from print, radio, television, websites, etc.

- All reinsurance materials
- All materials related to compensation systems for all involved in the claim
- All re-engineering surveys or evaluations
- All materials used or promulgated by the state's special investigations unit (SIU) or its equivalent
- All regional plans or statistics that relate in any way to claim denial, claim reduction, claim severity, including but not limited to goals and behavior of adjusters
- All progress development summaries by regions or otherwise
- All human resources manuals and materials, including job descriptions, personnel files, training manuals and materials, and organizational charts by company, department, and personnel
- All bad faith grievances, complaints, notices, claims, or other communications in which bad faith was alleged
- All bad faith judgments or settlements
- All documents relating to criticism, reprimand, penalty, discharge, or improper claims handling of particular adjusters and supervisors
- All documents of whatever nature that directly or indirectly reflect payments of or for punitive damages on any and all types of insurance claims throughout the United States, whether as a result of an agreement, settlement, appraisal, arbitration, trial, judgment, or appeal
- All documents relating to loss reserve histories on the claim as well as to all materials relating in any way to the evaluating and setting of reserves
- All documents relating in any way to programs or the like, designed to control claim costs and/or claim severity (e.g., severity cost containment management, peer review, bill review, financial claims budgets, financial forecasts, management by objectives or management by goals, claims costs, claims severity, goals for average pay claims, etc.)
- All guidelines for letter writing and form letters; and
- All documents relating to quality control audits (e.g., identifying and measuring leakage or "overpayment" of claims).[4]

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[4] John J. Pappas, Presentation at the Defense Research Institute Extra-Contractual Liability Seminar: Institutional Bad Faith Claims, at C- 22-23 (Sept. 17, 1998) (citing Jonathan Gross, *Defending "Pattern and Practice" Evidence in Punitive Damages Cases,* 61 Def. Couns. J. 403 (1994)) (presentation outline available from authors).

When confronted with the plaintiffs' discovery requests, the courts look to the broad terms of Rule 26(b)(1) of the Federal Rules of Civil Procedure,[5] which gives the courts vast leeway in deciding what is permissible discovery. For nearly sixty years, the courts have recognized that "the discovery rules are given 'a broad and liberal treatment.'"[6] In addressing the plaintiffs' requests, and analyzing the insurers' objections, the courts start with Rule 26(b), which, by its own terms, ensures the parties may cast a wide net:

> (b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> > (1) In General. Parties may obtain discovery *regarding any matter*, not privileged, *that is relevant to the claim* or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. *Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.* All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).[7]

The terms of Rule 26 are broad, permitting discovery of "any matter" so long as it is "relevant." This expansive language leads to abuse by the plaintiffs' attorneys and liberal orders from the judiciary. Courts often recognize that if they order the discovery, settlement is more likely to occur; if settlement does not occur and the matter goes to trial, the issue of admissibility can be addressed at that time. Thus, in the mind of the court, permitting broad discovery and denying limitations on the same is more time efficient and is a better allocation of judicial resources.

The far-reaching scope of permitted discovery arises, in large part, from the proof requirements to prevail in a bad faith case against an insurance company. To prevail, the plaintiff must typically prove a general business practice or, at a minimum, more than a single incident. In other words, the *allegations* drive the discovery; the broader the allegations, the broader the discovery permitted. Accordingly, courts allow evidence of past activities. For example, in *Miller v. Pruneda*, the insured-plaintiff was required to prove a general business practice to establish a bad faith claim. The court permitted discovery of all files relating to claims

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[5] Fed. R. Civ. P. 26(b)(1).

[6] Miller v. Pruneda, 236 F.R.D. 277, 280–81 (N.D. W. Va. 2004) (quoting Hickman v. Taylor, 329 U.S. 495, 507 (1947)).

[7] Fed. R. Civ. P. 26(b)(1) (emphasis added).

brought directly against the defendant for bad faith, unfair claims settlement practices, or other extra-contractual damages, in the State of West Virginia, from 1998 to 2004.[8] Just how much leeway do the courts allow? In *Cozort v. State Farm Mutual Automobile Insurance Co.*,[9] the court declared that "Florida recognizes no privileges or limitation with respect to claim file materials in [a bad faith] action."[10]

The distinction between relevance for purposes of discovery and relevance for trial admissibility plays a significant role in the courts' permitting liberal discovery. For discovery purposes, the standard of what is relevant is necessarily broader:

> A court must strike a balance between the broad scope of the rules of discovery and the discovery of relevant evidence that is ultimately deemed admissible or inadmissible at trial. . . . In striking the appropriate balance between these two tensions, "[d]istrict courts enjoy nearly unfettered discretion to control the timing and scope of discovery and impose sanctions for failure to comply with its discovery orders."[11]

For the most part, all the insured need establish is that the information is necessary to prove a certain business practice, and the information sought will be deemed relevant and, therefore, discoverable. In *Miller v. Liberty Mutual Fire Insurance Co.*,[12] the plaintiffs requested information concerning all of the insurers' bad faith complaints for all of its lines of insurance, not just that line related to the insured-plaintiff. The State of West Virginia required insurers to maintain a record of complaints filed against it, which includes "any written communication primarily expressing a grievance."[13] The State Insurance Commissioner is required to keep some of this information confidential, and the defendant-insurer tried to protect the information from the insured based on this confidentiality provision. The court held that the confidentiality protection did not cover all of the insurer's records. The party could obtain the information from the insurer-defendant, even if the Commissioner was required to maintain its confidentiality.[14]

Though the courts often allow seemingly endless amounts of discovery, some are cognizant of (at least some of) the discovered material's sensitivity. Though a court will require the insurer to produce the requested materials, some courts will conduct a balancing test to

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[8] *Miller*, 236 F.R.D. at 285.

[9] 233 F.R.D. 674 (M.D. Fla. 2005).

[10] *Id.* at 676 (relying on Allstate Indem. Co. v. Ruiz*,* 899 So. 2d 1121 (Fla. 2005)).

[11] *Pruneda,* 236 F.R.D. at 281(quoting Hinkle v. City of Clarksburg, W. Va., 81 F.3d 416, 426 (4th Cir. 1996) (citations omitted).

[12] No. Civ.A. 2:03-2325, 2004 WL 897086 (S.D. W.Va. Apr. 27, 2004).

[13] *Id.* at *3.

[14] *Id.* at *4.

determine whether to issue confidentiality orders. For example, the Third Circuit's standard is as follows:

> [T]he court . . . must balance the requesting party's need for information against the injury that might result if uncontrolled disclosure is compelled. When the risk of harm to the owner of [a] trade secret or confidential information outweighs the need for discovery, disclosure [through discovery] cannot be compelled, but this is an infrequent result.
>
> Once the court determines that the discovery policies require that the materials be disclosed, the issue becomes whether they should "be disclosed only in a designated way," as authorized by the last clause of Rule 26(c) (7) . . . . Whether this disclosure will be limited depends on a judicial balancing of the harm to the party seeking protection (or third persons) and the importance of disclosure to the public. Courts also have a great deal of flexibility in crafting the contents of protective orders to minimize the negative consequences of disclosure and serve the public interest simultaneously.[15]

At the end of the day, the plaintiff-insured will likely not find it difficult to compel the discovery he seeks. In fact, the district court in *Saldi v. Paul Revere Life Insurance Co.* issued a fifty-one-page decision that was hailed by the plaintiff's attorney as a "road map" for bad faith discovery litigation.[16] In that case, the court allowed the plaintiff-insured to gain access to training materials, claims management studies, personnel files, "profitability analyses," and many other documents in connection with hundreds of document requests. In response to the requests, the insurers objected and attempted to convince the court that the Supreme Court's decision in *State Farm Mutual Automobile Insurance Co. v. Campbell* limited the scope of discovery in bad faith litigation to those documents concerning the particular plaintiff's own case.[17] The district court rejected that argument and ordered production and responses to most of the discovery requests, noting the distinction between admissibility for trial versus discovery.

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[15] Saldi v. Paul Revere Life Ins. Co., 224 F.R.D. 169, 175 (E.D. Pa. 2004) (quoting Pansy v. Borough of Stroudsburg, 23 F.3d 772, 787 (3d Cir. 1994)).

[16] *See generally id.; see also* Jean Hellwege, *Insurers Must Comply with Broad Discovery Requests, Judge Rules*, Trial, Nov. 2004, at 16.

[17] *See Saldi*, 224 F.R.D. at 176 (discussing State Farm Mut. Auto. Ins. Co., 538 U.S. 408 (2003)).

B. *Responding to Broad Discovery Requests*

The plaintiff's broad discovery requests can be a bit overwhelming. What follows are several tips on how to manage and respond to these requests when they inevitably come.

1. Reacting to the Broad Discovery Requests

When the insurer receives the discovery requests, it must take them seriously. Do not put off commencing the search for responsive documents or preparing the interrogatory responses. Time is of the essence. "Be comprehensive, candid and careful in both research and response. . . . [B]e diligent, forthcoming, and sincere."[18] The documents compiled should be indexed and organized into a central system for retrieval and control. Do not play games with the court or counsel. "Parties must respond truthfully, fully and completely to discovery or explain truthfully, fully and completely why they cannot respond. Gamesmanship to evade answering as required is not allowed."[19] The courts are not concerned about the difficulties for the insurer in compiling the requested information and documents. Rightly or wrongly, organizations with tens of thousands of employees and vast computer networks are believed capable of assembling almost any category of documents.

Generally no one employee or group of employees within the corporation has knowledge of the documents' existence or where they are located. Many documents are retained in unlabeled boxes; some are kept by certain employees but not by others. Some are maintained in official "libraries." Many are not. Various drafts are retained and final copies disposed of. There is often no unanimity within the company with regard to handling or retention and no method to ensure consistency. This lack of document-management policy, too, can be construed by the able plaintiff's lawyer as some kind of bad faith scheme to mislead the court or cheat the insureds.

It is important to note that at least one court has recognized that the manner in which the insurer conducts its defense during the pendency of the litigation may be evidence of bad faith.[20] Fortunately, however, the court acknowledged that discovery practices likely would not support the bad faith claim since the rules of civil procedure provide a remedy for improper discovery practices.[21]

2. Don't Get Caught in an Inconsistency

Be careful. Be organized. Be prepared. Why? Because the plaintiffs' bar is all of these things, and its members communicate with one another at the speed of light. The plaintiffs'

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[18] John J. Pappas, *Oops,* 15-18 Mealey's Litig. Rep.: Insurance Bad Faith (2002).

[19] Miller v. Pruneda*,* 236 F.R.D. 277, 281 (N.D. W. Va. 2004).

[20] Hollock v. Erie Ins. Exch.*,* 842 A.2d 409, 415 (Pa. Super. Ct. 2004).

[21] *Id.*

requests for documents are not only overbroad and burdensome, but are particularly daunting because plaintiffs' counsel knows exactly what they are doing when they ask for these materials and information. They ask for materials they know the insurer has, and they ask for information they know the insurer does not want to provide. Their goal is for the insurer to either settle the case to avoid providing the information, or for the insurer to hide the documents from the plaintiff and the court. In either instance, the plaintiff has "caught" the insurer because the plaintiff knows the insurer has the information and documents. In fact, more often than not, the plaintiff already has the information and documents and doesn't even need to get them from the insurer.[22]

With the growth of the Internet and the development of technology, in any given case, a plaintiff-insured's attorney may know more about the insurance client than the particular defense counsel representing that client in that case. Moreover, any given defense counsel, along with any particular adjuster, may respond to written discovery, ignorant of facts known to others within the company. This ignorance of all the facts, coupled with the plaintiffs' knowledge of those facts, can and does result in a devastatingly adverse impact before a judge during the litigation process. Any mistake or oversight is seen not as human error, but as strong evidence of institutional deceit and "bad faith." Although untrue, it is a difficult burden to overcome and is best defeated by being avoided in the first instance.

Plaintiffs handling large-scale litigation claims, including insurance bad faith cases, share information and discovery materials about insurance companies.[23] By pooling their resources, the lawyers save money and also improve their ability to finance higher-level litigation. They work together to plan their strategy, conduct discovery, retain experts, perform jury assessments, and other various litigation activities.[24]

Among the various online resources available to plaintiffs' attorneys is the American Association for Justice's (formerly the American Trial Lawyers Association) document exchange where "[m]embers [can] share their case strategies, court documents, depositions, experts, and other case-specific knowledge," which is then made available to all of the association's other members.[25] The website invites viewers to "Send Us Your Documents" and provides a section called "Litigation Group Document Libraries," which provides access to a group's documents any time in an "easy-to-use environment." In light of the strength of the plaintiffs' bar, the insurance client and its counsel must be prepared.

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[22] Pappas, *supra* note 4.

[23] Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits,* 50 Duke L.J. 381, 392 (2000) (citing Guide to ATLA Litigation Groups, July 1998, at 7.

[24] *Id.*

[25] *See* AAJ Exchange, www.justice.org/exchange.

In *Saldi*,[26] the plaintiffs' attorney used documents from other cases against the same insurers, in which verdicts had been rendered against them, and presented the documents to the defendants with requests for admissions. The court found the documents from the other cases provided the requisite nexus for relevance. The opinion declared that

> for any evidence of Defendants' actions outside of the instant case to be relevant and potentially admissible in the instant case, there must be some nexus or connection between those actions and the instant case. Here, Plaintiff has submitted a number of documents obtained in similar litigation that provide a proffer of evidence of the defendants' bad faith actions. . . . The evidence proffered by Plaintiff provides support for the instant allegations of a pattern and practice of bad faith and supports further investigation into Defendants' internal business practices and policies.[27]

The large advantage the insurance industry may once have had in defending against a claim by an individual policyholder no longer exists in light of these collective efforts by plaintiffs' counsel against the corporate defendant. However, juries, and often judges, still perceive that the imbalance exists and make their decisions with this non-existent inequality in mind.

B. *Objections*

1. In General

The burden is on the party resisting discovery to specifically show how the information sought is not relevant or how the request is overly broad, burdensome, or oppressive, or to establish some evidentiary privilege.[28] It is important to keep in mind that a party "'cannot escape responsibility of providing direct, complete and honest answers to interrogatories with the cavalier assertion that required information can be found in this massive amount of material. Rather [a party] must state specifically and identify precisely which documents will provide the desired information.'"[29]

2. Burdensome

A blanket statement that the discovery request is overly broad, burdensome, or irrelevant is not sufficient to avoid discovery, even if the request is, in fact, overly broad, burdensome, or irrelevant.[30] Instead, the insurer must be prepared to demonstrate factually, by affidavit

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[26] Saldi v. Paul Revere Life Ins. Co., 224 F.R.D. 169 (E.D. Pa. 2004).

[27] *Id.* at 177–78.

[28] McCrink v. Peoples Benefit Life Ins. Co., No. Civ.A.2:04CV01068LDD, 2004 WL 2743420, at *1 (E.D. Pa. Nov. 29, 2004).

[29] *Pruneda,* 236 F.R.D. at 284 (quoting Martin v. Easton Publ'g Co., 85 F.R.D. 312, 315 (E.D. Pa. 1980)).

[30] *Id.* at 281; Hussey v. State Farm Lloyds Ins. Co., 216 F.R.D. 591, 595 (E.D. Tex. 2003).

or deposition, the extent of the burden claimed. In *Hussey v. State Farm Lloyds Insurance Co.*, the insurer defendant claimed it would be unduly burdensome to provide the information requested by the plaintiffs and that the plaintiffs could obtain the information through deposition. The court disagreed and held that a conclusory statement of burden and expense is not sufficient to avoid disclosure.[31]

The court in *Hussey* also held that an expert's engineering reports prepared for the defendant-insurer over the preceding five years were discoverable in a case for bad faith failure to pay for damage from plumbing leaks under a homeowners' policy. In *Hussey,* the plaintiff filed a Notice of Intention to Take Deposition by Written Interrogatories of George Perdue, the defendant-insurer's testifying expert. The Notice sought "[a]ny and all engineering reports prepared by State Farm for the past five years on residential foundation claims where damage was alleged to be caused by a plumbing leak."[32] The defendant insurer argued the discovery of reports prepared but not connected with the case for the sole purpose of impeaching the expert should not be permitted where the expert's credibility is not at issue. In addition, it asserted the request was burdensome, oppressive, and calculated to cause undue expense. The insured argued the reports were relevant to determine if there was a breach of the duty of good faith and fair dealing. In allowing the discovery of the expert reports, the court considered what elements the insured had to prove to prevail in its bad faith case. The court declared that

> [t]he previous expert reports conducted by Perdue could potentially allow the fact-finder to logically infer that Perdue's reports were not objectively prepared, that State Farm was aware of Perdue's lack of objectivity, and that State Farm's reliance on the reports was merely pretextual. Accordingly, expert reports are discoverable because they are relevant to the general subject matter of this case and are likely to lead to the discovery of admissible evidence.[33]

Do not object on the grounds that the production or response would be burdensome if the insurer has already produced the materials in another case. In *Saldi*, the insurer objected to certain responses on the grounds the requests were unduly burdensome and would interfere with its "confidential internal practices."[34] The court responded that "[d]ue to the highly relevant nature of many of these requests, . . . it [wa]s permissible to burden the Defendants with this discovery, especially in light of the fact that it appears Defendants. . . already had to produce much of this discovery in earlier litigation."[35] In addition to losing the motion, such a finding will cost valuable credibility with the court.

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[31] *Hussey*, 216 F.R.D. at 595.

[32] *Id.* at 593.

[33] *Id.* at 594.

[34] Saldi v. Paul Revere Life Ins. Co., 224 F.R.D. 169, 176 (E.D. Pa. 2004).

[35] *Id.* at 176 n.5.

If the insurer claims it is burdensome to produce the documents requested, be certain that there is no easier way to comply with the discovery request. In *State Farm Mutual Automobile Insurance Co. v. Engelke*,[36] the plaintiff sued State Farm for bad faith arising out of its handling of her personal injuries. State Farm objected to certain interrogatories and requests for production. At the hearing, the State Farm representative testified that providing responses to the interrogatories regarding other lawsuits would involve manually examining individual claim files, requiring full-time work by twenty-seven employees for one year, costing approximately $2.7 million. On cross-examination, however, the representative testified the information could be compiled with the use of a computer program. The court ordered the insurer to respond to the extent the information was available through computer-generated information.[37]

3. Privilege

For the most part, the protection of the attorney-client privilege and work product doctrine remains sacrosanct, even in the context of the broad scope of bad faith discovery. For example, in *McCrink v. Peoples Benefit Life Insurance Co.*,[38] the court rejected the insureds' argument that the attorney-client privilege and the work product doctrine do not apply in bad faith insurance cases if the defendants' attorney's opinion is in question. Where, as in *McCrink,* the defendant does not plead advice of counsel as an affirmative defense and does not assert counterclaims relying on advice of counsel, there is no waiver of the attorney-client privilege or the work product doctrine.[39] Similarly, in the case of *Nicholas v. Bituminous Casualty Corp.*, the court held that asserting the defense of advice of counsel did not result in a waiver of the work product doctrine.[40]

On the other hand, the court in *Roehrs v. Minnesota Life Insurance Co.* held that memorandum notes prepared by claims adjusters for the insurers' attorneys and the attorneys' written responses to the adjusters' questions were discoverable to the extent the adjusters relied on them.[41] The *Roehrs* case was an action for breach of the covenant of good faith and fair dealing in connection with the handling of a pulmonologist's claim on a disability income insurance policy. The plaintiff filed a motion to compel production of documents from the claims file after three of the insurers' claims adjusters relied, at least in part, on written legal

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[36] 824 S.W. 2d 747 (Tex. App. 1992).

[37] *Id.* at 750–51.

[38] McCrink v. Peoples Benefit Life Ins. Co., No. Civ.A.2:04CV01068LDD, 2004 WL 2743420, at *1 (E.D. Pa. Nov. 29, 2004).

[39] *Id.* at *3–4.

[40] 235 F.R.D. 325, 333 (N.D. W.Va. 2006).

[41] 228 F.R.D. 642, 646–47 (D. Ariz. 2005).

advice in deciding to deny the insureds' claims. The court applied Arizona state law to find the attorney-client and work product privileges were waived. It held the documents would be discoverable because (1) the assertion of the privilege was the result of an affirmative act by the party asserting it; (2) through the affirmative act, the party asserting the privilege made the information relevant by putting it at issue; and (3) the application of the privilege would deprive the opposing party of access to information vital to its case.[42]

C. *Accept What You Cannot Change*

1. Negotiation and Cooperation

Once litigation commences, protecting information from disclosure is initially a matter that counsel for the parties should try to negotiate. Agreed-upon restrictions may be submitted to the court as a stipulated protective order which may then be endorsed with the court's signature of approval. Obviously, if the parties can reach an agreement without court intervention, some expense may be saved, and some goodwill may be earned. The court will generally favor stipulated orders and permit the parties significant latitude in drafting them. One method of addressing protective orders is through the case management process at the outset. Negotiate and submit to the court a stipulated Master Protective Order that applies to all parties and contains appropriate triggering mechanisms as well as clawback provisions.

Protective orders may be very broad or very narrow with respect to what they protect. They can be drafted to cover only particular documents or categories of documents, which are identified within the order's terms. Alternatively, the parties may agree to an umbrella protective order, which might provide for all of the parties' discovery materials to be treated as confidential. These will be hard to come by and might not pass the court's scrutiny. The parties will likely reach some sort of middle-ground that permits each party to designate at the time of production the materials that it deems to be confidential or otherwise protected. The requesting party would then reserve the right to dispute the designation of confidentiality or privilege.

Further, the parties may agree to certain permissible uses of confidential materials. The least restrictive form of protective order would limit use of the discovery materials for purposes related to the case in which the discovery is produced. To avoid disputes, the agreement should endeavor to specify what constitutes matters "related to" the litigation. Perhaps the most common and efficient form of protective order limits the disclosure of confidential material to specific individuals and types of individuals expressly identified in the order and who are required to sign confidentiality orders. In the agreement, the signatories acknowledge reading the confidentiality agreement and consent to its provisions.

[42] *Id.* at 646.

Another form of protective order would permit the receiving party to retain, use, and disclose the materials, but not disseminate them to specific parties. An order of this sort is difficult to enforce. Although the parties to the order are prohibited from disclosing the materials to the forbidden entities, there is no way to prevent them from disclosing to third parties, who may in turn disclose the information to the prohibited parties.

Other protective orders require the receiving party to return the materials or to certify that the materials have been destroyed by a specific time after the conclusion of the litigation. This requirement also would apply to copies, summaries, and excerpts of confidential materials. Plaintiffs' counsel will often resist orders of this nature as they significantly impact counsel's ability to share the documents with others.

In responding to the discovery requests, rather than making flat-out objections, it is often helpful to establish acceptable limitations on the scope of what the insurer is willing to provide. In this way, when the insurer first appears before the court in response to the inevitable motion to compel, it appears as a reasonable defendant who is willing to turn over some materials and provide some information, within certain reasonable parameters. For example, in a long-running bad faith action arising out of a sinkhole claim, the insurer-defendant responded to the insureds' first set of requests for production with the following "Preliminary Statement of General Objection":

> Based on the above and subject to the specific detail set forth in each individual response, it is [the insurer's] position that Plaintiffs' requests are not reasonably calculated to lead to admissible evidence in this case and production, if required at all, should be limited temporally, geographically and with respect to type of claim as follows:
>
> TIME PERIOD: With regard to the claim file - documents from the date of loss (1/19/98) through the date Plaintiffs served their Civil Remedy Notice Of Insurer Violation (9/21/98) and any non-privileged documents contained within the claim file after that date.
>
> With regard to training manuals, personnel/administrative procedural manuals and guides - documents in use in 1998.
>
> With regard to personnel files - documents pertaining to the education, training and licensing of the adjusters who handled this claim and the annual evaluations of the adjusters who handled Plaintiffs' claim for the year of the loss (1998) and two years prior to the loss (1996 and 1997).
>
> With regard to advertising documents displayed, circulated or broadcast for two years prior to loss (1996 and 1997).

GEOGRAPHIC LOCATION:	Pasco County or the State of Florida, depending on the particular request.
TYPE OF CLAIM OR SUBJECT MATTER:	Claims for a sinkhole loss under a homeowners' policy issued by [the insurer].

> With respect to production of documents which fall within these parameters (assuming production is required), considerable time and expense will be incurred in locating and identifying responsive documents. Some documents may need to have portions redacted. Some documents may be confidential and/or proprietary in nature. Therefore, [the insurer] is agreeable to producing documents after Plaintiffs post the cost estimated to reasonably be incurred and the entry of an appropriate confidentiality order. Subject to the general objections stated above, [the insurer] responds to each individual request as follows: . . .

Well-drafted protective orders are the key to successfully avoiding being caught in the insured-plaintiffs' fishing expeditions. Even the *Saldi* court recognized that the courts can provide protections:

> Most commonly, courts condition discovery of confidential documents by preventing the party obtaining the documents from sharing that document with others and by using that document for any use, other than the present litigation. Courts are given broad discretion in evaluating the competing interests in discovery disputes so that they have the necessary flexibility to "justly and properly consider the factors of each case."[43]

In *Saldi*, although the court required the insurers to produce a vast array of materials, the court did impose some limits on the use and dissemination of the documents and information that it ordered the insurers to provide.[44] Among other things, the court limited the time period during which the plaintiff's discovery requests would apply to the period after the plaintiff had filed his first claim for benefits, but the court allowed discovery prior to the claim with regard to the formation of the policy and for any documents the plaintiffs' attorney had already obtained from other sources. Further, plaintiffs were prohibited from disclosing or exchanging the documents and information with anyone not associated with

[43] Saldi v. Paul Revere Life Ins. Co., 224 F.R.D. 169, 175 (E.D. Pa. 2004) (quoting Pansy v. Borough of Stroudsburg, 23 F.3d 772, 789 (3d Cir. 1994)).

[44] *Id.* at 179–197.

the case unless by specific request to the court.[45] The court also found plaintiffs had not established the relevance of certain documents or their connection to the case, including "board of directors' packages," "scoping team meetings," "telephone templates for initial interview and recommendations from the Psychiatric Disability Consultants."[46]

2. Settlement

Responding to the written discovery requests is expensive. Privilege logs and motions for protective orders increase the costs of litigation. Gathering and producing the documents adds to the usual litigation costs as well as the costs incurred for the insurance company personnel who must devote their time to providing the responses rather than their primary job responsibilities.

Often, the insurer elects to settle the bad faith case for an exorbitant amount in an effort to avoid the intrusive and burdensome nature of the discovery foisted upon it. Among the insurance companies that are targeted by these cases, a strong corporate culture has developed in which the insurer resists paying litigation expenses. When the insurer reaches a point where it expects its litigation expenses will exceed the dollar amount necessary to settle, it is inclined to take the less expensive alternative by paying out the settlement. Although the settlement may be the cheaper choice in dollars and cents, a reputation for settlement to avoid production may ultimately be much more costly to the insurer. Often this assessment leads to a determination that the nuisance value of the case, which is the expected cost to defend it, constitutes a settlement value in the six-figure range.[47] Because the nature of the claim is, in essence, against the corporate infrastructure, not the individual claims handler, the insureds' attorneys expect that the insurer will treat all of the bad faith cases in the same manner. Thus, they expect that if the insurer settles one case, it will settle them all, and in at least the same amount, even if the case is devoid of merit. Some consider this to be "legal extortion."

V.
Conclusion

You can handle the case of a lifetime without imperiling your sanity, your relationships or your E&O policy, but doing so requires proactive action, discipline, and a long-term strategy. Know your strengths and limitations, and do not fear asking for help. With this advice, and the other pointers in this article, you will not only handle the case of a lifetime, but thrive and eagerly await the next.

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[45] *Id.* at 178.

[46] *Id.* at 181 n.9.

[47] *See,* John J. Pappas, *Bad- Faith Should be Difficult to Prove,* 19-22 Mealey's Litig. Rep.: Ins. Bad Faith 22 (2006).

Effective Use of Plot to Convey a Corporate Client's Story

Martha Alderson

I.
Introduction

When going to trial, do you consider hiring a plot consultant as part of your legal team a wild idea? Yes? Think again. A plot consultant offers a unique perspective on creating your presentation strategy. Learn tricks that great writers use. Create the most compelling story to benefit your client.

Rather than viewing your case solely in terms of law and facts, see the world through a different prism. Stretch for ways to use plot to enhance your litigation expertise. Screenwriters and authors compress and reorganize a substantial number of complex facts into the context of a story. You can, too.

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II.
Plot

Plot integrates dramatic action, a character's emotional development, and thematic significance in a story. Here is a writer's definition:

Plot is a series of
scenes
deliberately arranged by
cause and effect
to create
dramatic action
filled with
conflict, tension, and suspense
to further the
character's emotional development
and provide
thematic significance.

So what does that mean?

A. *Scenes*

Plot is a series of scenes that show outward action. Scenes are in the now, the physical, moment-by-moment. Action is a scene marker, as is dialogue. Think of each scene as a witness, each with its own little story.

B. *Cause and Effect*

Plot is a series of *scenes* deliberately arranged by cause and effect. Cause and effect means that each scene comes directly from the preceding scene. One scene causes the next, creating a satisfying story for audiences because each scene is organic. From the seeds you plant in the first scene, the next scene emerges.

C. *Dramatic Action*

Plot is a series of scenes deliberately arranged by *cause and effect* to create dramatic action. Dramatic action means that the scenes played out moment-by-moment through action and dialogue include conflict.

D. *Conflict, Tension, and Suspense*

Plot is a series of *scenes* deliberately arranged by *cause and effect* to create *dramatic action* filled with conflict, tension, and suspense. Story is conflict shown in scene. Conflict, tension, and suspense force the audience members to the edge of their seats. Conflict, tension, and suspense are built through setbacks, not through good news.

E. *Character's Emotional Development*

Plot is a series of *scenes* deliberately arranged by *cause and effect* to create *dramatic action* filled with *conflict, tension, and suspense* to further the character's emotional development. Use authors' and screenwriters' techniques to develop your case's plot through its characters – your witnesses. More than anything else, an audience identifies most with the character/witness. Characters in a story, or the experts and witnesses in your case, allow you to tell the story through their testimony. Experts help advance your case's plot and theme.

We connect to one another through emotion. A witness able to "show" an emotional response to the conflict and action engages the jury, while a witness who merely "tells" how she feels about what happened is boring and often unbelievable. A character's action or behavioral response to conflict, during the event itself and later, in relating the conflict, is most compelling to an audience, whether judge or jury. Your audience needs to understand and care about your characters/witnesses, who represent the heart of your case. Emotional meaning always comes from your characters/witnesses.

F. *Thematic Significance*

Plot is a series of *scenes* deliberately arranged by *cause and effect* to create *dramatic action* filled with *conflict, tension, and suspense* to further the *character's emotional development* and create thematic significance. Thematic significance ties your entire story

together. It is the main thrust of your argument and what you hope to prove through your presentation. The theme is the *why*: what you want your audience to take away after having heard your story. The deeper meaning of the case becomes the thematic significance of the trial itself.

III.
Plot Planner

Plot your trial plan using the universal story form for structure and impact. The universal story form is the framework for developing a gripping story. Rather than creating a dry, episodic list of facts to cover, arrange your case by cause and effect to best engage the jury. Like an author of a book or a screenwriter of a movie, lawyers, too, can plot compelling stories.

Think of the plot planner as the route or map of the journey you envision for your case. When you first plan your plot, your route is likely to be sketchy with lots of gaps and dead ends. These gaps will smooth over and fill in as you come to know your story and characters/witnesses better. Along your case's route, the plot elements of dramatic action, characters/witnesses, and thematic significance will rise and fall, like waves cresting. The flow of these elements is like the flow of energy the Chinese call "qi" (pronounced "chi"). The *qi* is the mainstay of life force, inherently present in all things.

Within your story, the energy undulates. Although every story has its own energy, a universal pattern of energy rising and falling repeats itself. The greater your understanding of this stable format, the better able you are to determine where and when to allow the energy to crest, to make your case most compelling to the jury. Allow the energy of your case to direct the flow of your story. The closer you can re-create this pattern in your presentation to the jurors, the stronger and more compelling your case. A plot planner helps you map your case's energy and direction.

A. *Description*

All great stories have a beginning, middle and end.

1. The Beginning

The beginning usually encompasses one quarter of the entire story or presentation or trial. Most of us start out strong in the beginning, but struggle to keep the momentum going.

2. The Middle

The middle is the longest portion of the project – perhaps one half of the entire story. It commands the most scenes/witnesses, and is where many writers fall short. When the allure of the beginning is over, the story starts getting messy. Writers often know the beginning and the end of their story, but bog down in creating the middle. Crisis is the meat of the middle.

Place crisis – the scene of greatest intensity and highest energy in your story thus far –

around the three-quarter point in your case, when your audience needs a recharge to combat fatigue, frustration, and irritation. Crisis is where tension and conflict peak – it is a turning point in your case. Crisis is developed through the testimony of the right character/witness to provide the greatest impact in the energy flow of your story.

The crisis is the false summit of your case, where the audience can perceive the true summit. Here, your story's energy drops after the drama of the crisis, giving your audience the opportunity to rebuild energy in anticipation of reaching the climax.

3. The End

The final quarter of your presentation represents the end, which comprises three parts: the build-up to the climax, the climax itself, and the resolution. The build-up to the climax represents the steps you take to lead the jury to envision how the story should end. The climax is the point of highest drama in your story, the crowning moment when the thematic significance of your case becomes clear to the jury. The resolution is your opportunity to fully tie together that significance and make your story complete.

B. *Plot Planner Benefits*

A plot planner helps you visualize your case. Use a plot planner to place your ideas and sequence your witnesses to greatest effect. A plot planner allows you to experiment with changes in the storyline, witness line-up, or presentation to evoke stronger reaction and interest from the jury, and gives you a sense for how the trial may be paced. A plot planner also allows you to collaborate with others to generate ideas for better developing your case and to solidify your team's understanding of the case's core elements, and helps ensure that both you and your witnesses understand the story you are presenting. Importantly, the plot planner enables you to keep the larger picture of your story in full view as you concentrate on creating the story's individual parts, helping you maintain paramount focus on crafting a story that will convey your core message to jurors in a compelling way.

C. *Constructing a Plot Planner*

I recommend building your plot planner on big pieces of banner paper, running horizontally. It takes up quite a bit of space, but serves as a continual visual reminder of the entire project.

The plot planner is merely a line that separates scenes filled with conflict and excitement (above the plot planner line) from those that are passive, boring, filled with summary and back story, or heavy with information (below the plot planner line). Scenes are where the story plays out, where the action happens moment-by-moment in your presentation.

The external dramatic action of stories told in scene and filled with conflict belongs above the line, like the white caps on the sea's surface as a wave swells toward the shore. Scenes that show complications, conflicts, tension, dilemmas, and suspense belong above the line. Any scene that slows the story's energy belongs below the line.

By placing ideas above and below the line, you create a visual map for analyzing criti-

cal story information, presentation flow, and weaknesses in your story's overall sequence. Ideally, the plot planner line is not flat – it moves steadily higher, building your story slowly and methodically as tension increases. Each scene should show more tension and conflict than the preceding scene, with intensity building to your presentation's climax.

IV.
Conclusion

Cases must have plots, which are developed through the characters involved. It is these characters, your witnesses, who tell your case's story, who connect with the jury, and who bring your case's thematic significance to life for the jury.

By exploring the universal story form, lawyers can gain new insights into how best to prepare and use witnesses in a trial, time the presentation of critical evidence, and build the most dramatic and compelling message on behalf of their clients.

An Overview of Juror Perceptions of Witnesses and How to Prepare Witnesses to Properly Convey a Trial Story

Paulette Robinette, Ph.D.

I.
Introduction

When it comes to courtroom drama, a plaintiff often has the upper hand. A heartfelt plaintiff's story allows the jurors to eagerly exercise their ability to right a wrong. An evil villain harmed an innocent, or at least undeserving, victim and escaped without penalty; that is, the villain escaped until justice was placed in the hands of good citizens who are empowered to correct the injustice using the defendant's pocketbook. Defendants, on the other hand, are faced with the daunting prospect of giving jurors a sense of closure through inaction.[1] This prospect creates a significant temptation for defendants to proceed by attempting to negate the plaintiff's story—the defendant is not an evil villain, the plaintiff is undeserving, the plaintiff was not harmed, or the harm was not caused by the defendant. As a result, defendants end up arguing that no amends are needed because justice was already served.

Like many of my colleagues, I have counseled defendants to stop playing defense against the plaintiff's story and adopt an affirmative case theory that replaces a plaintiff's melodrama. Jurors are more open to persuasion if they have a reason to be *for* a defendant, rather than simply being against the plaintiff. However, unless an affirmative message is developed early in the litigation—ideally before witnesses are selected, prepared and deposed—defendants are confronted with the difficult task of taking an affirmative stance at trial with largely defensive evidence. In some cases, this defensive stance is unavoidable;

[1] Neal Feigenson, Legal Blame: How Jurors Think and Talk About Accidents (American Psychological Association 2000).

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however, there are times when an affirmative framing of the defense early in the case will lead the defense team to consider alternative witnesses and to prepare witnesses differently so they come across to the jurors as less *defensive* and more *persuasive*.

While the need for a trial story is widely accepted, the ability to develop effective storytellers can be easily overlooked. Defendants face the initial challenge of crafting an appealing positive story given the case facts, but a secondary challenge of finding and developing witnesses who can communicate in a manner consistent with how jurors listen. A defensive strategy often brings out the worst aspects of juror decision making, while an offensive strategy may bring out the best. As jury trials are won and lost on the witness stand, even if the facts and the law are on your side, your witnesses must carry the message to the jury in a credible and compelling manner in order to achieve victory. This article explores the ways that jurors process witness testimony, including the factors that help determine what information they retain and argue about during deliberations; then it examines the implications for preparation strategies, focusing on how to equip defense witnesses to be offensive forces on the stand.

II.
How Do Jurors Evaluate Witnesses?

The extent to which jurors are ultimately persuaded by witness testimony depends in large part on variables related to the witness (*e.g.*, perceived credibility, honesty, likeability),

the juror (*e.g.*, prior experiences and attitudinal predispositions), and the message (*e.g.*, valid arguments, consistency with other evidence). The Elaboration Likelihood Model ("ELM") offers a useful tool for illustrating the ways in which these factors have a collective impact on juror attitude formation and change.[2] While no theory is a perfect fit for all real-world experiences, the ELM framework can help us conceptualize what leads jurors to accept or reject witness testimony and identify strategies for preparing witnesses to be more effective in the courtroom.

According to the ELM, there are two basic routes to persuasion. The first is the *central* route, which involves the systematic processing of message content.[3] The central route is the more cognitively challenging of the two routes as it entails thoughtful analysis of the message and its inferences regarding a recommended action. Jurors who are motivated and able to engage in this type of processing might weigh testimony against their own life experiences and other evidence presented at trial, and then actively consider the implications of message acceptance on the jury's verdict. Attitudes formed or changed via the central route are considered to be persistent and predictive of behavior; accordingly, jurors who process through the central route may become your strongest advocates or harshest critics in deliberations, depending on whether their independent analysis led to acceptance or rejection of your message.

If you have watched only one mock jury deliberating or interviewed a single juror post-verdict, you know that jurors are not always processing systematically via the central route. Jurors often rely more on the second route to persuasion, or the *peripheral* route, which does not require extensive cognitive effort, but rather relies on cues such as the source's credentials, honesty, attractiveness, or method of delivery.[4] Jurors who accept or reject a witness's message through the peripheral route might dismiss the substance of testimony entirely as a result of the witness's nonverbal behavior (*e.g.*, "I ignored what he said because I could tell he was lying, did you see how he kept blinking, sipping water, and glancing at his attorney during cross?"). While peripheral processing may lead to attitudes that are temporary and less predictive of behavior, that is little consolation to the defendant who learns that jurors dismissed the key expert's opinion because they did not like the way the expert peered at them over his glasses.

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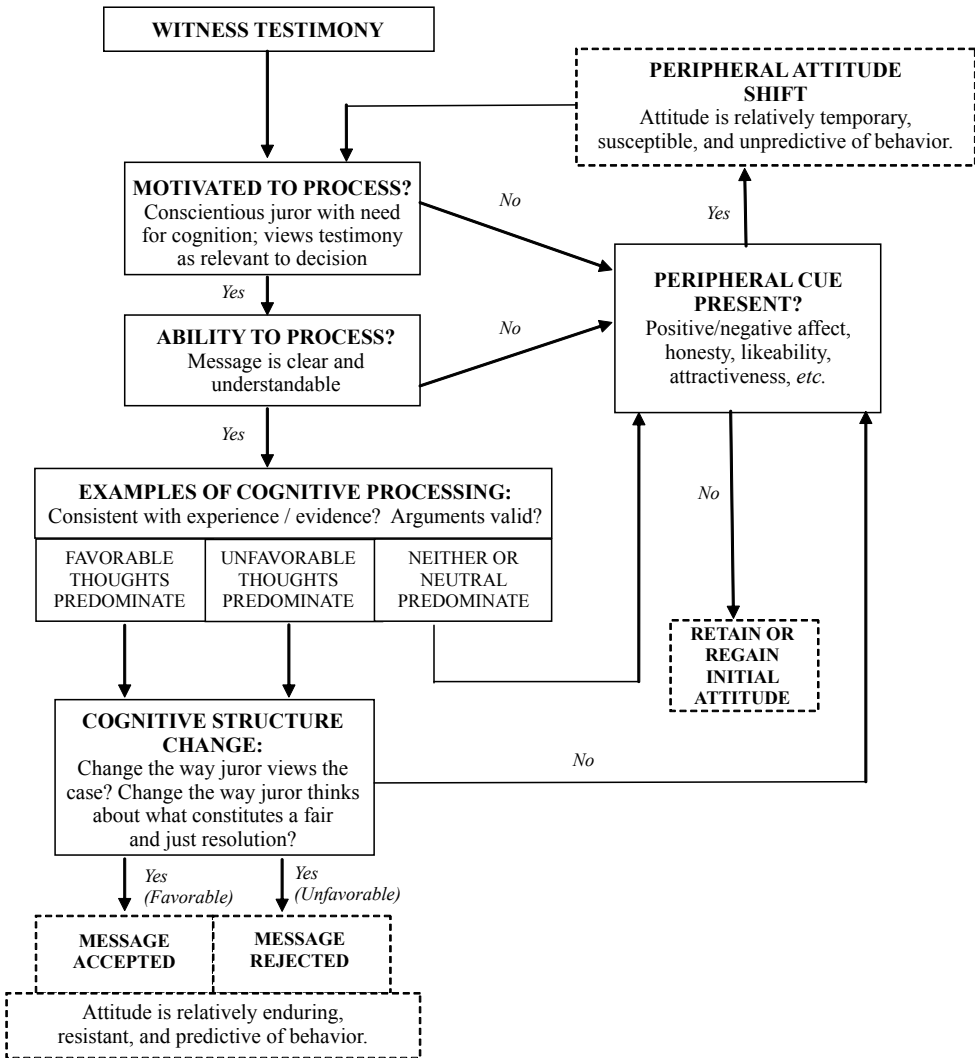
[2] Marcus T. Boccaccini, *What Do We Really Know about Witness Preparation?*, 20 Behav. Sci. Law 161, 181-83 2002).

[3] Richard E. Petty & John Cacioppo, Attitudes and Persuasion: Classic and Contemporary Approaches, 255-269 (Susan Soley, ed., Wm. C. Brown Company Publishers 1981); Richard E. Petty & John T. Cacioppo, *The Elaboration Likelihood Model of Persuasion*, *in* 19 Advances in Experimental Social Psychology 123, 123-205 (Leonard Berkowitz ed., 1986).

[4] Richard E. Petty & John Cacioppo, Attitudes and Persuasion: Classic and Contemporary Approaches, 255-269 (Susan Soley, ed., Wm. C. Brown Company Publishers 1981); Richard E. Petty & John T. Cacioppo, *The Elaboration Likelihood Model of Persuasion*, *in* 19 Advances in Experimental Social Psychology 123, 123-205 (Leonard Berkowitz ed., 1986).

However, before we lambast jurors for relying on peripheral cues, we should keep in mind that without the use of heuristics, or mental short-cuts, none of us would be able to function in daily life, let alone process the quantity of evidence jurors are asked to consider in a complex case. That being said, the ELM illustrates key factors that encourage jurors to process witness testimony through the central route and adopt an attitude that favorably predicts their behavior during deliberations. Below is a graphical depiction of the ELM model that has been simplified and adapted to reflect juror processing of witness testimony.[5]



[5] Richard E. Petty & John T. Cacioppo, *The Elaboration Likelihood Model of Persuasion*, *in* 19 Advances in Experimental Social Psychology 123, 126 (Leonard Berkowitz ed., 1986).

III.
What are the Implications for Witness Preparation?

So how do we prepare witnesses in a way that encourages jurors to process testimony cognitively via the central route, embrace the message, and argue the desired points during deliberations? And how do we prepare witnesses in a way that helps ensure that peripheral cues do not derail a strong cognitive message? Sometimes the defense bar gives up too easily. We think we must rely purely on the argument to carry the day. Therefore, witnesses are well-prepared, coached to stay on message, and we put our faith in finding defense-oriented jurors who have high need for cognition, understand the message, and have an uncanny ability to ignore peripheral cues that undermine the message. Unfortunately, few cases are tried with more than a few of these types of jurors on the panel. For the vast majority of jurors, persuasion depends on *both* central and peripheral cues. Thus, entirely ignoring one mode of persuasion or the other leaves a detrimental gap in your persuasive ability. The practical implications for the preparation of witnesses are discussed below.

A. *Message Construction*

The first step is developing a strong case theory that resonates with jurors *and* witnesses. Defense witnesses, particularly corporate representatives, need to see how their testimony fits into a larger narrative; this reassures the representatives that jurors will be open to what they have to say. Jurors need to hear an affirmative case theory that gives them a reason to listen to witness testimony that fits within the theory. The key elements of a strong case theory include the following:

1. Worthy Party—for the corporate defendant, worthiness is not about corporate responsibility on a macro scale (*i.e.*, charitable donations, natural disaster recovery efforts, investment of profits, *etc.*), but rather about the motives and behaviors of individual actors who played a role in the case on a micro scale. (Does the plaintiff's characterization of the company fit with what jurors learn about the corporate individuals who testified? Are the corporate witnesses good people who exercised their best judgment under the circumstances?)

2. Solid Foundation—given that the outcome of a trial is largely determined by the facts of the case and the specific questions jurors are asked to answer, a strong theory must have a solid legal and evidentiary foundation. The case theory must be developed with an eye toward the legal standards jurors will be asked to apply during deliberations.

3. Consistency—there are two dimensions to consistency, first, a persuasive theory of the case will resonate in part because it is consistent with what jurors already believe about the way the world works and how people behave in particular circumstances. If the theory flies in the face of common sense (*e.g.*, characterizes a large

corporation as entirely unmotivated by profits or describes all physician-patient exchanges as lengthy discourses on the risks and benefits of a new medication or procedure), it will invite skepticism among jurors *and* witnesses who cannot provide believable testimony to buttress the theme. Second, a persuasive theory will be supported by multiple witnesses who offer testimony that complements, rather than contradicts, the overarching narrative.

4. Moral Appeal—a strong theory does not revolve around an attack on the opponent's narrative, such as discrediting the plaintiff or shooting holes in the causation theory, but prioritizes an appeal to higher values that motivate jurors to support your side of the case. This is where too many corporate defendants cede to the other side, assuming, for example, that the moral appeal of compensating an innocent victim will always trump the moral appeal associated with voting for a corporate defendant. This perspective leads to a case theory that is defensive by nature (*i.e.*, "We just have to convince jurors that the plaintiff is wrong") rather than a positive theory that demonstrates why a defense verdict is fair and just. Examples of moral appeals include a focus on personal responsibility, reaping the benefits of hard work, and even providing hope to a sympathetic plaintiff who has come to believe her injuries are irreparable.

The case theory naturally evolves through document discovery and interviews with witnesses, eventually developing into a core set of themes that will be used to anchor the opening statement, direct examinations, and closing argument. However, establishing the general framework for an affirmative case theory early on will point the natural evolution process in the right direction. While the initial selection of a defensive strategy may lead one to choose corporate and fact witnesses who attempt to minimize the company's role and criticize the opposing expert's theory, an offensive strategy will encourage the selection of witnesses who can tell a positive story reflecting the affirmative theme.

Finally, consider the impact of positive framing on a witness's state of mind during trial preparation. The typical fact or corporate witness does not have the larger story in mind and may feel defensive about the potential for things he or she wrote or said to be taken out of context. Educating these witnesses on the larger story helps them relax and provides the necessary context for the presentation of their particular piece of evidence. While there are exceptions, most witnesses do not perform as well when they feel pressured to be an advocate or to focus on how their words will be used against them by the other side. Witnesses need to trust the trial lawyers and other witnesses to complete the picture, showing jurors everything they need to know in order to reach a fair decision.

B. *Increasing Jurors' Motivation to Process Witness Testimony*

As the ELM suggests, individual characteristics help determine whether a juror will critically evaluate the substance of a message (typically a witness's testimony). While most take the job seriously, some jurors are more conscientious about their duties than others,

and some have a much higher "need for cognition."[6] However, if we want all the jurors to attend to the substance of a witness's testimony, we must make it clear, as early as *voir dire*, during opening statements, and certainly in the first few moments of a direct examination when jurors are most attentive, *how* the witness is relevant to the outcome of the case. Jurors who are encouraged to see the big picture and how a witness fits in will be more motivated to analyze and evaluate the message on a substantive and cognitive level.

C. *Increasing Jurors' Ability to Process Witness Testimony*

The more complex a trial, the more likely it is that jurors will be forced to rely on peripheral cues to reach their decisions. As previously discussed, relying on the peripheral route to persuasion leads to less predictable results. Thus, a key challenge in witness preparation is to simplify highly technical or scientific concepts, eliminate the use of jargon, and incorporate real-life examples that help jurors understand the practical implications of a difficult concept. If a witness's message is clear and understandable, jurors are more likely to process the message on the merits, using the central route, which creates a better opportunity to rationally influence juror decision-making.

The results of studies designed to test the impact of peripheral cues on juror evaluations of expert testimony are informative. For example, Cooper and Neuhaus evaluated the effects of expert witness credentials on juror perceptions of that expert witness.[7] They found jury-eligible participants rated high-paid, frequent testifying experts as not likeable, not believable, and, most importantly, not effective at persuading them to support the expert's side of the case.[8] However, when the message was presented in language jurors could understand, the "hired gun" effect disappeared.[9] Thus, while the tendency may be to recruit a top-dollar expert witness with the most impressive *curriculum vitae*, unless the witness's testimony is clear and motivates jurors to listen, a seemingly attractive quality in a witness could end up becoming a peripheral cue that invites criticism from jurors. The challenge with the high-paid, frequently testifying expert is that he or she often wants to state an opinion and have it viewed as correct, simply because he or she said so. However, the results of Cooper and Neuhaus's study indicate that the most effective experts are those who respect the jury's need to understand a message before simply taking someone's word for it—even if that someone is a renowned expert.

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[6] John T. Cacioppo & Richard E. Petty, *The Need for Cognition*, 42 J. of Personality and Social Psychol. 116, 116-131 (1982).

[7] Joel Cooper & Isaac M. Neuhaus, *The "Hired Gun" Effect: Assessing the Effect of Pay, Frequency of Testifying, and Credentials on the Perception of Expert Testimony*, 24 Law & Hum. Behav. 149, 149-171 (2000).

[8] *Id.* at 168.

[9] *Id.* at 169.

D. *Encouraging Message Acceptance*

If jurors are motivated and able to process the desired message via the central route, they will be more likely to evaluate the merits of a case on the substance of the witness's testimony. This cognitive exercise by the jury may involve asking themselves questions such as:

- Is the testimony consistent with my personal experience?
- Is the testimony consistent with other evidence in the case?
- Are the arguments valid?

The result of these considerations is a number of thoughts that may lead to attitude formation, or change, in the juror's mind. If the message is consistent with what a juror already "knows" from life experience and prior evidence and the arguments accepted as valid, the witness's testimony is more likely to produce a favorable attitude that is resistant to change. However, if the converse is true, the message may produce a "boomerang" effect, leading the juror to not only reject the desired message, but to adopt an attitude firmly in opposition to the witness's side of the case.[10]

Much of the work that encourages a jury to accept a particular message occurs at the level of message construction, namely by developing a case theory that is consistent with the evidence, grounded in the law, and appeals to jurors' overall sense of justice. However, additional work is needed during witness preparation to increase the likelihood that jurors will be persuaded by what a particular witness has to say. One of the most common reasons that jurors, mock or actual, reject a witness's testimony involves a juror's violated expectations. For example, a corporate witness who comes across as honest, and even sticks to the message well, can still crash and burn if he does not know what jurors expect him to know (*e.g.*, the CEO who repeatedly defers to others is dismissed as the "one who is in charge of everything but responsible for nothing"). Likewise, an expert who ventures outside her area of expertise will give back any ground gained on direct examination (and likely more) when the limitations of her knowledge are exposed on cross.

E. *Preparing for the Peripheral*

Whether peripheral cues such as a witness's perceived competence, honesty or likeability are evaluated to the exclusion of, or in addition to, the substance of a witness's testimony, depends on the how well the witness was prepared. Jury instructions regarding the evaluation of witness credibility typically give jurors wide latitude to discuss a topic most feel more comfortable with, a witness's personality, rather than whether they were persuaded by the plaintiff's causation theory or the defendant's review of the scientific literature.

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[10] Richard E. Petty & John Cacioppo, Attitudes and Persuasion: Classic and Contemporary Approaches, 255-269 (Susan Soley, ed., Wm. C. Brown Company Publishers 1981).

Thus, the witness preparation session must go beyond substance of the testimony and address the way in which a witness's testimony is delivered. Literature on persuasion supports three general constructs subsumed into jurors' evaluations of witness credibility, each of which deserves attention during witness preparation:

1. Competency—if a witness expects a jury to believe he knows what he is talking about, he should sound like he does. For example, reducing a witness's experience and background to a few key points that quickly convey competence in a way jurors find meaningful takes time and preparation. Another key issue related to perceived competence involves powerful, versus powerless, speech patterns.[11] Some witnesses unwittingly adopt powerless speech patterns, such as hedges (*e.g.*, "I think," "perhaps"), hesitations (*e.g.*, "uh," "um"), and amplifiers (*e.g.*, "very," "most certainly") that communicate a lack of confidence. The challenge in preparation involves distinguishing between uncertainty that should be addressed and explained, versus speech patterns that convey uncertainty where none actually exists.

2. Trustworthiness—in an adversarial world with ambiguous and conflicting evidence, jurors are looking for a witness they can trust. Often their general impressions of a witness are all the jurors retain by the time they enter deliberations. If overly anxious or defensive, a witness may inadvertently exhibit the non-verbal behaviors that people associate with deception (*i.e.*, speech hesitations and sudden body shifts). As a result, jurors may be unwilling to factor this witness's testimony into their decisions, or even worse may use the testimony against the side that presented the witness.

3. Dynamism—effective witnesses make an impression. Not only do they offer new information that jurors find interesting and important to their decisions, but they are dynamic speakers who capture and hold jurors' attention with the use of eye contact, focused gestures, real-life illustrations and visual aids.

A common mistake in witness preparation is to focus on the mechanics of a witness's delivery without attempting to address the source of negative peripheral cues. That is, many lawyers attempt to repair a witness's testimony without first correcting the underlying problem. As time is a luxury not often available to the trial lawyer, there is always pressure to sacrifice the important for the sake of the urgent during witness preparation. Giving a witness the opportunity to share his thoughts and feelings about the case, without critique, is a non-essential activity that often falls by the wayside. However, a relaxed, exploratory conversation with a witness before "getting down to business" will do wonders for making

[11] William M. O'Barr, Linguistic Evidence: Language, Power, and Strategy in the Courtroom 61-76 (Academic Press 1982).

the preparation session more productive. Stimulating prompts for such a discussion include the following:

- How would you summarize what this case is about?
- How would you describe your role in the case?
- If you could sit down with the jurors and have a conversation with them, what are the key messages you would want to communicate?
- What do you think will be the most difficult part of this case to explain?
- Are there any concerns that come to mind when you think of testifying?
- After you have testified, how do you hope jurors will describe you?

Answers to these questions not only shed light on what is at stake for the witness, but they provide an opportunity to address the *source* of anxiety rather than spend preparation time futilely treating the symptoms. Furthermore, sometimes the simple act of verbalizing their concerns helps witnesses get past those concerns and simply focus on telling the truth about what they know.

Take, for example, the corporate witness whose answers during an open discussion reveal her suspicion that jurors will never listen to her or believe what she has to say. She has seen a wealth of public opinion data that suggests jurors are biased against corporate America and eager to use the company's deep pockets to compensate the plaintiff. This cynicism filters into her testimony and delivery in predictable ways: at times she sounds defensive or hesitant as she thinks about how a plaintiff's attorney will twist her words and use them against her. At other times she comes across as indifferent or resigned. This witness needs to find common ground with jurors, for their sake and for her own. She needs to recognize and appreciate how her testimony would be well received by the average person, and why jurors would find the defense case theory persuasive. An attorney's time is better spent addressing these concerns rather than attempting a "quick fix" for the defensive, hesitant, or indifferent delivery.

IV.
Conclusion

Defense witnesses can be, and should be, used as offensive forces during the presentation of a case. Understanding the forces that impact a juror's willingness and ability to process the substance of a witness's testimony provides insight into the most effective preparation strategies that allow defense witness to become such a force. The most persuasive witnesses are those who motivate jurors to listen, offer a clear and consistent message, and deliver that message in a competent, honest, and memorable way. That is, the most effective witnesses provide a complete package by addressing both the central and peripheral routes of persuasion. By prioritizing an affirmative framing of the case and focusing on the witness's state of mind during preparation, defense attorneys can bring out the best in their witnesses and thereby provide better service to their clients.

Rule 30(b)(6) and the Crisis Client[†]

Larry E. Hepler

I.
Introduction

Corporate clients are unique, and their representation is accompanied by unique challenges. Imagine if the corporation you represent is frequently featured engaging in alleged "bad" behavior. Imagine if the alleged "bad behavior" included criminal charges. Defending a corporation with this sort of record is challenging. Opposing counsel will be eager to make the alleged "bad behavior" the centerpiece of its suit. This issue is even more relevant if the suit is in federal court; you can expect opposing counsel to notice a deposition under Federal Rule of Civil Procedure Rule 30(b)(6). A review of Rule 30(b)(6)'s obligations reveals that preparation of the corporate representative through this process is manageable. Even a "crisis client" can have a successful deposition if it takes its obligations seriously and is properly guided by counsel. This article addresses Rule 30(b)(6) depositions and the "crisis client." Part II defines a "crisis client" for the purposes of the article. Part III examines the duties Rule 30(b)(6) imposes on corporations as well as considerations to ensure that the deposition is a success.

[†] Prepared by the author on behalf of the Trial Tactics, Practice and Procedures section.

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II.
The Client In Crisis

A crisis client has everything riding on the outcome of litigation. A loss will typically mean its most profitable product will be pulled from the market, and an entire profit stream will evaporate. Soon after, good will and jobs will disappear. Adding to the intensity is the specter of other hungry plaintiffs ready to pounce. For the crisis client, litigation is "must win." To frame the Rule 30(b)(6) discussion below, consider the following hypothetical

crisis client. You are contacted by a large multinational pharmaceutical company. Company representatives tell you that the company is being sued under the state consumer fraud act, and they want you to represent the company. The company manufactures a drug that has revolutionized the lives of millions of people for whom it is properly prescribed. Unfortunately, the product has also been taken improperly, abused, and obtained and used illegally. Additionally, some company representatives have misrepresented to medical health providers the characteristics and risks associated with the drug. The company has admitted these facts in a plea agreement in federal court. Now, one of the abusers is suing the company for millions of dollars. You agree to represent the company, and during the course of litigation, opposing counsel properly notices a Rule 30(b)(6) deposition of your client. How do you prepare the company's designee?

At this early stage, it is imperative that the crisis client empowers you to manage the entire Rule 30(b)(6) process. The client must also commit its resources to finding the correct designee, properly preparing the designee, and granting the designee the appropriate time and resources he or she needs to become knowledgeable on the noticed topics. Establishing this foundation is a sensitive endeavor; no one wants to bite the hand that feeds him. But, if handled correctly, you can successfully navigate your client through the Rule 30(b)(6) process.

III.
A Corporation's Duties Under Rule 30(b)(6)

A meaningful analysis of Rule 30(b)(6) depositions requires an examination of the rule itself. Rule 30(b)(6) states as follows:

> In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then *designate one or more officers, directors, or managing agents, or designate other persons* who consent to *testify on its behalf* . . . The persons designated must testify about information *known or reasonably available to the organization.*[1]

Rule 30(b)(6) was created to remedy two problems that plagued corporate depositions. First, it was meant to end the difficulties a noticing party had in identifying the proper person to depose.[2] Second, it was designed to end the practice of corporate defendants presenting

[1] Fed. R. Civ. P. 30(b)(6) (emphasis added).

[2] Donald E. Frechette, *Duties and Problems: Beware the Rule 30(b)(6) Deposition*, For the Defense 37, 37 (March 2000).

a number of deponents, each of whom would testify that he or she had insufficient knowledge to answer the question but could identify someone else who could.[3] Simply put, the "'purpose of the Rule 30(b)(6) deposition is to get answers on the subject matter described with reasonable particularity by the opposing party, not to simply get answers limited to what the deponent happens to know.'"[4] Rule 30(b)(6) imposes two duties on a corporation: 1) a duty to designate a proper designee;[5] and 2) a duty to properly prepare the designee.[6] In addition to guiding the corporation's compliance with these duties, counsel is responsible for properly preparing the designee for the deposition. The remainder of this article addresses each of these duties in turn.

A. *Duty to Designate A Proper Designee*

Under Rule 30(b)(6), acorporation must designate a proper designee. The corporate designee is the company's spokesperson on the topics listed in the Rule 30(b)(6) notice, and the designee's answers are binding on the corporation.[7] The designee must speak to the facts known by the corporation as well as its subjective beliefs and opinions.[8] Because of the importance of a designee's statements, a corporation must take its designation duty seriously, but it has great latitude when choosing a designee. The rule does not require a corporation to choose someone with personal knowledge about the topics listed, nor does the rule require the designee to be a current employee.[9] The rule simply requires that the witness be able to "testify to matters known or reasonably available to the corporation."[10] As a result, the corporate designee can be taught about various topics or issues.

The client must consider several issues before choosing its designee. First, it must determine whether a designee can testify to the topics listed. Second, it must decide how many witnesses to designate. Finally, it must consider potential designees based on a variety of factors to determine the ideal designee to prepare and put in front of a fact finder. Each of these considerations is discussed below.

The first question a Rule 30(b)(6) notice raises is whether any current employee can testify to the noticed topics. One possibility is that the events in question occurred many years ago. Another possibility is that mergers, acquisitions, and restructuring may have

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[3] *Id.* at 37-38.

[4] *Id.* at 38 (quoting *Alexander v. Federal Bureau of Investigation*, 186 F.R.D. 148, 152 (D.D.C. 1999)).

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] Sidney I. Schenkier, *Deposing Corporations and Other Fictive Persons: Some Thoughts On Rule 30(b)(6)*, 29 Litigation 20, 23-24 (ABA Winter 2003).

[10] Fed. R. Civ. P. 30(b)(6).

resulted in the most knowledgeable person leaving the client's employ. It is also possible that no current employee has sufficient knowledge to testify about a document or topic. Corporations are permitted to "not recall" information as long as every attempt to discover the information has been made.

The second issue confronted by the corporation and counsel is whether to designate multiple witnesses. It is permissible to introduce multiple witnesses, but this approach is generally disfavored for a "crisis client." In a normal case, designating several witnesses with specialized knowledge may be wise. For a crisis client, more witnesses are generally not better. The more witnesses designated, the more people to manage and prepare, the greater the opportunity for error, and the greater the time and resources that must be expended. For these reasons, the general rule for a client in crisis is to present one designee even if he or she is unfamiliar with the Rule 30(b)(6) topics. But, be aware that it is difficult to teach any one person everything he or she needs to know to testify about a sophisticated field or topic. Thus, it is important to consider the designee's education, knowledge, and background. Consider the hypothetical crisis client. All the preparation in the world may be insufficient to teach the Vice President of Information Technology everything he or she needs to know to be fully informed and educated on pharmacology, drug formulation, and the chemical properties of a drug.

The last step in designating a corporate representative is evaluating the intangible qualities of potential designees. When selecting a designee, it is important for the crisis client to recognize that the designee must be knowledgeable about the specifics of the topics listed in the Rule 30(b)(6) notice, but is not required to be the *most* knowledgeable person. The most knowledgeable person could be a disaster at a Rule 30(b)(6) deposition for a myriad of reasons. For example, he or she may be abrasive, non-cooperative, and difficult to prepare. Alternatively, choosing someone completely ignorant about the specified topics is unwise, because if the deponent is unable to answer a question, the corporation may be precluded from changing the designee's response later at trial.[11] Accordingly, the client and counsel should consider numerous factors when determining who should be the corporate designee. The designee must be smart and capable. He or she must understand and appreciate the "big picture." The designee will be required to learn vast amounts of information to testify as the corporation.[12] However, the "popularity" or "beauty pageant" component is also an important factor. The corporate designee should be polished and articulate. He or she should

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[11] Richard W. Ellis & Bradley M. Risinger, *Pick A Number, Take A Seat: A Guide to Rule 30(b)(6) Depositions,* For the Defense 30, 31 (September 1998).

[12] *Id.*

have a "good" personality and be likable, non-abrasive, and have an aura of trustworthiness. The designee should be confident, but not arrogant. The fact finder should be able to identify and be comfortable with the designee. Finally, the designee must be committed to his or her role and the preparation process. Preparing the designee requires more than a phone call; instead, many hours of in-person preparation will likely be required. If an ideal candidate cannot take or make time to prepare, a different designee should be found.

B. *Preparing the Witness*

The second duty imposed by Rule 30(b)(6) is the duty to properly prepare the designee so he or she can knowledgeably testify about noticed topics. Preparation is burdensome, and courts view this burden as an obligation that accompanies the choice to use the corporate form.[13] The client and counsel must allow sufficient time for to consider and choose the most effective means for the designee to acquire required information. These considerations depend on the designee's preexisting knowledge, and the complexity, quantity, and scope of the topics.

In budgeting time for preparation, consider the designee's preexisting knowledge base. The more knowledge the designee has, the less time he or she requires to learn the necessary facts, opinions and beliefs to testify about what is "known or reasonably available to the corporation."[14] The reverse is also true; the less knowledge the designee has, the more preparation he or she will require. Second, consider the complexity, number, and breadth of specified topics. "When a noticed subject crosses disciplinary or departmental bounds within a client's corporation, the company must either produce multiple witnesses as necessary or engage in substantial preparation activities to consolidate the testimony."[15] All facilities or departments of the defendant corporation could be included in the required knowledge base.[16]

The final hurdle when preparing the corporate designee is developing his or her knowledge base. A designee may have to speak "with individuals with information of the relevant matters at issue," review documents, deposition transcripts, exhibits, and any other materials that assist gaining knowledge about the specified topics.[17] This preparation may require the corporation to facilitate a meeting between the designee and former or retired employees so the designee has sufficient information.[18] Even when the notice focuses on past events, the designee is obligated to acquire that knowledge. Further, "[w]hen the company possesses

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[13] *Id.* at 30-31.

[14] Fed. R. Civ. P. 30(b)(6); *see also,* Schenkier, *supra* note 9, at 23.

[15] Ellis & Risinger, *supra* note 11, at 32.

[16] *Id.*

[17] Kevin C. Baltz, *Deposition of the Corporate Representative: The Scope of Rule 30(b)(6),* For the Defense 22, 25 (February 2008).

[18] *Id.* at 26.

records that might be reviewed to help form the corporate position for deposition, the [designee] must review those records."[19] In addition to learning facts, the witness must also have sufficient information to testify about the corporation's subjective beliefs and opinions.[20] The designee is obligated to review and provide opinions on documents that pre-date the designee's affiliation with the company or that have no relationship to the designee.[21]

C. *Preparing for the Deposition*

The final step to a successful Rule 30(b)(6) deposition is properly preparing the designee after he or she possesses the required knowledge. An important aspect is committing the client and designee to scheduled times for meaningful preparation and practice . . . practice . . . practice. The client must support its designee by allocating ample time for substantive preparation as well as preparing for the deposition itself. Proper designation and preparation will ensure that the designee has enough information to succeed, and a client in crisis cannot afford to have its designee give a "bad" deposition.

Efficient preparation of a designee requires creating a schedule in advance; this advance scheduling ensures that preparation will be meaningful and productive.[22] Each session should cover a specific topic and be set for a specified time period.[23] To maximize efficiency, preparation should occur away from the designee's personal office, and the session should be free of smartphones, cell phones, email and other distractions.[24] To remedy this inconvenience, breaks should be scheduled so the designee and attorneys can check email and return or make phone calls. Although it may be difficult to plan these sessions with employees who are already busy, remind them of the magnitude of the litigation and what is at stake. Ultimately, these sessions may be more helpful to the corporation than the employee's access to email for a few hours.

Practice sessions are not optional for a crisis client. Ensure optimal deposition performance by giving the designee a feel for what to expect. As practice, the actual deposition can be replicated by having an unfamiliar attorney conduct a practice Rule 30(b)(6) deposition. Doing so is important, because a "stranger" will not be inhibited by the existing relationship and may be more likely to act as opposing counsel would. Facilitating multiple practice sessions with "hostile" or "tricky" questioning will bolster the confidence of the designee, client, and counsel and lead to a more successful deposition.

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[19] Ellis & Risinger, *supra* note 11, at 32.

[20] Frechette, *supra* note 2, at 38.

[21] Ellis & Risinger, *supra* note 11, at 32.

[22] Kimberly Baker, *Navigating the Maze of Corporate Executive Witness Preparation,* 53 Fed'n Def & Corp. Couns. Q. 229, 231 (2003).

[23] *Id.*

[24] *Id.*

IV.
Conclusion

Navigating a crisis client through a Rule 30(b)(6) deposition is manageable when all parties allocate appropriate time and consideration. It is essential that the attorney and client ensure that the "right" designee is chosen, that the designee can be educated on the designated topics, and that the designee is properly prepared for the actual deposition. A client in crisis faces an intense situation and high-stakes litigation rendering the Rule 30(b)(6) preparation process essential. The good news, however, is that the corporation plays a large part in how it represents itself at the Rule 30(b)(6) deposition. A client and counsel that take the duties seriously and commit to the process can create a "successful" deposition.

An In-Depth Look at Direct Examination of Expert Witnesses[†]

Deborah D. Kuchler

I.
Introduction

The Honorable Ralph Adam Fine[1] describes a trial as a "battle for your client while the jurors are those whom you must *persuade*" and he describes direct examination as a "great engine" to get at the truth.[2] Fine's theory is for an attorney to "[u]se what the jurors already know – before they hear any of the witnesses."[3] He encourages examiners to "build on this foundation of pre-trial knowledge to win your case through the expert witness; that is, use the witness to validate the points you need to make on direct-examination" starting far enough back in the logical train so that either (1) the jury knows the answer before the witness responds; or (2) the answer rings true to the jury.[4]

[†] Prepared by the author on behalf of the Trial Tactics, Practice and Procedures section. Deb Kuchler acknowledges with thanks the contributions of Nathan Swingley and Mary Nell Bennett to the preparation of this paper.

[1] The Honorable Ralph Adam Fine is an appellate court judge in the Wisconsin Court of Appeals, located in Milwaukee, Wisconsin. He is also the author of The How-to-Win Trial Manual (Juris 3d rev. ed. 2005).

[2] Ralph Adam Fine, Direct and Cross-Examination of Expert Witnesses to Win, SM060 A.L.I.-A.B.A. 265, 267 (2007), adapted from Ralph Adam Fine, The How-To-Win Trial Manual, *supra* note 1.

[3] *Id.*

[4] *Id.* at 267-268.

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In accordance with Fine's theories on the direct-examination of expert witnesses, this article attempts to untangle how an expert can effectively "assist" the jury to either "understand the evidence or determine a fact in issue."[5] First, the article highlights the expert witness generally by looking at the need for expert testimony and ways to engage a competent expert. Next, the article focuses on managing expert witnesses. Third, the article explores preparing the expert witness by reviewing of testimony, demonstrative exhibits, and ways to frame questions prior to trial. Fourth and finally, this article emphasizes a four-step process to use in the direct examination of witnesses: (1) qualifying the expert; (2) establishing a basis for his or her opinion; (3) eliciting the opinion; and (4) explaining the opinion. Specifically, under the subsection entitled "Explaining the Opinion," the article provides a two-step process that counsel can utilize to maximize the effect of experts' testimonies on jurors.

[5] Fed. R. Evid. 702; Fine, *supra* note 2, at 267.

II.
Expert Witnesses Generally

A. *Need for Expert Testimony*

When preparing a case for trial, counsel must assess whether an expert's testimony will be necessary.[6] Generally, the purpose of expert witnesses is to clear up fuzzy facts or to strengthen inferences that might otherwise be confusing for the jury.[7] The decision usually involves weighing the cost of an expert with the potential advantage gained through her testimony, coupled with the difficulty in securing the correct expert for the job.[8] However, in certain instances, the law imposes a duty to present expert testimony, and the attorney is required to select an expert.[9]

A central principle in the selection of an expert witness is helpfulness, and the attorney should make a practice of asking herself whether a "witness with specialized skills, education, or training would add in some appreciable way to the jury's understanding of the facts."[10] If the answer to this question is "yes," the time and expense of engaging an expert will surely pay off at trial.[11]

Moreover, expert testimony offered to counter an opponent's expert's testimony can be valuable to point out a case's weaknesses and flaws that might not be as evident to the jury as they are to counsel. Retaining the skills of a knowledgeable, informed, personable, and straightforward expert could prove more effective in highlighting those flaws than exposing them only through a closing argument.[12]

Despite the help that expert testimony can provide, a potential for abuse also exists if an expert exaggerates, makes misstatements, or bolsters facts. To avoid these scenarios, it is crucial that attorneys remain conscious of the potential for abuse and carefully prepare for both direct and cross-examinations.

B. *Engaging the Expert*

Unlike when the attorney selects lay witnesses, "a good deal of selectivity may be exercised when it comes to experts."[13] One of the most important questions to consider when selecting one expert from many qualified candidates, is asking for what purpose you are seeking the expert's assistance. While the ultimate goal is to obtain qualified expert at the lowest possible cost, there are other factors to consider.

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[6] Kenneth M. Mogill, Examination of Witnesses § 6:3 (2d ed. 2008).

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *See id.* at § 6:4.

[11] *Id.*

[12] *Id.*

[13] *See id.* at § 6:6.

If an expert will be called as a witness at a trial, not only should the expert be qualified, but the expert's qualifications should mirror the issues about which testimony is sought.[14] For example, if a medical expert is required to testify about heart surgery, the expert should be qualified in this area of specialization. Not only are these qualifications important to give accurate and knowledgeable testimony, but because the witness will appear on the stand, he or she should have an appearance and demeanor with which the jury can identify.

When choosing an expert to testify, it is critical that the attorney meet the expert in person and examine her demeanor. The attorney should carefully consider the expert's behavior and ask several questions. Does this expert have any irritating personal habits? If those habits irritate the attorney, are they going to irritate the jury too? Can she communicate with real people? How does the expert express complicated scientific principles? If the attorney can barely understand her, the jury will surely struggle.

However, if the expert is not expected to testify at trial, different considerations might affect the choice of expert. In that situation, the expert's appearance and demeanor may be insignificant.[15] When an expert is used in a consulting role to advise counsel during pre-trial stages, counsel should attempt to balance the expert's qualifications against the cost of his services.[16] It might be the case that a particular expert can conduct examinations and tests at a lower cost than others, but that same expert might not be sufficiently qualified to testify at trial.

When choosing an expert, it is also important to consider that experts decipher facts that are incomprehensible to the average layman, and there is a presumption that authorities in the field will have very divergent views.[17] Because experts can often reach different conclusions based on the same evidence, it is important for attorneys to take considerable time and effort to locate an expert witness whose views are as consistent to the theory of your case as possible.

Finally, when choosing an expert, attorneys should investigate them as carefully as they would the opponent's experts. A prudent attorney must always request a resume and also references from other lawyers with whom the expert has worked.[18] Several questions are essential. How did the expert perform in deposition? In trial? Was the expert difficult to work with? An attorney's pre-retention investigation should also include the location and analysis of previous transcripts. Transcripts can be found using IDEX, Google and other searches. A prudent attorney should also look for *Daubert* challenges and whether judicial opinions cite the expert favorably or unfavorably.

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[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *See id.* at § 6:8; *see also* Douglas Danner and Larry L. Varn, Expert Witness Checklists §§ 1:30-1:37 (3d ed. 2008).

Ultimately, an attorney should exercise great diligence and care when locating and selecting an expert, and the expert's qualifications should always be determined at the outset. Counsel should remain mindful of how the expert will come across in court and what value he or she will bring to the presentation.

III.
Managing the Expert

During preparation for a trial, it is important to properly manage an expert's work. Even an expert who is persuasive and articulate on the stand can be a poor choice if the cost is so exorbitant it breaks the proverbial bank. To ensure that the expert does not over-work the case, counsel should stay in regular communication with the expert and develop a personal relationship with him. This contact will make it easier for the attorney to touch base with the expert frequently on budget expectations and carefully monitor the work that is being done. Additionally, counsel should be specific in giving assignments so that both the attorney and the expert know what is to be done, how long it is likely to take, and what it is likely to cost.

IV.
Preparing the Expert to Testify

A. *General Considerations*

Due to the expense and importance of expert testimony at trial, the attorney must take proper care to prepare the expert. This preparation includes such considerations as ensuring that the expert understands the legal elements of the case, reviewing substantive testimony with the expert, practicing a clear explanation of exhibits, if necessary, and framing questions in a way to make the expert's job as easy as possible.

Rehearsal of question and answers in preparation for trial is as important with the expert as it is with the lay witness, and special care should be taken to ensure that the expert will adequately testify.[19]

To ensure favorable expert testimony, the attorney must be certain that the expert understands the legal elements that must be proven in order to win the case and how his or her expert testimony will support this effort.[20] It is imperative that this discussion take place at the beginning of preparation to determine whether the expert will be able to testify truthfully to opinions that will establish the elements necessary to prevail.[21]

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[19] Danner & Varn, *supra* note 18, at § 1:147; Thomas A. Mauet, Fundamentals of Trial Techniques, § 4.8 (2d ed. 1988).

[20] Deborah J. Gander, *Prescription for Powerful Expert Testimony,* 43 Trial 40, 40 (May 2007).

[21] *Id.*

Another important consideration is the expert witness's credentials and experience. Just as with a lay witness, much time should go into the preparation of an expert's testimony. However, additional time will be devoted to "developing the expert's professional background in order to qualify him to render an opinion."[22] Not only is the preliminary testimony regarding his background necessary to establish the expert's competency, but this preliminary testimony also creates credibility with the jury.[23]

B. *Reviewing Testimony*

During a preparation session with an expert witness it is often tempting to simply review the substance of the testimony and indicate that the expert will be asked about his or her education, background and training.[24] This technique is especially tempting when the expert is paid on an hourly basis. If the witness has had experience in the courtroom, this technique might prove adequate provided the witness is also very informed about the facts of the case prior to trial. However, the testimony and effectiveness of the witness will still be enhanced if the preparation session is an *actual* dress rehearsal of the in-court testimony.[25] A principal benefit of an actual dress rehearsal is that the examiner and witness can align the theory of the case. Additionally, the attorney can ensure that the expert understands the questions, and likewise that the attorney understands the answers. If counsel prepares by simulating the trial testimony, the actual examination will be superior and more persuasive than one where the expert is entirely unfamiliar with the surroundings or the procedure of the court.

In addition to practicing direct examination, preparing the witness for cross-examination in a "mock trial" setting may also prove helpful. Deborah J. Gander suggests having someone whose trial abilities you respect cross-examine your expert before the trial.[26] She further suggests that "[a] mock cross-examination with someone who can act as the expert's worst nightmare will help minimize surprises at trial. When you actually face each other in the courtroom, the preparation will help you start off strong."[27] This preparation will also ensure that the witness is not surprised and does not get flustered at trial.

A mock trial exercise is also an opportunity to identify issues with the expert's clothing. For example, is she wearing slacks and a manly blazer in a Southern courtroom where women are best perceived in a skirt? Office staff can also sit in on the exercise and offer their input on the expert's demeanor, language, mannerisms or other unhelpful quirks.

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[22] Mogill, *supra* note 6, at § 6:14.

[23] *See id.* at §§ 6:21-6:26.

[24] *See id.* at § 6:15.

[25] *See id.* at §§ 3:6-3:10.

[26] Gander, *supra* note 20, at 40.

[27] *Id.*

C. *Demonstrative Exhibits*

"Charts, models, bodily demonstrations, and in-court experiments often make up some of the most dramatic and informative parts of an expert's testimony."[28] Not only do these exhibits catch the eyes of the jury, but they also offer a break from the monotony of questions and answers between the examiner and expert.[29] Demonstration of exhibits will often require the witness to leave the stand in order to explain an exhibit, conduct an experiment, or even handle a treatise.[30] In all circumstances where exhibits are known in advance, choreographing these portions of the exam allows the testimony to have a uniform and cohesive outcome.[31]

D. *Framing Questions*

Some courts previously required that the "expert state that he holds the opinion with a reasonable degree of (e.g., scientific or medical) 'certainty'[32] or 'probability.'"[33] Although the Federal Rules of Evidence no longer require such rhetoric, many lawyers continue to follow this tradition in framing their questions.[34] In order to avoid confusing the witness, it is essential that the examiner forewarn him about the possibility of such questions. Attorneys should "[m]ake sure that the expert understands the standard of proof that their testimony must meet."[35] "For example, in the state of Florida, the 'reasonable probability' or 'more likely than not' standard is defined as more than 50 percent."[36] However, in another state, this standard could be different, and the same testimony could fail to meet the necessary standard of proof. Further, is it good practice to "arm [an] expert with any legal language that the evidence rules require, and make sure he or she is comfortable using it."[37] After the necessary time and diligent care is utilized in preparing an expert to testify, the next consideration for an attorney is the actual direct-examination.

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[28] Mogill, *supra* note 6, at § 6:18.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *See, e.g.*, Measday v. Kwik-Kopy Corp., 713 F.2d 118 (5th Cir. 1983); Eberle v. Brenner, 475 N.E.2d 639 (Ill. App. Ct. 1985), *appeal after remand*, 505 N.E.2d 691 (Ill. App. Ct. 1987).

[33] *See, e.g.*, Jones v. Ortho Pharmaceutical Corp., 209 Cal. Rptr. 456 (Ct. App. 1985); Thirsk v. Ethicon, Inc., 687 P.2d 1315 (Colo. Ct. App. 1983).

[34] *Id.*

[35] Gander, *supra* note 20, at 40.

[36] *Id.*

[37] *Id.*

V.
Direct Examination of Experts

Experts are retained for the purpose of stating opinions and expressing conclusions, and because of their special knowledge, training, education, and expertise, experts have much more freedom on the witness stand than a typical lay witness.[38] Most often, the expert's purpose is to decipher something that is beyond the judge or jury's common knowledge or competency.[39]

The direct examination of experts can be divided into four stages: (1) qualifying the witness as an expert; (2) establishing the basis for the opinion; (3) eliciting the opinion; and (4) explaining the opinion.[40] A good examination of a witness will follow this sequence.

A. *Qualifying the Expert*

1. Generally

To qualify an expert witness and demonstrate her expertise to the judge and jury, introductory questions should focus on her professional background[41] and seek to accomplish two goals: (1) demonstrate to the judge that the expert possesses at least the minimum qualifications to give opinion testimony on a particular subject; and (2) persuade the jury (or fact finder) that the expert's judgment is sound and that her opinion is correct.[42] As a "rule of thumb: the introductory material must either foreshadow an argument that is consistent with a theory of the case or make the witness someone with whom the jury can identify."[43]

A primary goal of qualifying the expert is eliciting testimony that he has the requisite "education, skill, or training to qualify as an expert."[44] It is also good practice to obtain an expert whose knowledge can be derived from formal as well as practical experience.[45] These factors should be considered along with the fact that jurors must be able to identify with the expert. By making the expert a three-dimensional person (e.g., asking a series of personal questions – married, children, hobbies, etc.) and advising the expert how to avoid braggadocios language, counsel can make the expert come alive for the jury.[46] Moreover,

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[38] *See* Mogill, *supra* note 6, at § 6:20.

[39] *Id.*

[40] *Id.*

[41] Fed. R. Evid. 702; Charles Tilford McCormick, Handbook of the Law of Evidence § 13 (3d ed. 1972); Graham C. Lilly, An Introduction to the Law of Evidence § 12.1 (2d ed. 1987); Louis E. Schwartz, Proof, Persuasion, and Cross-Examination § 5:06 (1973).

[42] Mogill, *supra* note 6, at § 6:21; Robert E. Keeton, Trial Tactics and Methods § 2.22 (2d ed. 1973).

[43] Fine, *supra* note 2, at 274.

[44] Howard Hilton Spellman, Direct Examination of Witnesses § 9:7 (1972).

[45] Fred Lane & Scott Lane, Lane's Goldstein Trial Technique §§ 14.06-14.08 (3d ed. 2009).

[46] *Id.*

the jury's ability to understand that an expert engages in far more than just a daily business routine increases the chance that an expert will be viewed as a three-dimensional person the jury will relate to and trust.

A large component of developing a three-dimensional expert is humanizing him for the jury. For example, if an expert is from Africa, he might explain that he has a Southern accent because he is from four degrees south of the Equator. If the expert is an oceanographer, he should tell several Jacques Cousteau-like stories about descending to the sea floor in a submarine. Being a "local boy" could also carry weight with a jury. A Mississippi jury will likely give the testimony of a local doctor from Ole Miss greater weight than the testimony of a doctor from Harvard.

2. Education and Formal Training

If an expert witness is highly accredited in his field, the attorney should put greater emphasis on the expert's formal education, training, academic qualifications, and credentials. For example, it is more effective to elicit a medical expert's formal training while in residency than simply having him state where he attended medical school and completed his residency.

The amount of information necessary to convey to the court regarding the witness's educational background depends entirely on the circumstances of the case. This decision is a "tactical determination," dependent on whether his qualifications derive from experience he has gained since his education and training or solely prior academic achievements.[47] A combination of an impressive technical background in addition to an expert's humanity is a recipe for success. As an example, one expert was especially persuasive when he had a unique combination of four certifications that no one else in the world had. This impressive accreditation in addition to his English-explorer mustache and tales of his work in tropical jungles created a highly successful and persuasive portrayal in front of the jury.

3. Experience

While experience alone may be enough to qualify an expert witness, experience coupled with education or actual training in the expert's field will demonstrate that he is not only well-versed in an area, but that he has direct experience, as well. For example, if a law professor is called to testify as an expert to the appropriate standard of practice in a legal malpractice case, and he has experience in a clinical practice as well, his credibility will likely be enhanced. With practical experience beyond the academic credentials elicited, the expert will no longer be subjected to the question "Professor, have you never actually handled a case?"[48]

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[47] Keeton, supra note 42, at § 2.22.

[48] Mogill, *supra* note 6, at § 6.23.

4. Additional Considerations

In addition to an expert's education, training and experience, there are many other qualifications that can speak to the expert's credibility. For instance, licenses and certificates, professional associations, awards, research and publications, teaching positions, and of course prior testimony, are all relevant.[49] Many experts devote a large portion of their careers to the forensic side of their respective professions.[50] It is also effective to establish, if possible, that the witness has testified on both sides; this will demonstrate that he is not devoted to a certain side of a particular type of case.[51]

5. Offers to Stipulate to Qualifications

Some lawyers will offer to stipulate to the qualifications of an expert, in an attempt to keep the jury from hearing the expert's credentials. To avoid this tactic by the opposing attorney, advise the court that the jury will be able to adequately judge the credibility of the witness only if they know her qualifications. Having the expert testify to her qualifications is especially important when counsel anticipates arguing to the jury that its expert is better qualified than the opponent's. To invoke this argument for the expert's specific background and accomplishments there must be evidence on the record that these qualifications actually exist. At this point, counsel usually tenders a witness as an expert by stating, "Your Honor, I offer Dr. Navarro as an expert in the field of neurosurgery."[52]

B. *Establishing the Basis for Opinion*

1. Generally

In the second stage of preparing for expert witness testimony, the witness should describe the facts and data that support his opinion. Prior to the testimony, the expert must have relevant information about the subject to present at trial. If the expert gives only an opinion without disclosing facts on direct examination, he may be required to do so during cross-examination.[53] Thus, it may be more credible for the expert to present these facts at the outset of direct examination. Traditionally, it was permissible for an expert to express an opinion only if it were based on personal knowledge or a hypothetical, or a combination of the two. Under that system, the expert could not draw an opinion based on information that he acquired outside the courtroom from other sources.[54] In contrast, the modern approach liberalized the sources of information the expert may refer to, including testimony from

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[49] *See id.* at § 6:24.

[50] *Id.*

[51] *Id.*

[52] *See id.* at § 6:26.

[53] Fed. R. Evid. 705.

[54] Advisory Committee Note, 56 F.R.D. 183, 283 (U.S. 1972).

other experts, other sources normally relied upon by experts in that field, and data given to the expert outside the courtroom.[55] The following discussion addresses the various techniques an attorney can use for examining an expert under both the traditional and modern approaches.[56]

2. Using the Expert's Personal Knowledge

In instances where the expert observed the facts or conditions upon which she bases the opinion, counsel should elicit the expert's personal knowledge of these circumstances after establishing her qualifications.[57] Doing so is especially important where the expert was involved in the events that led to the trial. For example, a patient's treating physician can also be used as an expert to attest to that patient's predicted recovery.[58] The treating physician has personal knowledge of the injuries and can form an informed opinion as to the patient's prognosis. By describing a personal familiarity with the case in addition to facts that support this opinion, the expert's credibility will be magnified.

3. Asking Hypothetical Questions

If used properly, hypothetical questions can be a great tool for establishing facts that are relevant to an expert's testimony.[59] Particularly, the hypothetical question is useful to focus the jury's attention on the relevant facts that control the expert's conclusions, even where the expert might not have personal knowledge. In cases where the expert does not have personal knowledge, the hypothetical can be used to make inferences. For example, "If I *assume* A, B, and C to be true, then I can infer X."[60] Furthermore, even though the hypothetical must establish the facts of the case fairly and accurately,[61] the examiner need not mention all of the facts. This selectivity in determining exactly which facts to provide to the expert is an effective technique to control the information to which the jury is exposed.[62]

While hypothetical questions allow an attorney to choose the facts to present to the expert, the way counsel poses the question also impacts the effectiveness of the expert's testimony. When posing a hypothetical question, an attorney should remember that other witnesses must prove the facts assumed in the question. Therefore, the attorney is afforded

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[55] Fed. R. Evid. 703; Advisory Committee Note, 56 F.R.D. 183, 283 (U.S. 1972).

[56] Mogill, *supra* note 6, at § 6:28-6:33.

[57] *See id.* at § 6:28.

[58] *Id.*

[59] *See id.* at § 6:29.

[60] *Id.*

[61] *See, e.g.*, Theriot v. Bay Drilling Corp., 783 F.2d 527 (5th Cir. 1986).

[62] *See* Mogill, *supra* note 6, at § 6:29.

an opportunity to remind the jury of testimony that has already been given or preview testimony about to come. Furthermore, some attorneys have a great ability to relay a sense of drama and action into the hypothetical question, which builds on the idea explored below, that creating a story is an effective tool to win over the jury.

4. Expert's Opinion on Testimony of Other Witnesses

Under the modern approach, it is advisable to have the expert remain in the courtroom and listen to the testimony of other witnesses who describe the facts upon which the expert will base his or her opinion. Experts who plan to rely on the testimony of other witnesses in order to form their opinion are not typically sequestered from the courtroom during this time.[63] The attorney should always make sure that he knows beforehand what the witness will testify to, in addition to the opinion that the expert can draw from this testimony to ensure that examination goes smoothly.[64]

C. *Eliciting the Expert's Opinion*

1. Generally

The third stage of consideration for an expert witness is the actual opinion generated by the expert. In this phase of the questioning, the "witness applies [his or] her knowledge, skill, experience, training, or education to the facts known or assumed … and draws conclusions or makes inferences that are helpful to the jury."[65] This opinion is often the focal point of an expert's testimony; therefore, counsel must ensure that the testimony falls within the expert's field of expertise to render opinions on the subject matter. Moreover, it is of great importance that counsel thoroughly discusses the matter with the expert prior to trial so that the expert actually conveys the desired opinion consistent with the theory of the case.[66]

2. Never Ask "What Happened Next?"

The following excerpt from John Grisham's *The Runaway Jury*, demonstrates the flawed follow-up question, "What happened next?" which some attorneys choose to ask. At this point in the book, the plaintiff's lawyer is asking an expert witness (a former high-level tobacco company employee) to describe a long-missing document that allegedly showed that the tobacco company knew that nicotine was addictive:[67]

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[63] *See id.* at § 5:13.

[64] *See id.* at § 6:30.

[65] *See id.* at § 6:41.

[66] *Id.*

[67] Fine, *supra* note 2, at 268.

Q: And the next paragraph?

A: The writer suggested [to the president] that the company take a serious look at increasing the nicotine levels in its cigarettes. More nicotine meant more smokers, which meant more sales, and more profits.[68]

While these statements do seem powerful, many jurors will miss them, and unfortunately this *is* the way that many lawyers question.[69] The statements from the expert could be much more powerful if the lawyer did not ask, "What happened next," which undoubtedly produces a lengthy exegesis by the witness.[70] Rather, the jury needs to know the answer or likely answer to the question before the expert actually responds.[71] According to Judge Fine, a direct-examination question should not be asked unless it satisfies at least one of the following rules: (1) the jury already knows the answer before the witness responds; (2) the attorney has immediate corroboration for the witness's answer or (3) the attorney starts at a point so early in the logical train of thought that the answer rings true.[72]

There are several benefits to allowing the jury to know the answer to a question before it is even answered. First, it "cements into their minds these building blocks of the lawyer's argument, without relying on their assessment of the witness's credibility."[73] Second, the attorney must make the logical connections in incremental steps, so that the jurors are not forced to take in the whole developed testimony as one question and one answer.[74] This is especially crucial because jurors have a tendency to fade in and out, and it is possible that their "fade-out" could be during the most important part of the expert's testimony.[75] Third, by using this method rather than the "what happened next" methodology, the lawyer is allowed to repeat all of the helpful information by rephrasing questions to give a different perspective.[76] By repeating key phrases and facts, no juror should miss the highlights of the argument.

Fine demonstrates a better way to reformulate the direct examination of the tobacco witness to accomplish these three abovementioned points:

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[68] *Id*; John Grisham, The Runaway Jury (2003).

[69] Fine, *supra* note 2, at 268-267.

[70] *Id.*

[71] *Id.*

[72] *Id.* at 271.

[73] *Id.* at 270.

[74] *Id.*

[75] *Id.*

[76] *Id.*

Q: Did you read the next paragraph as well?

Q: What was the subject of that paragraph?

Q: Did the writer of that memorandum suggest that the company do something about the nicotine levels in the cigarettes it was making?

Q: Did the writer suggest that the nicotine levels in the cigarettes be increased or decreased?

Q: Did the writer tell the company's president how increased nicotine levels would affect the number of people who smoked?

Q: Would increasing the nicotine levels in cigarettes mean more or fewer smokers?

Q: More smokers than if the nicotine levels were not increased?

Q: Would this mean more or fewer sales?

Q: Would this mean more or less profit for the company?

Q: Would the profits be substantial? [77]

In his example, Fine frames the questions so that the jury should expect to know the answer before it is repeated by the expert and breaks down each of the logical connections necessary to implant the whole opinion in the jury's mind.

3. Consistent Framing of the Questions

"Because the wording of the question might influence the expert's response, it is important not to vary the form of the question in any material way that will trouble the witness."[78] If the examiner changes the phrasing of questions from how they were rehearsed, the expert might be taken aback and ask for a clarification and might give an unexpected answer.[79] The actual trial testimony is not the time for miscommunication between the examiner and the expert.

D. *Explaining the Opinion*

1. Generally

The fourth step to consider for an expert witness is that he must be prepared to explain his opinion. Even though the expert is not required to offer an explanation, the opinion will lose persuasive effect if the jury is unable to understand the technical or scientific reason-

[77] *Id.* at 268-269.

[78] *See* Mogill, *supra* note 6, at § 6:42.

[79] *Id.*

ing underlying the opinion.[80] One way to ensure that the explanation makes sense is for the expert and attorney to focus on turning the courtroom into a classroom.[81] Some strategies an attorney can use to create this setting include having the expert leave the stand and write on an easel, using body language to draw in the jury or having the expert converse directly with the jurors. Further, the attorney should start the questioning facing the expert, then turn to the jury for eye contact during the question and return to face the witness for the conclusion of the questions. Additionally, the expert should be prepared to speak directly to the jury for substantive answers and make eye contact with the jurors.

While experts are essential to help the jury absorb and comprehend technical matters that might be outside of the realm of common knowledge, they must be careful not to "undo the carefully prepared presentation by eliciting an impermissible vouching statement during the course of the expert's explanation."[82] For instance, in a child abuse prosecution, the state was incorrect to allow the expert to vouch for the credibility of other witnesses[83] when the witness testified, "99.5% of children tell the truth and that . . . in his experience with children, [he] had not personally encountered an instance where a child had invented a lie about abuse."[84] The testimony "improperly invade[d] the province of the jury and [wa]s particularly likely to be prejudicial where [it] [wa]s relied on in closing argument,"[85] and attorneys should be mindful of the repercussions.

2. Help the Expert Teach Through Story Telling

In a short column for the American Bar Association, Professor Jim McElhaney[86] highlights two key points an attorney should recognize for the direct examination of an expert witness in a criminal trial. Although the article pertains to a criminal trial, it can easily apply to experts in civil litigation.

a. The High Ground of Credibility

Professor McElhaney first emphasizes that the purpose of an expert is not to "put a hired gun on the stand who will argue the case for you," [87] as many attorneys mistakenly think. The problem with this mindset is that the attorney is just adding another advocate as

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[80] *See id.* at § 6:44.

[81] *Id.*

[82] *Id.*

[83] Snowden v. Singletary, 135 F.3d 732 (11th Cir. 1998), *cert. denied*, 525 U.S. 963 (1998).

[84] *Id.*

[85] *Id.; see also* Mogill, *supra* note 6, at § 6:44.

[86] Jim McElhaney, *Put Simply, Make Your Experts Teach: Expert Witnesses Are Most Effective When They Tell the Story of Your Case*, 94-MAY A.B.A. J. 28 (2008).

[87] *Id.*

opposed to an expert, and credibility issues may arise. Similarly, the purpose for calling an expert witness is not to "fill the courtroom with incomprehensible erudition," according to McElhaney.[88] If the expert is portrayed as just another advocate for one side, jurors may be reluctant to accept what they do not understand.

Rather, McElhaney surmises, the "point of calling an expert is to put a teacher in the stand – an explainer who brings another set of eyes in the room through which the judge and jury can see the facts and understand your case."[89] He suggests that the expert should act as a guide that can lead the fact finder through the confusing elements of a case.

McElhaney proposes that when selecting an expert, attorneys should look for an individual who can act as a teacher, because that profession is seen as a fundamental symbol of credibility in our society.[90] By using someone who enjoys explaining complex issues to others and who feels "natural with a piece of chalk in their hands," the jury will likely view the expert as more credible, and the fact finder will have a greater chance of grasping difficult elements of a case. While there are many intelligent and highly qualified experts, it can be difficult to find an expert who is able to convey information in a way that a lay person can understand. While it might take time to find a qualified expert who is also an effective explainer, teaching an expert to be a good educator would likely consume an even greater amount of time.[91]

While some characteristics create an effective credible witness, there are characteristics an attorney should avoid in an expert as well. First, when picking experts, attorneys should also be wary of witnesses who caution that the case is too complex or deals with concepts that are too difficult for ordinary people to comprehend. If the expert has this attitude going into the trial, she is sure to convey this impression to the judge and jury.

Second, the expert's vocabulary is important. By using professional jargon, the fact finder will feel "uninitiated out of the inner circle."[92] Conversely, attorneys should seek out experts who like to "share secrets" with others. "Sharing secrets" means that the judge and jury will understand a concept that they did not understand prior to trial, and then they can share that idea with others. A juror who gets an idea from an expert and uses that information indicates that the juror trusted the expert enough to share the idea with others. McElhaney surmises that when jurors partake in this relay of information from experts, they are essentially buying what the expert is selling.[93]

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[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.* at 28-29.

The following examples of clear and unclear ways to communicate the same concepts demonstrate the importance of ensuring the expert avoids scientific jargon.

> NO: The analytical laboratory results indicated that the levels and distribution of congeners of dioxin and dioxin-like compounds within the plaintiff's blood sample were within normal limits.
>
> YES: The blood is normal.
>
> NO: The dioxin and dioxin-like congeners in the plant's emissions were not consistent with those found in the plaintiff's samples.
>
> YES: The plant's DNA was not in the plaintiff's blood, or soil, or dust, or water. OR The fingerprints don't match.
>
> COMPLICATED: The plaintiff's expert pointed to one study where furans could theoretically convert to dioxins in a lab.
>
> SIMPLE: The defense expert explained that for furans to convert to dioxins, the temperature would have to be 980 degrees – it gets hot in South Mississippi, but not that hot!

b. Let the Witness Repeat the Story

A second strategy an attorney should follow for effective expert testimony is having the expert repeat the attorney's theory of the case. Ideally, by the time the expert testifies, the attorney has already told the story of the case in her opening statement. Stories are what both judges and jurors use to process facts. By reiterating this story through a different voice, the expert's testimony, the story may reach a fact finder that the attorney was unable to reach in her opening statement.[94] Further, the expert's reiteration gives the jury a new point of view and a different way of approaching the case, through the expert witness.

The choice of words can be effective when an attorney and expert are explaining their theory of the case. Some words help a story come alive to the judge and jury. These words include "teach," "tell," "explain," "help us understand," "help us learn," "educate us about," "demonstrate," "interpret," "untangle," or "decipher."[95] A second group of words can be used in a demonstrative way to help the jury see what the expert or attorney is saying. Demonstrative words include: "show," "see," "watch," "look at," "view," "picture," "demonstrate," "scene," or "take us there."[96] Other words, however, insult the audience's common sense and

[94] *Id.* at 29.

[95] *Id.* at 29.

[96] *Id.*

should be avoided. Such words include "indicate," "elucidate," "illuminate," "explicate," "expound," "discern," "enlarge upon," or "assist us in comprehending."[97] It is good practice for an attorney to write down and review these words prior to examining the witness so that the attorney can use the helpful words and avoid those that are unhelpful as much as possible.

Demonstrative evidence can also be in the form of visual aids. Exhibits such as anatomical charts, models depicting various parts of the body, slides, overhead projections, films, and videotapes can afford a dramatic and effective opportunity to portray the data used by experts in reaching their opinions.[98] Particularly, when overhead projections, films, or videotapes are used in a darkened courtroom, the effect can be captivating and introduce a realistic element to the testimony.

It is also great practice when an attorney is "using words of both teaching and visualization to create questions that will inspire vivid testimony from experts."[99] The purpose is for the jurors to see the facts as if there were actually an eyewitness to the case. McElhaney offers several sample questions that demonstrate this point:

> Q: Dr. Sweeney, we need you to teach us a little about the spleen so we can understand what went wrong in the hospital. Take us to the operating room and let us see what's happening.
>
> Q: Ms. Wildt, help us look at this bridge through the eyes of a design engineer. What should we be looking for in this diagram?
>
> Q: Mr. Winter, we want to understand what these delusions were doing to Joan Quigley. Give us a picture of what was going on in her mind.[100]

3. Explaining Technical Terms

Often in an effort to sound scholarly and perhaps disregard the lawyer's request to speak English, experts will use complex rhetoric and technical language when testifying.[101] When this occurs, the lawyer must ensure that the jury understands exactly what the expert is trying to explain.[102]

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97 *Id.*

98 Mogill, *supra* note 6, at §§ 5:141-5:147, § 6:46; Lane & Lane, *supra* note 45, at § 14.50.

99 McElhaney, *supra* note 86, at 29.

100 *Id.*

101 *See* Mogill, *supra* note 6, at § 6:47

102 Lane & Lane, *supra* note 45, at § 14.51.

Some experienced expert witnesses will offer an explanation by their own initiative; however, when the expert does not do so, the attorney should prompt the expert to do so.[103] The following sequence of questions, answers, and explanations from a medical expert offers an example:

> Q: What sort of fracture was it?
>
> A: It was a compound, comminuted fracture.
>
> Q: What do you mean by a "compound, comminuted fracture?"
>
> A: Well, compound means that the bone is actually sticking out of the leg, piercing the skin. Comminuted means that bits and pieces of the bone were broken off, like the bone itself was shattered into smaller pieces.

When asking the expert to explain a technical term, the attorney must do so in a way that does not insult the jury's intelligence.

> Q: Now, Dr. Berg, no one on the jury here is a doctor, and you're probably talking over their heads when you use the term "spinous process," so would you please explain that word for their benefit?

Even more simply,

> Q: Would you explain the term "spinous process" for the jury?

This question might have a condescending ring to it. To be most effective, counsel should ask the question in a way that indicates the attorney actually wants to know the answer:

> Q: What's the "spinous process," Dr. Berg?

Much to the contrary, the lawyer should not convey a false ignorance to the jury by stating something like the following:

> Q: I'm sorry, doctor, but I'm just a poor lawyer who never went to medical school, and you lost me when you were talking about that spiny something-or-other; could you tell me what you meant by that?

Presenting the question in this fashion makes the lawyer seem patronizing to the jury and disingenuous.

Lastly, is it important not to use acronyms when asking the witness questions. For example, if an attorney refers to the expert as the "CEO" of a company, she is assuming that

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[103] *Id.*

jurors will be well aware that "CEO" stands for "Chief Executive Officer." To avoid this problem, avoid the acronym. Further, if a witness chooses to use an acronym in testimony, the attorney should respond by explaining what the witness actually was referring to. For example:

Q: Where did you get your degree?

A: MIT.

Q: The Massachusetts Institute of Technology?

Q: When did you get that degree from MIT?

After the acronym is established and explained, it is typically okay to use it again, unless the acronym is lengthy and complex.

VI.
Conclusion

The care, preparation and direct examination of expert witnesses can be a tedious task. The practice of most attorneys is to brief the expert on what he will opine in court and discuss a brief synopsis of his or her background information and education. However, a diligent attorney can maximize his or her possibility of prevailing on the basis of the expert's testimony alone, if the attorney cautiously adheres to the four-step process for the direct examination of witnesses: (1) qualifying the expert; (2) establishing a basis for his or her opinion; (3) eliciting the opinion; and (4) explaining the opinion.

Mediation: Not If, But When and How[†]

Elizabeth F. Lorell
Jeffrey W. Lorell

I.
Introduction

Statistically, 95% of all cases settle before trial.[1] Civil litigation has become an increasingly expensive and exhaustive prospect for all defendants with the rising demands of pre-trial discovery, onerous electronic discovery, and e-document production.[2] Strike suits by individual plaintiffs and class actions by a small number of class representatives can impose enormous defense costs on a company and its insurers, while plaintiffs often have little risk or personal expense themselves and very little to produce on discovery. Waiting until just before trial to settle such cases exposes defendants and their insurance carriers to enormous defense costs, much of which will be incurred after the strengths and weaknesses of all parties' respective positions can be reliably evaluated.

[†] Submitted by the authors on behalf of the Employment Practices and Workplace Liability section.

[1] ABA Coalition for Justice, *How-to Series to Help the Community, the Bench and the Bar Implement Change in the Justice System: Roadmap to Alternative Dispute Resolution, Alternatives to Litigation* (Mar. 2008), http://www.abanet.org/justice/pdf/ADR_Covered%20_Final.pdf.

[2] *See, e.g.,* F.R.C.P. 26(a)1(B).

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While no defendant wants to settle a case too early and pay more than a case is worth, sophisticated corporate officers, in-house counsel, and insurance claims representatives must nonetheless answer to their respective shareholders for ever-increasing defense budgets. The mandate from the board room is clear: reduce defense costs without increasing corporate exposure to liability.

Over the last decade, a variety of alternative dispute resolution ("ADR") procedures have come into vogue as methods to reduce litigation costs while maintaining reasonable limits on exposure to liability. Non-binding mediation, the most popular ADR technique, has been warmly embraced not only by corporate boards and in-house counsel, but also by their insurers, outside counsel, and even the courts. Indeed, most state and federal courts now routinely order cases to non-binding mediation and frequently have rosters of trained neutral mediators who will mediate a case at no cost or at a reduced rate.[3] Mediation is also mandated by most circuit courts of appeal, where appropriate.

As the demand for mediation has grown, so too have the ranks of qualified mediators. Most ADR providers devote much of their time and energy to mediation, as evidenced by the robust membership growth of the American Arbitration Association, JAMS, and The Center for Dispute Resolution. In addition to the national ADR providers, experienced litigators and retired judges form a veritable army of qualified mediators. Mediation has, indeed, become a cottage industry.

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[3] *See, e.g.,* N.J. L.Civ.R. 301 (2009).

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Given the demand to lower defense costs by resolving disputes early, the pressure from courts to relieve crowded dockets by sending cases to mediation, and the likelihood that a case will settle before trial, mediation of significant civil disputes has become virtually inevitable. Whether mediation will be successful depends not only on the choice of a skilled mediator but also on the sound judgment of respective counsel in planning for mediation, including when to attempt it and what protocols or ground rules to agree upon in advance. Advocates must bring to bear their wisdom and skill long before they walk into a conference room and shake hands with a mediator.

II.
Identifying When Mediation Will Be Most Fruitful

Just as a farmer must gauge the optimal time to harvest fruit from an orchard, an advocate must determine when each case is ripe for mediation. Fruit picked too early or too late will be inedible and worthless. Likewise, premature mediation often leads to unnecessary posturing and failure because the parties cannot properly evaluate the strengths and weaknesses of the various claims, counterclaims and defenses. Conversely, mediation attempted too late, after "scorched earth" discovery, may result in a settled case that avoids risks of trial but also fails to keep a lid on enormous defense costs incurred during discovery.

When is the right time to discuss mediation, and when should advocates mediate? Answering these questions necessarily relies on counsel's judgment and experience, but the following general guidelines are useful considerations.

A. *Use Mediation to Preserve Ongoing Business Relationships*

If the parties have been doing business together and will likely continue their relationship, early mediation is advantageous because it prevents parties from hardening their positions and generating ill will that could damage their business relationship. Creative business solutions are likely to be palatable to both parties and will enable them to look together toward future transactions that could result in a "win-win" for everyone.

B. *Initiate Mediation When the Facts Are Sufficiently Known*

In some cases, the parties know many of the facts before the complaint is filed. Although they may have to fill in gaps, much information is already available from past dealings or from the public record. If the parties can fairly assess the merits of their dispute and potential resolutions without much discovery, early mediation is encouraged. Alternatively, if information gaps must be filled before mediation begins, counsel can either agree to a limited exchange of information for mediation or agree to stay all but very limited and targeted discovery to produce documents or testimony needed for effective mediation.

An experienced mediator will determine early in the mediation process whether the various parties have sufficient information to allow their respective decision-makers to make an informed settlement decision. If he or she senses such information is absent, the mediator can supervise the exchange of information as part of the mediation process or temporarily suspend mediation until certain documents are produced, interrogatories are answered, or key deponents are deposed.

C. *Ensure Everyone Is at the Table*

Judges frequently attempt to send cases to mediation before all third- and fourth-party defendants have been joined. This practice is inadvisable. Everyone who will likely share in shouldering liability or who must help resolve the case must have a seat at the mediation table. Even foreign manufacturers or distributors over whom there is no jurisdiction should be invited to participate in the mediation (even if only informally, to help reach a global solution and – from their perspective – to minimize liability from a future indemnification or contribution suit). Even if it takes somewhat longer to initiate mediation and have all parties participate, nothing can sabotage an otherwise potentially successful mediation more than the empty chair of a potentially responsible party.

D. *Never Give Up on Mediation Until the Case Is Resolved*

If your client has a business interest in settlement, never give up on mediation and walk away from further communications with the mediator. Some cases cannot settle in a few days and instead require repeated sessions to attack different aspects of the issue. Some require a hiatus for cooling off or more discovery to let events outside of the litigation play out. In such cases, do not discharge the mediator; rather, encourage him or her to stay in touch, follow up, and urge future sessions. Sooner or later the mediation will work. Why? Because almost all cases settle, and mediation is the safest and soundest way to negotiate

that settlement without giving away your negotiating position. Never give up this advantage by closing the door on the mediator.

E. *Trade In a "Lemon" Mediator*

Not everyone who holds him or herself out as a mediator is qualified or adept at mediating, and not every mediator is right for every case. Be willing to change mediators, if necessary, to advance the mediation process; not only will it take less time than waiting for trial, but getting the right mediator for the job will best ensure an acceptable outcome.

III.
Choosing the Right Mediator

Being a successful mediator requires special skills. Being a skilled advocate, or a trial or appellate judge, doesn't necessarily equate with being an effective mediator. Mediators do not decide cases, and sometimes they do not even evaluate the strengths and weaknesses of a party's position. They are neutral. They are listeners, facilitators, and observers. A good mediator must be eminently flexible so that he or she can adjust his or her style to resolve the dispute at hand, reflecting the different issues, factual complexities, and personalities involved in each case.

The best mediators engage the parties, as well as counsel, in animated discussion during private sessions. They read between the lines, watch body language closely, and search for hidden agendas. They look for ways to bring the parties together, one issue at a time, gauging how flexible each party may be on different aspects of the issue. Keen insight and extensive experience help them judge which way a party will move and how far a party is willing to go. A good mediator knows when to push harder and when to back off, and when a demand or a response by a party is reasonable or grossly out of line.

While a mediator may not need specialized knowledge or subject matter expertise for a particular case, it is frequently desirable. Some mediators offer years of experience in a particular industry, adding to the respect they and their observations are accorded by the parties. Certain mediators have a reputation for being successful in mediating pharmaceutical patent disputes, for example, or for mediating claims in the construction industry. If a case involves facts that are highly industry-specific, using a mediator with extensive experience in that industry can facilitate the mediation process.

How do you select an appropriate mediator for your case? Ask a lot of people (both counsel and industry principals) about the reputations of, and their experience with, various mediators. Clearly, fair, smart, and knowledgeable mediators are desirable. But most importantly, mediators should possess the unique mediation skills described above, which cannot be ascertained from a cold resume or presumed based on the mediator's successful judicial career. Ask any prospective mediator for a list of cases that he or she has resolved, as well as a list of cases that he or she was unable to resolve, with the caption and counsel list for each. Call those people and ask them for their unvarnished comments about the

mediator's skills. In addition, ask friends, partners, and colleagues for their experience as well. Finally, do not make the common mistake of objecting to a good mediator just because the opposing party has proposed him.

IV.
Shaping the Mediation

Successful mediation is a collaborative process. All parties must believe that settlement is preferable to the risks, uncertainties, and costs of trial, which is the first step toward achieving a settlement. The next step is for the counsel to work collaboratively with each other, and often with the mediator as well, to structure a protocol for the mediation. If the parties really want the case to settle, they must communicate openly about subjects addressed by the protocol to give mediation the best chance of success.

In a simple case, the mediation protocol can also be simple and may address such topics as which issues will be discussed, whether each party will present its version of the facts to the other parties in a joint session, whether demonstrative aids will be used, and whether experts will participate.

Complex cases may call for a more sophisticated protocol that identifies which of many parties are necessary to resolve discrete sub-issues and whether mediation should be segmented, involving only those parties necessary to resolve a specific issue at any given time. When difficult coverage issues are involved, the mediation protocol should address whether the coverage issues should be simultaneously mediated or resolved separately from the underlying liability issues.

Mediation protocols should also identify how mediation expenses will be borne among the participants and where the mediation sessions will take place, especially in national cases involving parties and counsel from many jurisdictions.

In unique cases, mediation protocols sometimes give the mediator the power to arbitrate certain issues if those issues cannot be successfully settled or the power to resolve any disputes about the scope and terms of any settlement reached before the mediator.

V.
Advocating Effectively in Mediation

Great trial lawyers are not necessarily effective advocates in mediation. While some requisite skills overlap, many do not. For example, if the mediation protocol calls for each party to make an opening statement, trial advocacy skills will be useful. Increasingly, however, mediators shy away from permitting opening statements for fear of polarizing the parties and pushing them further away from a potential settlement. An advocate's ability to portray her party to the mediator as an earnest negotiator, as well as her flexibility and creativity, are qualities required in most mediations, though those skills are perhaps underutilized in a typical trial setting.

A. *Positioning Yourself with the Mediator*

Ultimately, an advocate's success in the mediation process may depend as heavily on how well she is positioned with the mediator as on skills transferred from the courtroom setting. Just as trial lawyers must sell themselves and their version of the facts to the jury, so, too, must mediation advocates sell themselves and their clients to the mediator. In mediation, however, the sales pitch differs significantly. While advocates are certainly selling their version of the facts and interpretation of the law, more importantly, advocates must sell themselves and their clients as the mediator's ally in reaching the mediator's only goal: achieving a settlement. The mediator's perception of an advocate's reasonableness and flexibility in considering creative settlement proposals, as well as that of the advocate's client, will support the mediator's conclusion that an advocate and his client are working with the mediator to reach a settlement, rather than thwarting a settlement by being obstinate or unreasonable.

A skillful advocate will appear to be flexible and reasonable without giving away the store, which requires a tremendous amount of thought, analysis, and work with the client well before mediation begins. An effective advocate must propose a starting negotiating position that demonstrates not only a realistic understanding of the facts and the law (*i.e.*, the client's likely exposure), but also an intent to be reasonable and to strive for a settlement. Yet a successful advocate must leave sufficient negotiating room to allow judicious movement during the mediation to satisfy the mediator. If a mediator concludes that an advocate is both realistic and candid, when the advocate subsequently communicates that he has little additional room to give, the mediator will likely lean heavily on the opposing party to close the gap.

B. *Reaching a Settlement Through Creativity*

A successful advocate communicates his or her alliance with the mediator not only by judiciously shifting positions during mediation, but also by suggesting creative non-monetary settlement terms or creative monetary structures. Ask the mediator to discern whether the other party would value certain non-monetary benefits, such as favorable publicity, a contract extension, or a letter of apology, and how those benefits would affect potential settlement terms. Additionally, consider whether making some promise to a third party, or refraining from doing business with a third party, would benefit the other side and facilitate the settlement. Undertaking a joint venture with the adverse side on another project may also facilitate a settlement.

Business proposals that can create common ground and generate goodwill between opposing parties are limited only by an advocate's creativity. An effective advocate in mediation will spend significant time identifying creative possibilities and sharing them with the mediator. Even when a suggestion is not accepted by the other side, merely proposing it demonstrates to the mediator a client's commitment to the settlement process, making the advocate the mediator's ally. By aligning with the mediator's objective of reaching a settlement, an advocate is more likely to come away with a favorable settlement.

VI.
Conclusion

Mediation of civil cases is a virtual certainty for most litigants. By embracing mediation and using it to your advantage by recognizing the best time to mediate, choosing the right mediator, and honing your skills as a mediation advocate, you are more likely to deliver an optimal outcome for your client.

Pre-Trial Preparation: The Key to Success in Toxic Tort Litigation[†]

Barbara J. Barron
Frank Domino
Molly K. Moore

I.
Introduction

Over the past two years, a number of attorneys in our firm have been involved in toxic tort litigation. The firm has received back-to-back defense verdicts in asbestos exposure, products liability, premises liability, and gross negligence cases; further, it has resolved several other cases during trial, after the plaintiffs' demands dropped from seven-figure to five-figure amounts. After analyzing the firm's recent victories, we determined that all the cases had one common thread: extensive pre-trial preparation. This article details some of the pre-trial strategies employed by our firm that resulted in successful outcomes for our clients.

II.
Investigation

In reviewing our recent victories, we determined that undertaking a thorough investigation was the first key to success. Often, clients are reluctant to spend money to undertake an extensive investigatory process, but where information is not readily accessible or apparent,

[†] Prepared by the authors on behalf of the Trial Tactics, Practice and Procedures section.

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such an investigation can be critical to winning a case. As a client's advocate, it is essential for an attorney to explain the potential benefits of a thorough investigation and to help the client see beyond the cost.

Counsel may need to investigate potential fact witnesses. For example, in one of our recent cases, the plaintiff asserted that he was able to identify our client's product, a joint compound, after having seen the joint compound as a child when he was on his father's jobsite. While this type of identification appears flimsy, it is difficult to disprove because it requires proving a non-occurrence. Luckily however, the client was willing to spend money to investigate the plaintiff's claims. Instead of retaining a private investigator, to help save money, one of the firm's associates traveled to Ohio and Kentucky on several occasions to investigate the plaintiff's story. During the investigation, the firm discovered that the plaintiff's attorneys had interviewed a number of witnesses but had not disclosed them on the witness list. The plaintiff's attempt to bury these witnesses indicated we were on the right track. The witnesses, an eighty-year-old foreman, the plaintiff's former employer, and the owner of a drywall contracting company, gave depositions that caused the plaintiff to reduce his demand from more than one million dollars to a sum in the low five figures. This reduced demand was made possible as a result of the client's investment in investigation, an investment that paid off by dramatically reducing the client's exposure.

In another recent case, the plaintiff was deposed and testified that he had been exposed to an asbestos-containing product while he lived in a particular house. The time period when the plaintiff testified that he lived in the house was about the same time that our client stopped using asbestos in its products; as such, after the deposition, we asked an associate to run a title search on the house. The associate not only determined that the plaintiff did not own the house at the time he claimed but was able to locate the house's prior owner, who indicated he had renovated the house several years prior to selling it, and that he did not use our client's product. Thus, two days of relatively simple sleuthing resulted in a non-suit.

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Abraham Lincoln once said that his secret for winning cases was to understand the opposition's case better than the opposition did.[1] Thus, as part of the investigatory process, our firm attempts to look beyond the plaintiff's allegations. For example, in toxic tort cases, medical records are typically ordered; often however, searching deeper into the plaintiff's records can yield substantial gains. In a recent trial, the plaintiff had contracted asbestosis and was suing our client, an asbestos manufacturer. The judge permitted our firm to subpoena the plaintiff's parents' medical records. Unbeknownst to the plaintiff's attorney, the plaintiff's mother and father had also been diagnosed with asbestosis. The mother contracted the disease having never worked outside the home, but for many years, she had cleaned her husband's laundry by hand, which included beating the asbestos-filled dust out of his clothes. The plaintiff, her son, was typically at her side while she was doing the laundry. At trial, the plaintiff's expert testified that it was impossible to determine how much of the plaintiff's exposure, if any, resulted from his father working for an asbestos company; he further testified that he would have to see evidence of the father's asbestos exposure before he would be willing to attribute the plaintiff's asbestosis to his father rather than attribute it to our client, another asbestos manufacturer. We showed the expert the medical records indicating that the mother had contracted asbestosis while doing her husband's laundry and that the plaintiff was constantly by her side; the jurors were on the edge of their seats absorbing the information, information the plaintiff did not know about his own case.

Finally, a word of caution: investigation is not always easy, nor does it always yield flashy results, but knowing where to look can often shorten the investigation and increase the probability of finding useful information. For example, in several of the firm's cases,

[1] Russell R. Windes & Arthur Hastings, Argumentation and Advocacy 193 (1966).

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researching bankruptcy trusts has provided fruitful information that was helpful to the case. In two separate cases, the plaintiff's attorneys indicated there were no bankruptcy trust claims filed in the matter. However, in both cases, researching Johns-Manville Trust documents (a trust set up to compensate asbestos victims) established that bankruptcy trust claims had, in fact, been filed. In one case, the judge was so frustrated by the plaintiff's deception that he eliminated the referring attorney's fee. In the other case, the plaintiff's attorneys lost substantial credibility with the judge. In both cases, a small investigation netted significant results. The moral of the story is to think outside the box and not to give up when traditional sources of information do not provide the desired results.

III.
Themes

Everyone remembers Johnnie Cochran's quip, "If the glove doesn't fit, you must acquit." It was catchy, short, and memorable, and it went to the heart of what O.J. Simpson's attorneys were trying to prove, his innocence. In the firm's recent successes, developing a strong theme has been another key to victory.

Attorneys spend months, or even years, gathering, deciphering, and organizing a case, but a jury will only have days to hear and comprehend the facts. Thus, what may seem clear to an attorney after months of preparation could be completely lost on a jury that has not shared those preparatory experiences. Because an attorney's ability to persuade depends on clearly and concisely communicating the relevant information to the jury, choosing a theme that precisely articulates the attorney's theory of the case is one of an attorney's most important strategic decisions before trial. A strong theme helps jurors form impressions, learn the facts, and comprehend and remember the bottom-line message.

When formulating the theme, keep in mind that a theme should be simple, straightforward, and resonate with the jury. The easiest way to develop a theme is to ask, at its heart, what is the case about? The theme should remind the jury of the core elements of the case, which in turn, should influence the case's development. In essence, formulating the theme requires thinking from finish to start: determine the final message you want to communicate to the jury at trial, and then use that theme to guide and streamline discovery, motions, and other pre-trial preparation. Working under the umbrella of a theme allows for a focused and well organized pre-trial practice: it is not necessary to include evidence just because you have it, and it is inefficient to spend time and resources developing a defense that will not further the theme during trial. Thus, developing a strong theme will not only assist the jury in understanding the case, but it will save time and money. Finally, do not recycle the exact same theme in case after case, even if the circumstances are factually similar; plaintiff's attorneys may begin to anticipate the theme and design the plaintiff's case to counter the theme, which significantly diminishes its effectiveness.

IV.
Deposition Preparation

The Boy Scouts are right: be prepared. Extensive preparation for depositions has been an essential element of our firm's recent successful litigation.

For a defense attorney, the plaintiff's deposition is often the most important deposition in a case; as a result, an attorney can never be too prepared for that deposition. It is imperative that a defense attorney conduct extensive discovery prior to conducting the plaintiff's deposition. Having information about social security and medical records, as well as other important evidence, allows the defense attorney to know what to ask and how to ask it. If the plaintiff's records are sparse or incomplete, employing contemporary tools like Google, Facebook, or MySpace allows an attorney to learn more about the plaintiff, particularly when younger plaintiffs are involved. During the deposition, an attorney should use the information gained from written discovery to create a general outline of topics to cover; however, it is still essential to listen to the plaintiff's testimony and allow the questions to develop accordingly.

Though a plaintiff's deposition is critical to the success of a case, a defense witness can just as easily make or break a case. When a defense attorney is presenting a witness, stick with the Boy Scout motto, and prepare him! Discuss the theme with the witness and ensure that the witness has a complete understanding of the facts that he will testify about. The witness should understand the attorney's expectations for him and how his testimony will ultimately affect the case. In addition to preparing the witness for difficult questions, attorneys should prepare the witnesses, especially the experts, to respond to questions concerning unfamiliar documents. It is important that a witness carefully review a document and that he avoids testifying about anything beyond his personal knowledge. Under no circumstances should a witness interpret the meaning or content of documents drafted by another individual.

Even when an individual is factually prepared for a deposition, many witnesses have anxiety about the thought of giving a deposition. To lessen that anxiety, make sure that the witness is familiar with the deposition process: provide details about the attorney taking the deposition, describe what will take place, and assure the witness that you will be there throughout the entire process. If the witness is still anxious, perform a mock deposition. Such a mock deposition not only eases the witness's nerves, but is a good opportunity to probe the witness's understanding of the case, and it can be used to demonstrate the various techniques that the plaintiff's attorney will employ to attack the witness's testimony or credibility. This technique helps the witness understand the strengths and weaknesses of the case, and how best to handle the "hard" questions.

Being well-prepared for a deposition has paid dividends in a number of recent cases the firm has tried. Though we do not necessarily bring our corporate witnesses to trial, we prefer, whenever possible, to put a face on the company for the jury. But, if the witness is particularly vulnerable and has already made it through a deposition he was well-prepared for, it may be the best strategy not to call the witness and instead, read in the deposition testimony. For example, we had one corporate representative who cried a lot while testifying; though we knew he was simply worried about losing his business, crying would have made him seem guilty to the jury. After we extensively prepared for his deposition and successfully made it through with no tears, we were able to make the decision not to call him to testify again at trial. The strategy worked because the deposition testimony was beneficial to us, something that may not have occurred if the witness had not been well prepared; as a result, we did not have to risk an incident in front of the jury at trial.

V.
Develop the Empty Chair

In Texas, a "responsible third party" has been defined as "any person who is alleged to have caused or contributed to causing in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these."[2]

Part of a successful pre-trial strategy involves searching for other responsible parties or causes; such a search should always be conducted as soon as possible and should be included as a part of your pre-trial strategy. Our firm analyzes medical records, social security records, and employment records to search for potentially responsible third parties in an attempt to uncover any potential source of contribution or indemnification. This investigation is particularly important in exposure cases where the client faces a very limited amount

[2] Tex. Civ. Prac. & Remedies Code § 33.011(6) (2008).

of liability when compared to other sources. For example, our firm's experience has been that in approximately one out of five trials, the medical records provide evidence of other possible sources of exposure or contain the plaintiff's speculation about possible sources of exposure. As was discussed above, in one of the firm's recent cases, reviewing the medical records allowed us to learn about the plaintiff's exposure to asbestos as a result of doing laundry with his mother.

Just as reviewing the applicable records is critical to discovering other potential parties or causes, the plaintiff's deposition can also do the same. Any type of work that the plaintiff has undertaken is especially crucial in toxic tort cases. For example, because silica is allegedly a carcinogen, in a lung cancer case, it is critical to establish whether the plaintiff sandblasted or used any cancer causing chemicals in order to establish all the possible causes of the lung cancer.

Beside reviewing records and taking depositions, our firm uses requests for admissions to help locate other responsible parties or causes. While preparing requests for admissions can be tedious, they require the plaintiff to admit or deny that he used various products, that he inhaled various chemicals, or other similar matters. If plaintiff admits any of the requests, those admissions can be used to help broker a settlement, or at the time of trial, the admissions can be read to the jury.

Finally, after the evidence of potentially responsible third parties and other potential causes has been developed, we force the plaintiff's experts to admit that the alternate parties or causes could have caused the plaintiff's injuries. In most toxic tort cases, causation can never be proved absolutely; thus, using the plaintiff's experts to admit that there are multiple explanations for an illness is an effective technique to gain concessions from an opposing party's expert while pointing the finger at the empty chair.

In all the mesothelioma trials our firm has tried, the diagnosis was undisputed; as there were definite injuries, the jury wanted to find the cause and attribute blame. If the defense does not provide any alternate explanation as to another responsible party or cause, the jury can place blame only on the defendant at trial, and the verdict will not be favorable. However, by developing the empty chair, the jury will have others to blame, even if they are not at trial, and a better chance for a favorable verdict exists.

VI.
Plaintiff's Experts

The most important aspect of any expert's testimony is his or her credibility. In order to attack an expert's credibility, it is essential to investigate the expert's qualifications and credentials and familiarize yourself with the purported areas of expertise during the pre-trial process.

Reviewing an expert's prior depositions is an excellent way to understand that expert's fields of expertise and testimonial style, and those depositions are a good source for impeachment material. We once deposed an expert in a toxic case about another toxic substance. He told us he did not know anything about the literature or state of the art for that substance.

Years later, we encountered the expert again. Despite his earlier testimony that he was completely unaware of a certain toxic substance, he was now providing expert testimony on that exact substance. After gaining an admission that everything the expert knew about toxic substances resulted from his schooling and that he had not done any independent research on the particular substance in question, we were able to impeach him with his prior testimony. He was ultimately forced to agree that he was not an expert on the substance at issue. The first time we deposed that expert was almost fifteen years ago, and we had no recollection of it, but, by researching and reviewing our prior depositions, we pinpointed what we needed to impeach the expert's credibility.

Before attacking an expert, make sure to get to know the expert so the attacks are intelligent and credible. Get to know the expert by utilizing all available resources. If an expert has testified in another jurisdiction, call a fellow FDCC member to discuss the expert's testimony. Like many firms, our firm keeps all expert depositions on file. While we have an excellent collection, we still contact other defense attorneys seeking additional depositions; those attorneys can count on us to respond to one of their requests about an expert we are familiar with. In addition to contacting other attorneys, research the expert online to determine whether courts have previously accepted or rejected his testimony; if that information is not available online, always ask the expert at his deposition. Last, but certainly not least, carefully check the expert's credentials and make sure his curriculum vitae does not include any exaggerations or misstatements.

VII.
Organize and Manage the File From its Inception

The thought of preparation for trial typically conjures images of attorneys working through huge stacks of documents late into the night. While preparing for trial does take a lot of work, the benefits of managing and organizing a file from the onset are immense: if nothing else, the final week before trial can be spent reviewing the facts and final arguments, not administering the file.

For larger cases, it is worth considering whether it is necessary to create a database to manage the relevant facts. There is nothing more important to file management than having relevant facts at your fingertips when you need them. Once our firm became involved in hundreds of toxic tort cases, we knew creating a working database of all plaintiffs was imperative to our success. We worked with a software designer to create a database, and we are now we are able to search the database by client, case, disease, venue, employer, or any number of other relevant factors. The database allows us to retrieve information on repeat plaintiffs and previously settled cases in seconds.

Another important factor to consider when opening a file is whether it will require litigation software support. If the case will involve hundreds or thousands of pages of documents, it may be worth using a program such as "CT Summation" or "Trial Director," both of which allow you to upload and review documents online. These programs also allow an attorney to make notes, highlight documents, and mark certain documents as a "Hot Docs"

for quick future reference. Such a program is also useful if it is necessary to maintain an on-going exhibit list, as it ensures that no piece of evidence will fall through the cracks.

VIII.
Demonstrative Exhibits

With all of the available technological advances, compelling demonstrative evidence in the courtroom has practically become a requirement. Not only does demonstrative evidence help present your case to the jury visually, but it helps the attorney stay on task and organized. Given the importance of demonstrative evidence, waiting until just before trial to prepare the demonstrative exhibits is a mistake. Not only does quality suffer with a quickly prepared exhibit, but the need for demonstrative exhibits is not limited to trial; the need for such an exhibit can arise at mediation or during a pre-trial hearing. Impressive and well-prepared exhibits prepared before trial send a powerful message to your opponent: that you are committed and ready to try the case, and that you will demand the jury's attention at trial.

When it comes to designing demonstrative exhibits, our firm, through trial and error, has learned a few basic rules. First, keep it simple. Too much information is distracting and disguises the true message. Thus, it is important to pay attention to scale, color, and contrast to ensure the message being conveyed is clear. Using images, phrases, and content familiar to the audience also provides an excellent opportunity to repeat your keywords and reiterate your theme.

Second, when preparing exhibits, it is important to keep the clients in mind. While defending a "mom and pop" client, the exhibits should not appear to be too high-tech. For example, when presenting the medical records of the parents in the asbestos laundry case discussed earlier, we simply used an Elmo document camera and a highlighter. While the document camera still allowed us to focus the jury's attention, it did not seem out of character with the client, who ran a fairly simple small business. On the other hand, while representing a large corporate defendant, the jury has certain expectations, and in those instances, the firm has found that high-tech, elaborate exhibits fit the jury's expectations. Having consultants help create such exhibits has been beneficial and well worth the investment.

Finally, using PowerPoint or other demonstrative exhibits during closing, if it is permitted in your jurisdiction, allows an attorney to quickly summarize the evidence in a visual format that a jury can remember. Using a demonstrative exhibit during a closing argument can also help an attorney focus on clarity and conciseness at a time when eloquence is of the utmost importance.

IX.
Analyze the Literature

In law school, students are taught how to read a case and critically analyze it using the IRAC method (issue, rule, application, conclusion). The same technique should be employed

when reviewing medical texts. When reading any medical text, our firm has found that it is helpful to analyze it in the following manner:

A. Define the most important finding(s) of the study;
B. Identify all consistent and inconsistent findings, and include the reasons for inconsistency;
C. Identify the strengths and weaknesses of the study's design; and
D. Summarize the implications of the study's application.

Unquestionably, many cases are complicated and involve complex facts or information; yet, too often attorneys mistakenly defer to experts to explain the specifics of the case, which leaves the attorney at the expert's mercy, forced to trust that the expert has done all the requisite homework. An attorney must understand all the literature that supports and conflicts with his case so a meaningful discussion with the experts, friendly or adverse, can take place.

X.
Know Your Jury, Opponent, and Jurisdiction

A. *Juries*

Litigators often try cases in unfamiliar locations, and potentially in venues where the lawyer is not welcomed by the jury. Consider the Hurricane Katrina insurance cases: nearly every potential juror was familiar with the devastation caused by the storm and the subsequent insurance coverage denials; this familiarity led to a hostile environment for insurance defense lawyers. When beginning a case in a foreign jurisdiction, it is important to familiarize yourself not only with the legal community, but the attitudes, biases, and prejudices potential jurors may carry with them. For instance, a jury from Beaumont is likely more familiar with asbestos cases than most other communities. The local newspaper has published numerous asbestos articles, and given the industrial makeup of the community, it is difficult to draw a jury panel where a significant number of potential jurors do not have a family member who has been involved in an asbestos case. If the jurisdiction provides the panelists' names before *voir dire*, our firm often runs the names through MySpace and Facebook, and carries out a general background search. This research allows the firm to determine who has been involved in prior lawsuits or filed for bankruptcy, and to glean other general information about the potential jurors. While we have never stricken a juror solely on the grounds of the information gleaned from a background search, the information does help us understand who may be predisposed to support the client's case or who will stand in the way of a successful outcome.

When high-value cases are involved, it is advisable to hire a jury consultant. Our firm has used consultants in three recent trials, and in all three cases, the consultants were extremely helpful. A consultant the firm hired for a trial in Fort Worth had been in the judge's

courtroom so many times that the judge recognized and spoke with her. Needless to say, the "behind the scenes" views and insights that a consultant intimately familiar with a particular judge can provide are invaluable. Not only was the consultant useful in terms of providing information about the court, but she also correctly convinced us to leave jurors on the panel that we had been planning to strike. A good consultant's ability to read people, despite outward appearances, helps impanel a favorably biased jury and gain a step-up on the plaintiff before the trial ever begins.

B. *Opposing Counsel*

Just as when an attorney is practicing in a foreign jurisdiction, if an attorney is unfamiliar with opposing counsel, it is important to spend time and investigate opposing counsel's credentials, style, and reputation. We have found that a helpful way to learn about an opposing counsel's strategy, mannerisms, and courtroom presence is by reading past trial transcripts involving that attorney. Most attorneys do not change their style, or in similar cases, even their opening statements. The transcripts provide a glimpse of the likely strategy, which allows us to anticipate what is coming, and better prepare our response.

C. *Court*

If you are in a foreign court, it is helpful to ask those familiar with the court about any of the judge's preferences or quirks. For example, one judge in the Fort Worth area does not allow any water bottles in the courtroom if there is a label on the bottle. So before trial, we had the firm's file clerks remove labels from a case of water. It sounds strange, but it is the judge's courtroom, so attorneys are obligated to follow the rule; being able to comply with the rule without being asked has the potential to make a good impression on the judge. As most judges have their own unique preferences, we typically question the judge's clerk about any of the judge's particular likes and dislikes before trial begins. Simply taking these small steps helps your relationship with the judge whose goodwill throughout a trial is invaluable.

XI.
Conclusion

Though television courtroom dramas suggest that witty banter with the witness or judge thought up on the spur of the moment leads to certain victory, the true key to success, pre-trial preparation, must begin months or even years before such an exchange can ever take place. In litigating toxic tort cases, or any other case, the groundwork for victory at trial begins with extensive preparation. From investigation to theme choice, to deposition preparation, to creating of demonstrative exhibits, the amount of time put in before trial will, more often than not, be reflected in the trial's outcome. Thus, even though it is not glamorized by either the entertainment industry or actual litigators, pre-trial preparation must be the attorney's top priority for the attorney to best serve his or her clients.

Successful Trial Tactics in Toxic Tort Cases[†]

David M. Governo
Brendan J. Gaughan
Julian S. Jordan

I.
Introduction

Our law firm recently defended an asbestos case for one of our corporate clients. The plaintiff in that case delivered building supplies to hundreds of commercial worksites in the 1960's and 1970's. He claimed that he contracted mesothelioma via asbestos exposure when he delivered supplies to job sites. More specifically, the plaintiff alleged that he was repeatedly exposed to joint compound, which contained asbestos, while walking through the job sites.

This article discusses some of the trial strategies we used to successfully defend this toxic tort claim.

II.
Personalizing the Corporate Client

A. *The Corporate Witness*

Toxic tort claims, including asbestos litigation, present unique challenges for defense attorneys because the clients are almost exclusively corporate entities.[1] Juries can be biased against corporations because they perceive the corporations as faceless entities, motivated

[†] Prepared by the authors on behalf of the Toxic Tort and Environmental Law section.

[1] Michele DeStefano Beardslee, *Advocacy in the Court of Public Opinion, Installment One: Broadening the Role of Corporate Attorneys*, 22 Geo. J. Legal Ethics 1259, 1262 n. 8 (2009); John A. Siliciano, *Corporate Behavior and the Social Efficiency of Tort Law*, 85 Mich. L. Rev. 1820, 1822 n.8 (1987).

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only by greed for increased profits. Plaintiffs' attorneys encourage this perception by portraying corporate defendants as being unconcerned about the safety of their products.[2]

In asbestos litigation, plaintiffs' attorneys usually allege that the defendant-corporations failed to warn the plaintiff that asbestos is hazardous because the company wanted to save costs and maximize profits.[3] The plaintiff's portrayal of the defendant-corporation as callous and greedy impacts the jurors' ability to objectively assess the corporate defendant's liability, in light of the particular facts of the case.[4]

One way to minimize this juror bias against the defendant-corporation is to emphasize throughout the trial that corporations are comprised of hard-working individuals who may be impacted by the outcome of a trial. Humanizing corporations is best done with employee testimony. Our firm used employee witness testimony as a trial tactic to gain juror sympathy for our corporate client during our recent asbestos trial. There, our corporate witness testified about his personal background and his role in the company. In addition, he discussed his relationship with the company founder, and he explained how the company flourished from humble beginnings. Suddenly, the company became more personable to the jury.

We also offered testimony that described the defendant as a small, struggling, local company, not the large, multi-national conglomerate that jurors tend to dislike. Our evidence showed the jury that the defendant's sales were generally limited to local companies, such

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[2] *See* Paul D. Carrington, *Asbestos Lessons: The Unattended Consequences of Asbestos Litigation*, 26 Rev. Litig. 584, 589 (2007).

[3] *See id.*

[4] Edward Luwenberg, *Managing the Defense of Toxic Tort Claims*, 84 A.L.I. Environ. Litig. 823 (1998).

Brendan J. Gaughan graduated from Boston College in 1996 and received his Juris Doctor from Suffolk University Law School in 2000. While at Suffolk University Law School, Mr. Gaughan served as the associate editor of the Suffolk Transnational Law Review. Since joining Governo Law Firm in 2007, his practice has involved general litigation, insurance coverage disputes, and toxic torts. He has successfully tried dozens of cases in the District and Superior Courts of Massachusetts. In 2008, he obtained a defense verdict for a national manufacturer of building materials after a three week jury trial in an asbestos personal injury case in Massachusetts.

as small hardware stores that sold their products to individuals in the community. We made it clear through testimony that the product in question was ancillary to our client's main line business and was sold and distributed on a limited scale. The low sales figures also helped to establish that the defendant was a minor player in the market not deserving of punishment. Additionally, the asbestos product's low sales figures allowed the jury to doubt the plaintiff's claim that he was exposed to asbestos during deliveries to the defendant's worksites.

B. *Trial Exhibits: Low Tech or High Tech?*

The decision of whether to use high-tech or low-tech trial exhibits depends on trial strategy. Using sophisticated technological tools when presenting trial exhibits may reinforce the jury's image of your client as a monolithic corporate entity with unlimited resources being defended by slick trial attorneys against the "small guy" plaintiff. Similarly, using low-technology exhibits can reinforce the jurors' perception that the defendant is a small company with modest resources, which would make it more connected to the community.

In our asbestos case, we deliberately chose not to use high-tech trial exhibits during the trial, and instead opted for simple poster boards and flip charts. On the other hand, our co-defendants employed PowerPoint presentations in their opening statements; additionally, the plaintiff's attorneys flew in several individuals for technical support to help run Trial Director, a specialized software. We believe that the plaintiff's decision to use this more expensive technology contributed to the plaintiff's loss because his lawyer appeared more resourced and savvy, using his prowess against a small company, which was just trying to squeak by in the market and was doing the same at trial with low-cost exhibits.

Importantly, a party must consider whether using less technologically sophisticated trial exhibits complements the overall trial strategy. Indeed, technically sophisticated exhibits

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can make highly complex facts much easier for the jury to digest. Nevertheless, simple, low-tech exhibits can be an integral part of a trial strategy that strives to show the client does not have a lot of resources.

III.
Warnings: Then v. Now

To succeed on a negligence claim in asbestos litigation, plaintiffs often must prove that the defendant failed to warn the plaintiff.[5] Typically, a plaintiff alleges that the defendant's failure to warn the plaintiff about the dangers of asbestos reasonably and foreseeably contributed to the plaintiff's exposure and resulting harm.[6] Therefore, defendants in the asbestos litigation must develop defenses against the plaintiff's failure to warn allegations to prevail in the negligence action.

Illustrating the cultural and social context in which the alleged exposure occurred is crucial for the jury to understand what would have been considered reasonable beliefs and precautions at the time of the asbestos exposure. For example, it is widely known that asbestos warnings were not commonly used in any industry before the 1970s.[7] Defendants should emphasize that using such warnings was simply not a part of the culture that existed

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[5] *See, e.g.,* Amchem Prods. v. Windsor, 521 U.S. 591, 603 (2007); Merrill v. Leslie Controls, Inc., 101 Cal. Rptr. 3d 614, 622 (Ct. App. 2009).

[6] *See, e.g., Amchem*, 521 U.S. at 603; *Merrill*, 101 Cal. Rptr. 3d at 622.

[7] *See* Asbestos and Mesothelioma, http://www.pericardialmesothelioma.org/asbestos.php (last visited March 9, 2010).

in the industrial and manufacturing sectors, or anywhere else during that period. A warnings expert is helpful to prove that most products, including inherently dangerous products, did not contain warnings in the 1960s and 1970s.

In our asbestos case, the plaintiff alleged that he had been exposed to asbestos before and during the 1970s, the period before widespread use of warnings on products. This fact certainly helped us obtain a favorable verdict.

Additionally, an expert can help prove that the plaintiff's employer had the principal duty to warn the plaintiff about the inherent dangers that plaintiff's work environment posed. Indeed, it is the employer's duty to provide a safe work environment, not the employer's business cohorts.[8] This allocation of duty makes sense, since the employer is in the best position to warn the plaintiff of the potentially hazardous products used on the job. The plaintiff would be much more likely to take note of communications from the employer rather than a posted warning on the wall of the work site. It is conceivable that the plaintiff would not even notice such a warning. This point is particularly powerful when defending cases where the plaintiff is exposed to asbestos indirectly, as in our case.

With the recent proliferation of warnings, they are becoming largely ignored.[9] Excessive warnings, even on products that are not dangerous, lead to information overload and dilute the impact of truly important warnings. The defense can illustrate this point by eliciting testimony that plaintiffs and co-workers tend to disregard warning labels placed on other products, such as cigarette packages. For instance, we recently deposed a plaintiff who testified that he never saw a warning of any kind on anything at his nuclear power worksite. You can then argue to the jury that if plaintiff routinely ignored other warnings, posting a warning at defendant's worksite would not likely have had any impact on plaintiff's behavior.

IV.
Causation

A. *Bucket Theory*

One of the most substantial departures from traditional tort law is the "bucket theory" of causation, sometimes referred to as the "any exposure" or "one-fiber" theory. Under traditional tort law, asbestos plaintiffs are required to show that each defendant's product was a substantial contributing factor in the cause of plaintiff's disease. Such a showing requires not only proof of exposure to the defendant's product, but exposure sufficient to actually cause disease.

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[8] Alissa J. Strong, *"But He Told Me It Was Safe!": The Expanding Tort of Negligent Misrepresentation*, 40 Univ. Mem. L. Rev. 105, 131 n.100 (2009).

[9] Wendy Rogers, Nina Lamson, & Gabriel K. Rosseau, *Warning Research: An Integrative Perspective*, Human Factors: The Journal of the Human Factors and Ergonomics Society, 102, 134 (Spring 2000), *available at* http://hfs.sagepub.com/cgi/reprint/42/1/102.

On the other hand, to prevail in an asbestos case, the plaintiff must prove only that the exposure to defendant's asbestos *contributed* to the plaintiff's harm.[10] The plaintiff's expert will likely testify that because asbestos is a cumulative, dose-response disease, each exposure to asbestos during a person's lifetime, no matter how small or apparently inconsequential, substantially contributes to one of the possible resulting diseases: asbestosis, lung cancer, or mesothelioma.

Judges do not often require a prima facie showing of a particular amount of asbestos exposure; instead, they frequently allow plaintiffs' experts to opine that any occupational exposure to asbestos fibers is sufficient for a jury to find the defendant negligent.[11] As a result, plaintiffs' experts regularly testify that every exposure a plaintiff received from any occupational work is a substantial factor in causing disease.

At trial, plaintiffs' experts often illustrate this point by performing a demonstration in front of the jury. The demonstration consists of pouring water, drop by drop, into a bucket, until the bucket overflows.[12] Then, the expert claims that the drops of water represent the asbestos fibers inhaled by the plaintiff over the plaintiff's lifetime. The theory underlying the demonstration is that at some point one drop, any drop, caused the bucket to overflow. Because each drop of water contributed to the bucket eventually overflowing, the plaintiffs' experts contend that each exposure to asbestos is a substantial contributing cause of the plaintiff's asbestos-induced disease.

In the opening statement during our client's trial, we illustrated the absurdity of the plaintiff's bucket theory. We explained to the jury that the plaintiff's experts wanted them to believe that a "drop in the bucket" was substantial. Our explanation was easy for the jury to understand because it made logical sense: a drop cannot cause the asbestos-related disease. Ultimately, mitigating the bucket theory was an extremely effective tactic, and an integral reason the jury found that our client was not negligent. Addressing the bucket theory head on, in our opening statement, took the "bucket" analogy out of the case; the plaintiff's attorney decided to abandon it after the opening statement.

Using analogy, we undermined the bucket theory again later in the trial to ensure that the jury rejected it. We argued that the plaintiff's bucket theory would be like saying that a lung cancer patient who smoked Marlboros for thirty years can hold Camel responsible because the patient smoked one Camel cigarette. Under the plaintiff's bucket theory, we argued, the plaintiff's experts would have the jury believe that the one Camel cigarette was a substantial cause of the plaintiff's lung cancer.

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[10] *See, e.g., Amchem*, 521 U.S. at 603; *Merrill*, 101 Cal. Rptr. 3d at 622.

[11] *See, e.g., Acands v. Abate*, 710 A.2d 944, 964 (Md. Ct. Spec. App. 1998).

[12] Mark A. Behrens & William L. Anderson, *The "Any Exposure" Theory: An Unsound Basis for Asbestos Causation and Expert Testimony*, 37 Sw. Univ. L. Rev. 479, 503 (2008).

B. *Deposing Plaintiff's Experts*

A successful expert witness deposition includes all questions relevant to establishing sufficient evidence to support a motion to exclude. Although this reasoning appears obvious, it is often overlooked.

Additionally, the examination should include questioning relating to the expert's qualifications in the field of expertise, and the methodology and facts used to arrive at her or his conclusions. Proving causation in an asbestos case requires inquiry into the duration and level of asbestos exposure.

As explained above, the bucket theory endorsed by plaintiffs' experts is the vehicle by which plaintiffs' experts elude consideration of proximity, duration and dose when rendering their opinions on causation. Consider the following excerpt from the deposition of a well-respected pathologist who is routinely employed as a plaintiff expert in asbestos cases:

Q. In cases where a person's alleged exposure to asbestos-containing products was that of a bystander, in order for you to render an opinion on causation, would it be important for you to know the intensity of the exposure to those asbestos-containing products?

A. Again, in terms of relativity, yes. In terms of causation overall, no.

Q. So if I understand your answer, you wouldn't necessarily need to know how close or far away a particular person was from an asbestos-containing product, all you would need to know was that the potential was there for that person to breathe asbestos fibers in; is that correct?

A. In terms of the causation, that's correct.

Q. I want you to assume that [the plaintiff] had only been around [the defendant's] joint compound on one occasion, assuming that to be true, would you be able to say to a reasonable degree of scientific certainty that his mesothelioma was caused by his exposure to [the defendant's] joint compound?

A. If he was exposed on one occasion, that one occasion adding to all the other exposures would have, in total, contributed to the development of the tumor.

Q. Are you aware of how many times [the plaintiff] may have been exposed to [the defendant's] joint compound while it was being mixed by others?

A. As I understood from your prior statement, it was once, but, in fact, I don't know.

Q. Are you aware of how many times [the plaintiff] may have been exposed to [the defendant's] joint compound while it was being sanded by others?

A. It would be the same answer.

Q. Do you have any idea how close [the plaintiff] may have been to [the defendant's] joint compound when it was being sanded by others?

A. I don't know.

Q. Do you have any idea how close [the plaintiff] may have been to [the defendant's] joint compound when it was being mixed by others?

A. I don't know.

Q. On the occasions when [the plaintiff] alleged that he was around [the defendant's] joint compound while it was being mixed by others, do you have any evidence of how long he was in close proximity to that mixing?

A. Since I already indicated that I don't remember his statements about [the defendant's] joint compound in the depositions, therefore, I don't know the answer to your question.

Q. And the same answer would apply to sanding?

A. Yes.

Despite the fact that the expert knew virtually nothing about the frequency, proximity or duration of the plaintiff's alleged exposure to our client's joint compound, he was allowed to opine that the exposure was a substantial contributing cause of his mesothelioma. The plaintiff admitted that he never personally worked with our client's joint compound. The plaintiff's only alleged exposure to our client's product occurred when he walked through commercial jobsites where others were mixing and sanding the joint compound. The jury, by virtue of its "no causation" finding, disagreed with the plaintiff's expert's testimony.

In a trend benefiting asbestos defendants, courts in multiple jurisdictions have begun to exclude or criticize the plaintiffs' bucket theory of causation, either as unscientific under a *Daubert/Frye* analysis or as insufficient to support causation. On September 24, 2008, the Court of Common Pleas for the First Judicial District of Pennsylvania analyzed the proffered "bucket theory" causation testimony of Drs. Eugene Mark, Arthur Frank, Jonathan Gelfand and William Longo (all veterans in the asbestos litigation), and excluded their testimony because it was based on faulty science.[13]

[13] In Re: Asbestos Litigation, No. 001, 2008 Phila. Ct. Com. Pl. LEXIS 229 (Phila. Ct. Com. Pl. Sept. 14, 2008).

The presiding judge, Hon. Allan Tereshko, stated that the plaintiffs' experts used no recognizable methodology to support their conclusions that "each and every breath of asbestos fiber is a substantial contributing factor to plaintiff's disease."[14]

With respect to Dr. Mark, Judge Tereshko referred to his causation testimony as "a form of inductive logic," which occurs when a specific observation is made into a generalized conclusion.[15] "This form of logic has been criticized as being an invalid method of concluding that an association exists between cause and effect."[16] Judge Tereshko also noted that the general population is exposed to asbestos and that some people get a disease from that exposure and some do not. Thus, the judge concluded, "not all asbestos exposures cause disease."[17]

The rejection of these experts' causation testimony, while a significant departure from past practice, reflects the sound application of standard causation rules to asbestos testimony. This trend should be of particular help to defendants in cases of slight asbestos exposure to the defendant's product. The trend is even more helpful when the plaintiff was exposed to asbestos in much greater amounts from other manufacturers' products.

C. *The Verdict Sheet: Did the Lack of a Warning Make a Difference?*

With asbestos litigation, as with other litigation, it is best to "begin at the end" when preparing defenses. This can be done by analyzing the specific questions the jury will be asked to decide. These questions can be found in the pattern jury instructions, which will be changed slightly based on your particular judge's interpretation of the law. Take advantage of any opportunity to sway the judge's interpretation of the pattern jury instructions to favor your client.

At the close of evidence in our asbestos trial, we were successful in incorporating an additional causation question into the jury instructions. Prior to the change, the causation question read:

> 5. Cause. Was asbestos contained in the defendant's product when manufactured or sold by the defendant a substantial contributing cause of the plaintiff's mesothelioma?
>
> A. Defendant A___
> B. Defendant B ___

[14] *Id.* at *92.

[15] *Id.* at *95.

[16] *Id.*

[17] *Id.* at *96.

Despite the judge's unwillingness to include additional questions on the verdict sheet in previous trials, he agreed to incorporate, at our request, a second question on causation:

> 5A. If you have a yes answer to questions [concerning negligence or breach of warranty], was a breach of warranty or negligence by the defendant a substantial contributing cause of [plaintiff's] illness?
>
> A. Defendant A___
> B. Defendant B ___

By incorporating the second question on causation, we were asking the jury to determine if our client's negligence or breach of warranty resulted in the inhalation of additional asbestos fibers by the plaintiff and, if so, whether the quantity was sufficient to cause his mesothelioma. With the added question, the jury ultimately had to decide whether a warning would have made a difference in the amount of asbestos fibers inhaled by the plaintiff while delivering supplies to our client's work site. The jury ultimately found that the plaintiff's inhalation of asbestos fibers from our client's product was *not* a substantial contributing cause of his mesothelioma.

V.
Trying the Empty Chair – The True Source of Plaintiff's Exposure

Current asbestos litigation focuses on defendants who have almost no liability because more culpable defendant companies have all filed for bankruptcy or engaged in group settlements which prohibit more claims.[18] This narrow focus effectively distorts reality in a way that is often readily accepted by jurors. The jury can easily be fooled into believing that the remaining defendants at trial were the only entities who manufactured products to which the plaintiff was exposed. Defense attorneys must therefore alert the jury to the entire universe of other dangerous products that may have caused plaintiff's health problems and that the defendant had nothing to do with.

Additionally, it is a good idea to make sure that the verdict sheet lists all settled parties, non-settled parties, and non-parties, including bankrupt entities whose asbestos products may have also contributed to plaintiff's disease. Listing all these other potentially culpable parties allows the jury to consider the paucity of your client's liability, which will increase the likelihood of a defense verdict or a reduced plaintiff award.

Indeed, ensuring that there are multiple potentially culpable defendants on the verdict form may be *the* most important trial strategy. However, in some jurisdictions, as in Mas-

[18] *See* Michelle J. White, *Asbestos and the Future of Mass Torts*, J. Econ. Persp. 183, 196-97 (Spring 2004).

sachusetts, bankrupt defendants and defendants who settle are not permitted to be included on the verdict forms. In these jurisdictions, it is important to make sure the judge will allow the defense to introduce evidence that plaintiff was exposed to multiple sources of asbestos, making, potentially, numerous defendants liable. This evidence reduces the risk that the jury will find that your client's product was a substantial cause of plaintiff's disease.

In our asbestos case, although the plaintiff sued forty defendants, only three defendants remained when the trial began, and one of those defendants settled a week after the trial commenced. The plaintiff acknowledged during a deposition that he had been exposed to multiple products manufactured by now-bankrupt companies. At trial, we highlighted these additional exposures and intimated that plaintiff was entitled to compensation principally from the bankrupt entities. We illustrated this point by posing the following questions to the plaintiff:

> Q. You have also testified under oath that you were exposed to US Gypsum?
>
> Q. You didn't sue US Gypsum in this case but you were exposed to their asbestos containing joint compound just as frequently as the others, correct?
>
> Q. Is there a reason you chose not to sue US Gypsum in this case?
>
> Q. Have you received any compensation from the US Gypsum Bankruptcy Trust in connection with your disease?
>
> Q. Do you intend to file a claim for compensation with the US Gypsum Bankruptcy Trust when this trial concludes?

Through this line of questioning, plaintiff was forced to acknowledge that he was exposed to US Gypsum's joint compound manufactured on multiple occasions. More importantly, we put the jury on notice that the plaintiff may be entitled to compensation from the US Gypsum Bankruptcy Trust after trial.

We also pointed out that the plaintiff settled with other defendants, who had exposed the plaintiff to asbestos-containing products. This tactic explained to the jury that the plaintiff's mesothelioma likely was caused by the settling defendants' asbestos products. It also intimated that the plaintiff likely already received compensation from those defendants as part of the settlement agreement.

> Q. The first category of products I want to talk to you about is the electrical equipment.
>
> A. Yes.
>
> Q. Two of the electrical companies whose equipment you worked with hands-on during your time as a truck driver were G.E. and Westinghouse. Is that right?

A. They were amongst the companies I mentioned, yes.

Q. And they were both defendants in this case?

A. Yes.

Q. No longer here today.

A. Correct.

Q. Some of the electrical equipment that you worked with personally was wire. Is that right?

A. Yes.

Q. And that wire contained asbestos. Is that right?

A. Yes.

Q. And you have previously stated under oath that you were exposed to GE asbestos containing products on a frequent and recurring basis?

A. Yes.

Additionally, we questioned the plaintiff in detail about all of his asbestos exposures, not just his exposure to products manufactured by the defendants at trial. By doing so, we were able to illustrate for the jury that exposure to our client's joint compound was very small compared to the plaintiff's other exposures to asbestos.

VI.
Conclusion

One of the most significant lessons we learned from this recent asbestos trial was that it is crucial to use new trial techniques, even when the co-defendants are not employing a creative defense strategy. In asbestos litigation, it is especially easy to follow the same strategies laid out in prior asbestos cases; but had we not been creative in our asbestos case by debunking the bucket theory, testing the basis for the expert's opinion, casting doubt on the effectiveness of a warning and pointing out that there are more culpable defendants, we may not have persuaded the jury that our client was not responsible for the plaintiff's disease.

The Federation of Insurance Counsel was organized in 1936 for the purpose of bringing together insurance attorneys and company representatives in order to assist in establishing a standard efficiency and competency in rendering legal service to insurance companies, and to disseminate information on insurance legal topics to its membership. In 1985, the name was changed to Federation of Insurance and Corporate Counsel, thereby reflecting the changing character of the law practice of its members and the increased role of corporate counsel in the defense of claims. In 2001, the name was again changed to Federation of Defense & Corporate Counsel to further reflect changes in the character of the law practice of its members.

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